



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>11/6/17</u> DATE	
<u>[Signature]</u> SIGNATURE	

Case No: 82114/2017
Case No: 82115/2017

In the matter between:

D G C SANDOW

Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
MINISTER OF POLICE

First Respondent
Second Respondent

JUDGMENT

D S FOURIE, J:

[1] This is an application for condonation in terms of section 3(4)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act No 40 of 2002. The applicant instituted two separate applications, one against the National Director of Public Prosecutions and the other against the Minister of Police. It was agreed that both applications be heard together and that one judgment be delivered.

[2] In case number 82114/2017 the respondent was initially cited as the National Prosecuting Authority of South Africa. This appears to be a misnomer and the parties have agreed that the correct citation should be the National Director of Public Prosecutions. The applicant applied for an amendment in this regard which was not opposed. An order amending the citation of the respondent has already been granted.

[3] The facts in both applications are to a large extent the same. On 29 May 2008 the applicant was arrested by members of the South African Police on a charge of murder. The arrest took place without a warrant. He was detained until 9 June 2008 when he was released on bail.

[4] On 2 June 2008 he appeared in Court for the first time. He's trial ran for almost 4½ years and he appeared in Court no less than 36 times. He was convicted of murder and on 15 November 2012 sentenced to 10 years imprisonment.

[5] Whilst in prison he drafted his own appeal documents. Only after this an attorney was appointed by the State to assist him with his appeal. He was imprisoned for a period of approximately two years when his appeal was heard by a Full Bench of this Division on 29 January 2015. On that day an order was granted that he be released as soon as possible. Following the said order on 29 January 2015, and his release on 30 January 2015, Janse van Nieuwenhuizen J handed down a full judgment (concurring by Mohlamonyane AJ) on 18 February 2015 in terms whereof the conviction and sentence were set aside.

[6] On 4 December 2017 he issued a summons (case number 82114/2017) against the National Prosecuting Authority of South Africa which has now been substituted by the National Director of Public Prosecutions. The summons was served on the 12th of December 2017. On 4 December 2017 he issued another summons (case number 82115/2017) against the Minister of Police which was served on 13 December 2017. On 2 October 2017 a notice in terms of section 3 of the said Act was sent by registered post to the National Prosecuting Authority of South Africa and the National Director of Public Prosecutions as well as to the Minister of Police.

DISCUSSION

[7] Section 3(1) of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of State unless the creditor has given the organ of State notice in writing of his or her intention to institute the legal proceedings in question. In terms of ss (2) a notice must be served on the organ of State within six months from the date on which the debt became due.

[8] Sub-section (4) makes provision for condonation of a creditor's failure to give proper notice as required. It provides as follows:

"(b) The Court may grant an application referred to in paragraph (a) if it is satisfied that -

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) *the organ of State was not unreasonably prejudiced by the failure."*

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[9] During argument counsel for the respondent indicated that the only issue relates to the question whether or not "*good cause*" has been shown by the applicant. He conceded that the claim (or debt) has not been extinguished by prescription and the organ of State has not been unreasonably prejudiced by the late delivery of the statutory notice.

[10] The applicant's claim against this respondent is for malicious prosecution. His cause of action was only completed on 29 January 2015 when his conviction and sentence were set aside. The debt became due on this date. Summons was issued and served within the period of three years.

[11] It was pointed out in the answering affidavit that the respondent had not been unreasonably prejudiced by the applicant's failure to give timeous notice of his claim as the full record of the evidence as well as the docket pertaining to his arrest, detention and conviction were at all times available. Furthermore, the deponent to the answering affidavit is the assistant State Attorney who, in my view, is unable to deny these allegations. I am therefore satisfied that both concessions made in this regard by counsel for the respondent were properly made.

[12] The only remaining issue is whether or not "good cause" has been shown by the applicant. Our Courts have in the past refrained from attempting to formulate a definition of what constitutes "good cause", because to do so would unnecessarily hamper the exercise of the Court's discretion (Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A and Ford v Groenewald 1977 (4) SA 224 (T) at 225E-G). In Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at 316E-G the following was said in this regard:

"'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefore."

[13] In Bertie van Zyl (Pty) Ltd & Another v Minister for Safety and Security & Others 2010 (2) SA 181 (CC) at par 14 the Constitutional Court held that lateness is not the only consideration in determining whether condonation may be granted. It pointed out that the test for condonation is whether it is in the interests of justice to grant it. This principle was further explained by the Constitutional Court in Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) par 20 where it was stated:

"This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry

include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[14] It was pointed out in the same judgment (par 22) that an applicant for condonation must give a full explanation covering the entire period of the delay and the explanation given, must be reasonable. However, the interests of justice also require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as possible (*F v Minister of Safety and Security & Others* 2012 (1) SA 536 (CC) par 34).

[15] The factors that a Court should take into account must not be considered in isolation. The weight to be given to any factor depends on the particular circumstances of each case. These factors are not individually decisive but must be weighed the one against the other (Harms, Civil Procedure in the Superior Courts, B27.7, B-182 and the authorities cited by the learned author). For instance, good prospects of success on the merits might tip the scale in an applicant's favour, notwithstanding a weak explanation for the delay. In these circumstances the strength of an applicant's case on the merits becomes crucial (*Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SECLD) at 349C-D and *Creative Car Sound v Automobile Radio Dealers Association* 2007 (4) SA 546 (D&CLD) at 555C-D).

[16] According to the founding affidavit it appears that the applicant's cause of action is that of malicious prosecution. It is alleged that the applicant was charged with murder under circumstances where there was not sufficient evidence justifying such a prosecution and that the prosecutor argued for a conviction "*without any legal basis justifying such conviction*". According to the applicant the conduct of the prosecutor "*constitutes malicious, unlawful and unconstitutional conduct*".

[17] As I have indicated above the deponent to the answering affidavit is the assistant state attorney. His response to the above allegations is twofold. First he says that these allegations "*are noted*". Second he argues that the applicant has failed to give a full and reasonable explanation for his failure to deliver the statutory notice timeously "*which covers the entire period of the non-compliance*".

[18] Having regard to the respondent's failure to answer the applicant's allegations regarding malicious prosecution, it appears to me, on the papers before me, that the applicant has demonstrated a *prima facie* case on the merits for the purpose of condonation.

[19] However, "*good cause*" also looks at other factors which bear on the fairness of granting the relief sought. In this regard it appears that the statutory notice was late by approximately two years and three months calculated from August 2017 when the six months period had expired. The applicant was released on 30 January 2015. According to his explanation he had already during March 2015 consulted an attorney. He had to obtain the appeal record

and this apparently took a long time. He then ended the attorney's mandate and appointed another attorney. This attorney had to obtain his file from the previous attorney and this caused further delays. He then also terminated the mandate of the second attorney. On 25 August 2017 he instructed a third attorney who is the attorney of record in this application. He was then informed that he had to give notice in terms of section 3(2) of the Act within six months from the date on which the debt became due. According to him he was unaware of this requirement "*as I am not familiar with the law*".

[20] From the applicant's explanation it appears that shortly after his release he instructed the first attorney. No doubt, at all times he pursued the matter by instructing two other attorneys as well. As I understand this explanation it is intended to apply to the entire period of the delay. Furthermore, the applicant appears to be a layman and one should be careful not to penalise a person in his position unnecessarily because he was unaware of a statutory provision. I have no reason to doubt his *bona fides*.

[21] The applicant's failure to give notice in time must now also be weighed against possible prejudice which the respondents may suffer. I have already indicated above that there is no issue in this regard. It should therefore be accepted that the long delay has caused no unreasonable prejudice to the respondents. Furthermore, I am also satisfied that the applicant has demonstrated a *prima facie* case on the merits. Taking into account all these considerations and having weighed the one factor against the other, it appears to me that the applicant has demonstrated that it would be in the interest of justice

to grant condonation. In the result I am satisfied that "*good cause*" has been shown and that the applicant should be granted condonation as prayed for.

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[22] According to the founding affidavit it appears that the applicant's cause of action against the second respondent ("Minister of Police") is that of unlawful arrest and detention. The applicant was arrested on 29 May 2008 and detained until 9 June 2008 when he was released on bail. There is no indication that after his release he was arrested again. It therefore appears that his cause of action arose during May/June 2008.

[23] On 4 December 2017 he issued summons against the Minister of Police which was served on 13 December 2017. The statutory notice was only sent by registered post on 2 October 2017. In terms of section 2(2) of the Act a debt which became due will be extinguished by prescription as contemplated in chapter III of the Prescription Act no. 68 of 1969 which, in this case, is after a period of 3 years. It means that the plaintiff's claim had already become prescribed before summons was issued. It follows that no condonation under this case number can be granted.

ORDER

In case no: 82114/2017 (National Director of Public Prosecutions):

- (a) The applicant's late filing of the written notice provided for in section 3(1)(a) of Act 40 of 2002 is condoned;

- (b) The respondent is ordered to pay the costs of the application.

In case no: 82115/2017 (Minister of Police):

- (a) The application is dismissed;
- (b) The applicant shall pay the costs of the application.


D S FOURIE
 JUDGE OF THE HIGH COURT
PRETORIA