



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No. : A44/2019

In the matter between:-

MASOPHA JOHANNES SEFATSA	1 st Appellant
SAMSON TAELO POKEDI	2 nd Appellant
STEPHEN MOLETE	3 rd Appellant
LEHLOHONOLO RADEBE	4 th Appellant
GEORGE PLAATJIES	5 th Appellant
MATSELISO JERMINA NDLOVU	6 th Appellant
TSHEDISO MASIMONG	7 th Appellant
LEBOYA MATSHANENG	8 th Appellant
NTHABELENG LICHAKANE	9 th Appellant
THABISO MPHATSENG	10 th Appellant
LERATO MOSALA	11 th Appellant
MANTOETSI MOLAPO	12 th Appellant

MPHO MOLOI

13th Appellant

And

THE MINISTER OF POLICE

1st Respondent

VICTOR JABULISA RADEBE

2nd Respondent

MR MBELEKANE

3rd Respondent

DIRECTOR OF PUBLIC PROSECUTIONS

4th Respondent

ADVOCATE STASSEN

5th Respondent

CORAM: VAN ZYL, MOLITSOANE, JJ et MOENG AJ

HEARD: 12 AUGUST 2019

JUDGMENT BY: MOLITSOANE, J

DELIVERED: 14 NOVEMBER 2019

- [1] This is an appeal against part of a judgment of a single judge of this division dismissing an application for condonation for failure to comply with the provisions of s 3(4)(b) of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002 (the Act). The appeal is with leave of the court of first instance.

- [2] The facts pertaining to the causes of actions of the Appellants are largely common cause and may conveniently be summarised as follows:

The First to the Fourth appellants were arrested on the 19th August 2013 and were released the next day, on the 20th August 2013. The First Appellant was also allegedly assaulted upon his arrest on the 19th August 2013. These four appellants were again arrested on the 31st January 2014 and were released from custody on the 2nd July 2014.

- [3] The remaining Appellants were arrested on the 31st January 2014 and released on the 1st February 2014. All thirteen Appellants were charged with various offences but their prosecution was unsuccessful as all of them were subsequently acquitted.

- [4] The Appellants, thereafter, instituted actions against, among others, the first respondent for unlawful arrest and detention as well as malicious prosecution against the fourth respondent. The first appellant also sued the first respondent for assault. The first respondent raised a special plea alleging non-compliance with the provisions of s3 (4) of the Act. The said plea prompted the Appellants to bring a condonation application.

- [5] The court *a quo* refused condonation for the claims of assault, unlawful arrest and detention against the first respondent but granted same for the claim of malicious prosecution against

the fourth respondent. This appeal is against the refusal of condonation against the first respondent.

- [6] I consider it necessary to refer to the applicable legal framework. Section 3(1) of the Act obliges a creditor who intends to institute an action to recover a debt against an organ of state, to serve a written notice in accordance with s4 (1) within six months from the date on which such a debt became due, before such a creditor institutes an action, unless the organ of state in question has consented in writing to the institution of the legal proceedings without such notice. Section 3(3) on the other hand provides as follows:

“(3) for the purposes of subsection 2(a) –

- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
- (b) a debt referred to in section 2(2) (a), must be regarded as having become due on the fixed date.”

- [7] Where the creditor has failed to give notice as envisaged in s3 (1) he may approach the court for an indulgence in terms of s3 (4) (a) where the respondent raises non-compliance. Section 3(4) (b) deals with the requirements for condonation and provides as follows:

“The court may grant an application referred to in paragraph (a) if it 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.*”

- [8] These requirements are conjunctive and must be established by the applicant who seeks an indulgence for non-compliance with the Act¹. Such an applicant also bears the onus to satisfy the court that all the three requirements aforementioned have been met. In **Madinda v Minister of Safety and Security**² it was held that “the standard of proof is not on a balance of probabilities but rather an overall impression made on the court which brings a fair mind to the facts set up by the parties.” Once the court is satisfied that the three requirements have been satisfied, the court may exercise its discretion and grant condonation.
- [9] The issue for determination is whether the court *a quo* was correct in finding that the appellants had not met the threshold as envisaged in s3(4)(b) of the Act and were not entitled to condonation for non-compliance with the said statute.
- [10] The appellants were arrested and detained by members of the IPID on different dates as alluded above. It is the case for the appellants that they were not aware that the first respondent was a co-debtor as they were not aware that the members of IPID resorted under him. The appellants further assert that they only became aware that the IPID members resorted under the Minister on the 1st March 2017.

¹ Minister of Agriculture and Land Affairs v CJ Rance(Pty) Ltd 2010(4) SA(SCA) at par [11]

² 2008(4) SA 312(SCA) at 316 par [8]

[11] It is submitted on behalf of the first respondent that the first to the fourth appellants were for the first time arrested on the 19th August 2013 and released on the 20th August 2013 and their claims for wrongful arrest and detention became due on the 20th August 2013. On the second arrest of the 31st January 2014 and subsequent release of the 2nd July 2014 their claims became due on the 2nd July 2014. The fifth to thirteenth appellants were arrested on the 31st January 2014 and were released on the 1st February 2014. Their claims became due on the 1st February 2014.

[12] It is trite that the prescription period for assault, unlawful arrest and detention is three years. For prescription to begin to run the creditor must know the identity of the organ of state and the facts giving rise to the debt. Clearly the assertions by the appellants are that their claims for unlawful arrest and detention against the first respondent had not prescribed as they only became aware of the identity of the said respondent as a co-debtor when they were so advised by their attorney on the 1st March 2017. The respondent makes no issue with the assertion that the appellants only became aware that the first respondent was a co-debtor when they were so informed by their attorney. In response to this allegation, it is pleaded on behalf of the first respondent that the allegations are '*noted*'. The first respondent does not dispute the allegations of the appellants.

[13] In the pleadings filed, it is not the case for the first respondent that appellants could have acquired the knowledge of the

identity of the debtor by exercising reasonable care. The court *a quo* found that the appellants could have acquired knowledge of the identity of the first respondent as a co-debtor by exercising reasonable care and failed to act diligently to take steps which a reasonable person in their position would have taken. This finding is not supported by evidence.

[14] It has to be borne in mind that the defendant bears the full evidentiary burden to prove prescription including the date on which a plaintiff obtained actual or constructive knowledge of the debt³. The mere fact that such knowledge resort in the knowledge or expected knowledge of the appellants will not divest the respondent of the incidence of proof. It is clear that the court *a quo* based its finding on failure to prove constructive knowledge⁴ of the debt. The court *a quo* held '*that the appellants failed to provide any information regarding investigations as to the identity of the co-debtor*'. In my view, by so holding, the court *a quo* shifted the burden of proof to the appellants. The burden shifts to the appellants only if the respondent has established a *prima facie* case⁵.

[15] As alluded above the evidence that the appellants were not aware of the identity of the Minister as a co-debtor remain uncontested and it has to be accepted that appellants only became aware of such identity on the 1st March 2017. In the absence of any contention by the first respondent to the

³ Macleod v Kweyiya (365/12) [2013] ZASCA 28 (27 March 2013) par [10]

⁴ Macleod v Kweyiya(supra) at [9]... 'Actual knowledge is established if it can be shown that the creditor knew the facts and the identity of the debtor.Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care.'

⁵ Macleod(supra) at par [10]

contrary, I am satisfied that the appellants were not aware until 1st March 2017 that the members of IPID resorted under the first respondent and consequently that the he or she was a co-debtor.

[16] In finding that the claims of the appellants in respect of the unlawful arrest and detention had prescribed the court *a quo* placed much reliance on **Mtokonya v Minister of Police**⁶. In **Mtokonya** the court was called upon to decide whether s 12(3) of the Prescription Act requires a creditor to have knowledge that the conduct of the debtor giving rise to the debt is wrongful and unlawful before prescription may begin to run against such a creditor. The court held that s12 (3) did not require knowledge of legal conclusions or remedies but only knowledge of the identity of the debtor and the facts giving rise to the debt.

[17] In **Mtokonya**, unlike in this case, knowledge of the identity of the debtor was not in dispute. While it is common cause that the appellants knew the identity of the members of IPID who arrested and detained them, same cannot be said with regard to the first respondent as a co-debtor. In this regard **Mtokonya** is distinguishable and reliance on it was misplaced. I am satisfied that the claims of the appellants have not prescribed and the first requirement for condonation has been met.

[18] The second requirement in the condonation application requires the determination of whether the appellants have

⁶ 2018(5)SA 22 (CC)

satisfied 'good cause' for their delay. In the determination of this requirement the court is required to examine factors which relate to the fairness of granting the relief sought and the proper administration of justice. One must also examine the reasons for the delay, the explanation given, the prospects of success in the proposed action, the bona fides of the applicant and any contribution by other persons or parties to the delay⁷. In this regard the court has a wide discretion⁸.

[19] It is the case for the appellants that during February 2017 they made contact with their attorney in order to seek assistance. Their attorney requested that the appellants pay a deposit of R23 000 when they came for the consultation and also to bring copies of the dockets which formed the subject of their arrest, detention and prosecution. According to the appellants they struggled to raise the deposit asked as their salaries had been stopped when they were suspended. It is their contention that they also struggled to obtain some of the copies of the dockets.

[20] In opposition the respondents aver that the appellants did not provide proof of payment of the deposit and according to the respondents such a struggle to obtain the deposit was *'irrelevant because the [Appellants] consulted and sent a notice before they paid a deposit.'*

[21] The assertion by the respondents that the lack of funds to instruct an attorney was irrelevant cannot hold water and stands to be rejected. Firstly, the facts of lack of funds remain

⁷ Madinda v Minister of Safety and Security(supra) at par[10]

⁸ MEC For Education,KZN v Shange 2012(5) SA 313 at page 320 par [15]

uncontested. Secondly, it remains uncontested that the appellants only came to know about the question of a notice to be issued in terms of the Act only upon consultations on the 1st March 2017. In this regard, there is reason to believe that the consultation may have occurred after payment of the deposit. In the exercise of the wide discretion this court has in the evaluation of the reasons for the delay, I have no reason to reject the assertion by the appellants. In the absence of any evidence to the contrary I also have no reason to reject the assertion by the appellants that they also struggled to obtain copies of the docket as requested by their attorney.

[22] It is an established principle that issues like prospects of success may mitigate a weak explanation for the delay. The appellants aver that they were nicknamed the 'Rambo Squad' by the community of Ficksburg. They further aver that there were complaints by the said community that members of this 'Rambo Squad' terrorised the community. The appellants deny that these allegations against them were true. It is common cause that they were arrested, detained and prosecuted unsuccessfully. They were discharged in terms of section 174 of the Criminal Procedure Act and it can thus be accepted that there was no evidence against them upon which a reasonable court could convict. On this basis I have reason to believe that the appellants have good prospects of success in the merits of their claims and they have thus shown good cause herein.

[23] In the final analysis it is also necessary to determine whether the organ of state will not be unreasonably prejudiced by the

failure of the appellants to issue the notice within the prescribed period. In amplification of the potential prejudice, it is submitted on behalf of the first respondent that *‘there are in excess of twenty potential witnesses that were involved in the matter which will be, more likely than not, extremely difficult for the respondents to locate should the need arise.’*

[24] The allegation made in the paragraph above is couched in general terms. The appellants aver that the arresting officers are still available. It is not the case for the first respondent that the arresting officers are no longer available. In the absence of an allegation contrary to the allegation by the appellants, I must decide this point on the basis of the uncontested evidence by the appellants and find that the witnesses are still available. I can find no prejudice on this basis.

[25] The fact that the witnesses are many does not necessarily imply that they are untraceable. No case is made as to what would make it difficult to trace the witnesses. The first respondent does not explain which witnesses are unlikely to be untraceable and on what basis they cannot be traced. I am unable to find that the witnesses may be untraceable and consequently that the first respondent will be prejudiced by granting condonation.

[26] It is axiomatic that a finding must correlate with the subsequent order made. The court *a quo* granted condonation for the claim of malicious prosecution. The judgment, however, reveal that condonation was essentially denied for the claims of assault,

arrest and detention on the basis that such claims have prescribed. In its judgment, however, the court *a quo* held that the claims for the unlawful detention of the first four appellants and the claims for malicious prosecution have not become prescribed. In spite of this finding, the court still refused to grant condonation for the detention of the first four appellants. It is unclear from the record why the court granted condonation for the claim of malicious prosecution but denied same for the claims of detention of the first four appellants where the court specifically found that both claims (malicious prosecution and detention) had not prescribed. In this way there is no correlation between the finding and the subsequent order the court *a quo* made. Condonation should therefore have been granted to the first four appellants for their claims of unlawful detention.

[27] In addition and in view of my findings that none of the claims of the appellants have prescribed and that they have shown good cause, condonation should also be granted pertaining to the rest of the claims of all the appellants.

[28] As alluded above, the court *a quo* granted condonation against the fourth respondent on a claim of malicious prosecution. The court *a quo* also ordered the appellants to pay costs of the fourth respondent jointly and severally as the said court was of the view that seeing that the appellants were, *inter alia*, seeking an indulgence that justified a cost order against them. It has, however, to be borne in mind that in the condonation application in terms of the Act an indulgence is sought for an enforcement of a right as opposed to enforcement of a court

procedure or rule. The appellants in the heads of argument referred this court to the decision of **Premier, Western Cape v Lakay**⁹ in which the following was said with reference to costs in condonation applications in terms of the Act:

“...Ordinarily, in applications for condonation for non-observance of court procedure, a litigant is obliged to seek indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter’s costs if it does oppose , unless the opposition was unreasonable. I doubt that this is the correct approach in matters such as the present, as an application for condonation under the 2002 Act has nothing to do with non-observance of court procedure, but is for permission to enforce a right, which permission may be granted within the prescribed statutory parameters; and such an application is (in terms of s3 (4)) only necessary if the organ of State relies on a creditor’s failure to serve notice. In the circumstances there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result”

[29] The condonation application against the appellants was opposed in the court *a quo* by the First to the fourth respondents. The appellants were, however, successful in seeking an indulgence. I can find no reason to depart from the practice that costs should follow the result. In my view the court *a quo* should have granted costs against the First to the fourth respondents. I accordingly propose the following orders:

ORDERS

1.The appeal is upheld and the second and third orders of the court *a quo* are set aside and replaced with the following:

⁹ 2012(2) SA 1 (SCA) at par [25]

- (a) Condonation for non-compliance with the provisions of Act, 40 of 2002 is granted to the Appellants with costs in respect of the claims against the respondents.
- (b) The First Respondent is ordered to pay the costs of the appeal.

P.E. MOLITSOANE, J

I agree

L MOENG, AJ

I agree and it is so ordered.

C VAN ZYL, J

On behalf of Appellant:

Adv BS Mene SC
 Instructed by:
S.M.O Seobe Attorneys
 BLOEMFONTEIN

On behalf of the respondent:

Adv. A Williams
Adv, K Nhlapo
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