

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

NOT REPORTABLE

Case No: 360/2017

In the matter between:

BANTU NQINILEYO

Applicant

and

MINISTER OF POLICE

Respondent

JUDGMENT

MFENYANA AJ:

Introduction

[1] This is an application brought in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). The

applicant seeks condonation for the late service of the notice envisaged in section 3(1) of the Act. The application is on occasion of action instituted by the applicant against the Minister of Police. The respondent has opposed the application. In his opposition, the respondent contends that the applicant has not established good cause for his failure to comply with the requirements of the Act. The respondent further contends that the applicant has failed to make out a case that he enjoys reasonable prospects of success in respect of his claim against the respondent.

[2] It is not in dispute that the applicant was arrested and detained by employees of the respondent. It is also common cause that the applicant has instituted proceedings against the respondent for damages in respect of his unlawful arrest and detention. It is further common cause that the plaintiff's claim has not prescribed. A further concession was made on behalf of the respondent, that the respondent has not suffered any prejudice as a result of the late service and filing of the notice. In the main, the issue now turns on whether good cause exists for the applicant's non-compliance.

The facts

[3] On 1 May 2016, the applicant was arrested and detained by employees of the respondent on a charge of rape. On 4 May 2016, he appeared in court, when the case was postponed to 25 May 2016 for a formal bail application. Upon appearing in court on 25 May 2016, the charges against him were withdrawn. On 16 September 2016, he approached his attorneys of record and instructed them to institute legal proceedings against the respondent for damages resulting from his arrest and detention. It was during this consultation that his attorneys advised him that a statutory notice needed to be dispatched to the respondent within six months from the date the cause of action arose. In the circumstances, the stipulated six months would expire on 25 November 2016. He instructed his attorneys to issue the requisite notice but they advised him that they needed to obtain the contents of the docket before they could issue such notice. This, he was advised, was necessary for his attorneys to ascertain whether he had a valid cause of action or not. It was not until June 2017 that his attorneys advised him that they had obtained the contents of the docket and after 'thoroughly' considering its contents, they were in a position to

issue the notice. The notice was dispatched to the respondent on 8 June 2017, followed by a summons on 22 June 2017.

[4] On 16 October 2017 the respondent served its plea wherein he raised a special plea of non-compliance with the provisions of the Act. It is on the basis of this special plea that the applicant brought the present application on 12 February 2018.

The test for condonation

[5] As correctly pointed out by counsel for both the applicant and the respondent, the correct approach in considering an application for condonation is set out in ***Madinda v Minister of Safety and Security***¹. It is trite that what section 3(4) requires, is not proof on a balance of probabilities, but an 'overall impression made on a court which brings a fair mind to the facts set up by the parties'². It involves an examination of 'all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice', and may include 'prospects of success, 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'.³

[6] The question which faces this court is whether in the circumstances of the present case, it can be said that good cause exists for the applicant's failure to timeously issue the notice as envisaged in section 3(1).

[7] It was argued on behalf of the applicant that it was necessary for the applicant's attorneys to ascertain the facts which triggered the applicant's arrest, and

¹ 2008 (4) SA 312 (SCA)

² at para 8

³ at para 1

this could only be done by accessing the docket and thus the applicant's attorneys duly issued the notice upon receipt of the docket.

[8] This was met with opposition from the respondent's counsel, who argued that the applicant has not shown that there is any justifiable cause for the delay and as such, the delay remains unaccounted for. Ms Mqobi, counsel for the respondent, argued that good cause is linked to the applicant's prospects of success, and argued further that the applicant has no prospects of success in this matter. She referred the court to the decision of **Chetty v Law Society, Transvaal**⁴ where the Appellate Division as it then was, stated that 'there is a specific link created between the delay and the good cause'. This is so. However the enquiry goes further than that. In her heads of argument, counsel cited what I consider to be a pertinent part of the Chetty judgment in relation to the present case, that 'the 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.'⁵ It is noteworthy that the respondent has already conceded that the state has not been prejudiced by the delay. This leaves just one aspect in respect of the two competing interests at play, namely, the applicant's right to have his case tried by a court of law *vis a vis* the right of the state organ not to be prejudiced by the delay. The remaining issue (applicant's right to have his case tried largely rests on whether the applicant has any prospects of success.

Good cause

[9] While consideration of the prospects of success forms an important part as to whether good cause exists, it is not the only consideration. The issue of good cause is intricately linked to a litigant's prospects of success and would invariably call for an

⁴ 1985(2)SA756 (A)

⁵ Chetty v Law Society, Transvaal

examination of the specific features of each matter. The circumstances of the case must be looked at in totality. It is evident from the argument presented on behalf of the respondent that the respondent rested its opposition solely on the applicant's prospects of success. This is unfortunate. A piecemeal approach to the issue of good cause is neither appropriate nor desirable. Mr Hansjee, counsel for the applicant, argued that arrest without a warrant is a violation of the rights of the applicant and is *prima facie* unlawful. He further argued that as it is common cause that the applicant was arrested by employees of the respondent, the onus to prove the lawfulness of the arrest shifts to the respondent. It is therefore not competent for the respondent to contend that the applicant has no prospects of success when in fact it is the respondent who bears the onus to prove the lawfulness of the arrest, having conceded the arrest and detention.

[10] It must be considered that it is not required of the applicant to set out in elaborate detail, the fullness of its case on the merits, but sufficient detail to enable the court to assess, of its own accord, the prospects of success. It appears to me that there exists a case to be answered by the respondent in the circumstances. I do not intend to go into the merits of the matter save to point out that the facts which form the basis of the applicant's arrest are common cause. In this regard, I need not go into, or pre-empt the evidence that will probably be presented before the trial court. That is not the purpose of the present application. Rather, the consideration is to establish whether good cause exists for the delay to enable this court to arrive at a conclusion whether or not to grant condonation.

[11] Whilst I am not satisfied with the reasons advanced by the applicant that the delay was occasioned by the need for his attorneys to obtain the docket, I am however persuaded that when regard is had to all the aspects relevant to good cause, the interests of justice dictate otherwise. I do not make much of the respondent's contention, which was in any event, not set out in any compelling detail, that the application was not made in good faith. This point was not taken further as there is no evidence to that effect whether on the papers or otherwise.

[12] It was further submitted by counsel for the respondent, albeit from the bar, that the cause for the delay is the negligence of the applicant's attorney and that even if the interests of justice are to be considered, there is a limit in the extent to which the applicant can rely on his attorney's inaction. I was referred in this regard to a judgment of the Labour Court in ***Khan v Cadbury South Africa (Pty) Ltd***⁶, where an application for condonation was dismissed on the basis of gross negligence on the part of the applicant's attorneys. I am however not persuaded that that submission has any merit more so that it was not pleaded and simply came from the bar. I further considered that the facts of the matter in the Cadbury case are vastly discernible from the present case, even on the principle sought to be argued by the respondent. Of particular distinction, is the infraction sought to be averted in the present case in contrast to the Cadbury case.

[13] In ***Maguga v Minister of Police***⁷ where the plaintiff had relied on the advice of his attorneys for his failure to serve a notice timeously, Plasket J had this to say:

'It is clear too that from an early stage (the plaintiff) was intent on pursuing a civil remedy against his assailants. As a lay person, he was reliant on the advice of the attorney who(m) he consulted. Through no fault on his part he was misinformed and given erroneous legal advice that prevented a notice from being given timeously.'⁸ The applicant approached his attorney on time. He was advised that his attorney needed to request the docket. When the docket was received, the stipulated six month period had already expired.

Interests of justice

[14] The interests of justice require the court to consider the facts of each matter holistically. As pointed out, correctly in my view, by counsel for the respondent, obtaining the docket is not a requirement for the issuing of the notice. It may be that

⁶ (c965/2008) [2010] ZALC 175 (17 November 2010)

⁷ CA 342/2017 ZAECGHC 2018

⁸ At para 31

the applicant's attorney was overcautious in not issuing the notice without first satisfying himself of the sustainability of his client's cause of action. I have misgivings about whether this on its own warrants a complete bar against the applicant to access the courts, detached from other considerations, including the applicant's prospects of success. I therefore do not agree with counsel for the respondent that the applicant has failed to demonstrate that it enjoys some prospect of success in the main action.

[15] 'When a judge decides to grant or refuse condonation, he or she exercises a discretion based on a balancing of relevant factors'.⁹ This presupposes that due consideration must be given to all the relevant facts of the case. It is not in dispute that the applicant approached his attorneys on time and upon being advised of the process, immediately gave instructions to them to carry out the instructions as advised.

[16] The Supreme Court Appeal expressed in ***The Minister of Safety and Security v De Witt***¹⁰ that '(t)he way in which the legislature has sought to avoid drawing a hard and fast rule that may cause undue hardship to a plaintiff is to make provision for time limits, and notices of intention to sue, but to enable a court to condone a failure to comply with the requirements... subject to ... (the specified requirements)...'.

[17] I must point out that while compliance with the requirements of the Act should not be taken lightly, the purpose of section 3 is not to create a complete bar to the institution of proceedings. I have in the circumstances, found that the applicant has shown good cause for the delay in serving the notice. No prejudice has been contended on the part of the respondent and the applicant's claim has not prescribed.

⁹ Maguga v Minister of Police, at para 4

¹⁰ (722/2007) 103 [2008]ZASCA (19 September 2008)

Costs

[18] In relation to the issue of costs, it is my view that the applicant is not entirely blameless in the circumstances and that a departure from the well-established rule that the costs should follow the result, is warranted.

[19] In the result I make the following order:

- (a) The application is granted.
- (b) The late service of the notice in terms of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is condoned.
- (b) Each party to pay its own costs.

SM MFENYANA

ACTING JUDGE OF THE HIGH COURT

Appearances

For the Applicant:

Mr Hansjee

Instructed by:

Sipunzi Attorneys, East London

For the Respondent:

Mr Mqobi

Instructed by:

The State Attorney, King Williamstown

Date heard:

14 March 2019

Date handed down:

18 March 2019