



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBELEY)

Case No: 1213/18

Heard On: 03/05/2019

Delivered: 28/06/2019

In the matter between:

HEINRICH SMIT

1st Plaintiff/1st Applicant

SHEREEN SMIT

2nd Plaintiff/2nd Applicant

AND

MINISTER OF POLICE

Defendant

JUDGMENT

PAKATI J

- [1] The applicants/plaintiffs, Mr Heinrich Smit and Shereen Smit, instituted action against the defendant/respondent, the Minister of Police for payment in the amount of R1 460 000-00 arising from a claim for damages for unlawful arrest and detention of Mr Smit (the first applicant) from 17 until 19 January 2017. The second applicant, Ms Smit, instituted the action in her capacity as mother and guardian of her minor child, H Smit. They apply for condonation for the late filing of the notice to institute legal proceedings against the respondent within six months as prescribed by section 3 of the Institution of Legal Proceedings

against Certain Organs of State Act¹ ("the Act"). The application is brought in terms of section 3 (2) and 4 (b) of the Act. The applicants also seek an order to compel discovery. The respondent opposes the applications. For convenience, I will refer to the parties as the applicants and respondent.

BACKGROUND FACTS

- [2] On 17 January 2017 Mr Smit was allegedly wrongfully and maliciously arrested by the members of the South African Police Services ("SAPS"). The respondent is the Executive Authority of the SAPS and its members acted within the cause scope of the respondent's authority. It is common cause that the arrest was without a warrant. Mr Smit says that when he was arrested he was unaware of the charges against him and was released from custody on 19 January 2017.
- [3] The applicants allege that Mr Smit was arrested in their residence in the presence of their 10 year old daughter who witnessed him being handcuffed and/or forced into a police vehicle and taken away. Ms Smit's (the second applicant's) claim is based on emotional and psychological trauma they suffered.
- [4] Mr Smit alleges that the members of the SAPS did not have reasonable grounds to suspect him of having committed any offence referred to in Schedule 1 of the Criminal Procedure Act ("the CPA")² as contemplated in section 40 (1) (b) of the CPA. He alleges further that the members of the SAPS did not exercise the discretion conferred on them by section 40 (1) of the CPA alternatively did not exercise such in good faith, rationally and not arbitrarily. He states further that he was not arrested to be brought before court but to be punished. The arrest and ensuing detention constituted an infringement on his rights as enshrined in section 35

¹ 40 of 2002

² Act 51 of 1977

of the Constitution of the Republic of South Africa³, the argument goes. According to him the members of the SAPS failed to bring him before court as soon as reasonably possible. He states further that they failed to appreciate and or exercise their constitutional duty to ascertain and/or inform him as reasonably possible of his right to bail and/or the right to legal representation.

- [5] At the beginning of February 2018 the applicants gave instructions to Mr Gerhard Geyer Labuschagne of Labuschagne Attorneys to institute civil action on their behalf. When they approached him the six months' time period in which the demand is required in terms of the Act had lapsed. They say they approached him at a late stage because they did not have funds to formally instruct him.
- [6] On 10 February 2018 Mr Labuschagne sent a letter of demand to the respondent dated 08 February 2018. He explains that good cause exists for the applicants' failure to file the notice timeously. The applicants served the summons on 25 June 2018 on the respondent. In its plea filed on 29 August 2018 the respondent raised a special plea of non-compliance with section 3 of the Act.

EXPLANATION OF THE DELAY

- [7] The reasons for the applicants' failure to file the notice timeously can be summarised as follows:
- 7.1 The applicants did not have funds to instruct legal representation to institute action on their behalf;
- 7.2 They are lay people and were unaware of the provisions of section 3 of the Act. This was discovered during consultation with their legal representative; and
- 7.3 They were "severely emotionally and physically traumatised" by the incident;

³ Act 108 of 1996

- [8] It is important to quote paragraph 9 of the letter of demand from Labuschagne Attorneys dated 08 February 2018 forwarded to the Minister on 10 February 2018 by registered mail. It reads:

'UNLAWFUL ARREST AND DETENTION OF SHEREEN SMIT IN HER CAPACITY AS MOTHER and guardian of her minor daughter identity number: 070920 1594 088

...

9. We place on record that the Demand was sent in time. We place on record that our clients have already instructed us should your office not agree to condonation that our letter of demand was not within the statutorily required 6 months period in terms of the Institution of Legal Proceedings against Organs of State Act and should your office not agree to condone same we will request the court to condone any late notification. We submit that our client suffered severe psychological trauma and that the associated effects inhibited him from prosecuting the matter earlier.' My underlining

NOTICE TO COMPEL IN TERMS OF RULE 35(7) OF THE UNIFORM RULES OF COURT

- [9] The applicants also seek an order to compel the Minister to file its discovery affidavit within five days of the court order. They also request costs of the application.
- [10] It is common cause that on 29 November 2018 a notice requesting the Minister to comply with Rule 35(1), (6), (8) and (10) of the Uniform Rules of Court affording the respondents twenty days to discover was served on the attorneys representing the Minister. As a follow up to the said notice the applicants forwarded a letter dated 18 February 2019 requesting discovery. This did not yield any results.
- [11] On 13 March 2019 the Minister filed a notice of intention to oppose the application to compel dated 06 March 2019 and an answering affidavit. On 05 December 2018 the applicants brought the application for condonation for failure to serve the notice in terms of section 3 of the Act. According to the Minister if the application for condonation fails that would be the end of the matter. It would therefore not be necessary to take further steps in the action. To

avoid unnecessary costs the Minister was of the view that it was prudent to deal with the application for condonation first before taking any further steps.

- [12] The Minister disputes that Mr Gerhard Geyer Labuschagne has been authorised to respond to the affidavit on behalf of the applicants. However, no reason has been advanced for this assertion. The Minister disputes further that he received the letter dated 18 February 2019 requiring compliance or raising an issue with non-compliance with discovery. He submits that should the Court find that he failed to comply with the request it should find that it was unintentional.
- [13] The Minister denies that the applicants are entitled to the relief sought. He denies further that Mr Smit was arrested on 17 February 2017 by the members of the SAPS and that the arrest was wrongful and malicious. He alleges that he was arrested in accordance with the provisions of section 40 of the CPA. He contends that Mr Smit was informed of the reasons for his arrest and his constitutional rights were duly explained to him. He was released on bail on 18 January 2017 after his first appearance in court.
- [14] The Minister disputes that the arrest took place in the presence of the applicants' minor daughter. During the first applicant's arrest the members of the SAPS exercised their discretion in good faith and rationally in accordance with the provisions of the CPA, the argument continues.
- [15] The Minister argues that Mr Smit was arrested in order to bring him before court, which was done. He was not arrested in order to infringe upon his constitutional rights, hence in his warning statement he indicated that he wished to be legally represented. According to the Minister he was indeed legally represented during his first appearance in court. However, the matter was struck off the roll to give the State an opportunity to complete investigations.

- [16] The Minister argues that Mr Smit could not rely on lack of financial resources for the failure to consult with a legal representative in order to forward the notice in terms of section 3 of the Act. The respondent submits that Mr Smit has no prospects of success in the main action. He urges the Court to dismiss the application as the applicants have failed to explain the delay.
- [17] According to the Minister it struggles to get hold of some of the witnesses especially those that were no longer in its employ. It alleges that others have been transferred, promoted or resigned. This has caused a delay in serving them with the processes with the result that the Minister has been unable to fully investigate the matter as some of the information could have been lost.
- [18] The Minister states that when he looks at the founding affidavit with all the documents attached to it, it is not easy to know what transpired from the date of arrest until date the notice was served. He contends that the applicants have failed to set out steps taken until the notice was served to ensure compliance. He argues that the applicants simply state that they were traumatised. Their failure to serve the notice was intentional, the respondent maintains. It requests that the matter be dismissed with costs.
- [19] The issue to be determined is whether the applicants make out a case for the relief sought in respect of both applications. The applicants persist that as lay people they were unaware of the provisions of the Act and also did not have funds to engage services of a legal representative to institute action. The Minister on the other hand disputes that and adds that the applicants did not only fail to serve the notice in terms of section 3 within six months but also failed to give full reasons for their non-compliance. The letter dated 18 February 2018 contains no detail as to the actual reasons for the delay.
- [20] Section 3 (1), (2), (3) & (4) of the Act provides:

'(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) The organ of state in question has consented in writing to the institution of that legal proceedings –

(i) without such notice; or

(ii) upon receipt of notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purpose 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 of 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

(c) a debt referred to in section 2(2) (a), must be regarded as having become due on the fixed date.

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(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.

(c) if an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.'

PRESCRIPTION:

[21] Mr Smit was arrested and detained on 17 January 2017 and summons was served on 25 June 2018. Prescription is therefore not applicable. This is undisputed.

[22] Plasket J referred to what Heher AJ said in **MAGUGA VS MINISTER OF POLICE**⁴ as follows:

'Unlike the position in other legislation, and I would add, in the approach to condonation in the context of non-compliance with the rules of court and the like, a clear distinction is drawn in s 3(4) of the Legal Proceedings Act between good cause, on the one hand, and absence of prejudice, on the other. The purpose of the distinction, Heher JA held, is to *'emphasise the need to give due weight to both the individual's right of access to justice and the protection of state interest in receiving timeous and adequate note'...preferable 2008 4 South Africa 312(SAC) at paragraphs 7, 10, 12,13 paragraphs 29...*' When a judge decides to grant or refuse condonation, he or she exercises a discretion based on a balancing of relevant factors. In the case of what has been described as a narrow discretion, an appeal court may only interfere in the event of a misdirection on the part of the court of first instance. In the case of the discretion to grant or refuse condonation in terms of s 3(4) of the Legal Proceedings Act, the position is different. In *Premier, Western Cape v Lakay*⁵ Cloete JA held that if condonation is refused by a court, an appellate court is in my view at liberty to decide the same question according to its own view as to whether the statutory requirements have been fulfilled, and to substitute its decision for the decision of the court of first instance simply because it considers its decision preferable.'

GOOD CAUSE AND PROSPECTS OF SUCCESS

[23] In **MADINDA VS MINISTER OF POLICE AND SECURITY**⁶ Heher JA set out the approach to condonation in terms of the Legal Proceedings Act and had this to say:

'[10] 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, the 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 therefor.

[12] 'Good cause' usually comprehends the prospects of success on the merits of a case, for obvious reasons: *Chetty v Law Society, Transvaal* [1985 \(2\) SA 756 \(A\)](#) at 765D - E. But, as counsel for the respondent stressed, whether that is the case must depend on the terms of the statute in which it is found. In s 3(4)(b)(ii), there is a specific link created between the delay and the 'good cause'. According to counsel's submission, no matter how strong an applicant's case on the merits that consideration cannot be causally tied to the reasons for the delay; the effect is that the merits can be taken into account only if and when the court has been satisfied and comes to exercising the discretion to condone. I do not agree. 'Good cause for the delay' is not simply a mechanical matter of cause and effect. The

⁴ (CA342/2017) [2018] ZAECHC 78 (04 September 2018)

⁵ 2012 (2) SA 1 (SCA) para 14

⁶ 2008 (4) SA 312 (SCA) at paras [10], AND [12]

court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two main elements at play in s 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration.'

- [24] The Minister vehemently disputes that the applicants have prospects of success in the main action. He disputes that Mr Smit was arrested on 17 January 2017 despite the warning statement taken from him and attached to the answering affidavit dated 17 January 2017. During argument Mr HC Du Plessis, on behalf of the respondent, conceded that Mr Smit was arrested on 17 January 2017. This is so even though in paragraph 10 of its answering affidavit it states:

'10. I deny that the first applicant was arrested on the 17th of January 2017 I humbly submit that the first applicant was arrested in accordance with the provisions of the Criminal Procedure Act 51 of 1977.'

- [25] The members of the SAPS have failed to attach a copy of Mr Smit's notice of constitutional rights (SAP 14 A) informing Mr Smit that his constitutional rights were explained as he was arrested. Mr Smit argues that failure to attach SAP14 A is indicative of the fact that the arrest was unlawful. According to him it also corroborates his case that he was not informed of the reasons why he was arrested. He says it would not be far-fetched for one to think that he was

arrested a day or two before the 17th January 2017 and that the respondent intends to capitalise on his possible oversight of a wrong date in the particulars of claim. This is supported by the respondent's failure to specify the date of the arrest in the plea. In this record the respondent does not take the court into its confidence, the argument goes.

- [26] According to Annexure "MVZ1" attached to the respondents' answering affidavit Mr Smit was charged with the offence of 'Wet 40/2000 Wet op Veiligheid van Vleis Artikel F (1), 2(b) and Wet 72/1962 Dierebeskermings Wet Artikel 2(1) (a) (f).
- [27] Notably, these offences and penalty clauses do not fall within the scope of Schedule 1 offences as provided for in the Criminal Procedure Act. This is, *inter alia*, indicative of the fact that the applicants have prospects of success in the main action.
- [28] On 13 July 2017 the matter was struck off the roll pending further investigations. Strangely, for almost two years the investigations have not been completed as a result the matter has not yet been reinstated.

REASONS FOR THE DELAY

- [29] In paragraph 19.6 of the answering affidavit the respondent states:
 '19.6 I submit that the 1st applicant was at all material times legally represented and the allegation that the applicants are lay persons should not be regarded in cases where they are exposed to legal representation and expected to have sought advice which they did not '
- [30] On 18 January 2017 the first applicant appeared in court for the first time. The Magistrate explained to him his rights to legal representation. The first applicant explained that Mr Reity was his attorney but was unavailable. On 13 July 2017 the Magistrate noted on "MVZ2" that Mr Reity made excuse for (not legible absence) page two of the same document has the following hand written notes by the Magistrate MT Davids:
 'Attorney of accused 1 absent-Not placed into funds.'

...
Dpp can't make decision-
14 queries noted-
Iro investigations
Statements ito...(not legible)
State requests matter to be PP
SOR
State to finalise investigation
(State struggle to finalise investigation)'

- [31] It is evident that the first applicants' attorney was not at court on 17 January 2017 due to the fact that he had not been placed in funds by the first applicant. This flies in the face of the respondent who says that the first applicant was at all times legally represented.
- [32] The fact that the first applicant experienced financial constraints is confirmed in Annexure "MVZ1" attached to the respondents answering affidavit where it is shown that the first applicant was unemployed (werkloos). The Minister's estimation of a consultation fee in a medium law firm to be less than R1000-00 has no basis. He cannot be in a position to tell how long it would take the applicants to raise funds especially taking into account that Mr Smit was unemployed at the time.
- [33] It is unreasonable for the respondent to have expected the first applicant who had to struggle funding his legal representative for his criminal case due to unavailability to afford legal representation to immediately have been able to prosecute his civil claim when he was unemployed in their own version. However, it would also be unreasonable to expect the first applicant to be knowledgeable concerning the requirements of the notice in terms of section 3 of the Act with a prescribed period of six months.
- [34] Taking the above into consideration it means that the applicants were entitled to wait for the Ministers plea in order to make an informed decision as to whether to apply for condonation- Lewis JA in **MINISTER OF SAFETY AND SECURITY VS DE WITT** held:

'If an organ of state relies on a creditor's failure to serve a notice –that the objective of the organ of state is a jurisdictional fact for an application for condonation, absent which the application would not be competent.'

PREJUDICE

[35] Heher JA in *Madinda* added at paragraph 29:

'[29] One is now in a position to assess the combined weight to be attributed to the three elements of s 3(4)(b)(i), (ii) and (iii) which were established, in the context of the discretion to grant or refuse condonation. Given the absence of unreasonable prejudice to the SAPS from the equation and the persuasive, though not flawless, reliance on good cause, no court exercising a discretion unaffected by the misdirections which tainted the assessment of the trial judge, would have deprived the appellant of the opportunity to have her claim tested according to the dictates of law and justice. Condonation should therefore have been granted. It follows that the appeal must succeed.'

[36] In paragraph 20.3 of its answering affidavit the respondent states:

'20.3 I submit that the respondent is struggling to get hold of some of the witnesses who have since left the respondent's employment. There is always transfers, promotions and resignations which results in officials changing offices or leaving the employment and delaying in serving the respondent with a notice always have a negative impact on the respondent. This is so because the respondent then struggle to fully investigate the matter as some of the information would have been lost or some of the witnesses would have moved which proves difficult to locate.'

[37] Importantly, this paragraph does not take this court into its confidence as there is no detail. It is a general statement which makes it very difficult to verify its accuracy. It is not clear who of the witnesses were untraceable, transferred, promoted, resigned and those who left the employ of the respondent. The respondent indicates that the delay in service of the notice had a negative impact on the respondent as it has struggled to fully investigate the matter because some of the information would have been lost or some of the witnesses would have moved making it difficult to locate them. The respondent makes it difficult to make a comment between the late filing of the notice and the prejudice that it alleges to have suffered.

- [38] Strangely, the respondent has already filed its plea in which it alleges that the arrest and detention of the first applicant was lawful. The question to ask is where he got the information from if the witnesses would not be located making it difficult to finalise the investigations. Clearly, the docket contents and witnesses assisted the respondent to draft the plea as well as the answering affidavit. This also includes the respondent's response to the application to compel.
- [39] In my view, the applicants have managed to make out a case for the relief sought and condonation has to be granted.

APPLICATION TO COMPEL

- [40] The respondent does not dispute that discovery was not complied with. However, he alleges that it did not fail to comply with the applicants Notice as it thought it was prudent to deal first with the application for condonation for non-compliance of the notice in terms of section 3 of the Act before taking any further steps to avoid unnecessary legal costs. It states further that the interlocutory application has not been finalised and if it does not succeed it would not be necessary to discover because it may result in the matter being finalised and disposed of. The respondent requests that the application be dismissed with costs.
- [41] The explanation by the respondent for not complying with the notice in terms of Rule 35 cannot stand because if he thought that the interlocutory application had to be dealt with first as an interlocutory application, nothing prevented him from communicating this with the applicants' attorney of record. Both applications must fail with costs.

In the circumstances I grant the following order:

- 1. The failure of the applicants/plaintiffs, Mr Heinrich Smit and Ms Shereen Smit, to comply with section 3 of the**

Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, is condoned.

- 2. The respondent, the Minister of Police, is compelled to file his discovery affidavit within ten days of this order.**
- 3. The defendant is ordered to pay costs of this application on a scale as between party and party.**

BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On Behalf of the 1st and 2nd Applicant: ADV HC Du Plessis
Instructed by: VENTER RUST INC.

On Behalf of the Respondent: Mr FD Ramavhale
Instructed by: STATE ATTORNEY