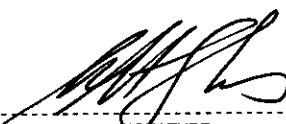


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 50672/14

20/2/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO. ☒ YES ☐ NO.
(2)	OF INTEREST TO OTHER JUDGES: YES / NO. ☒ YES ☐ NO.
(3)	REVISED.
20/2/2015	
DATE	SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2015-02-20
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

SABELO MISELO

APPLICANT

and

MINISTER OF SAFETY AND SECURITY

1ST RESPONDENT

MINISTER OF JUSTICE

2ND RESPONDENT

DEON ACKERMAN

3RD RESPONDENT

Coram: HUGHES J

JUDGMENT

Heard on: 10 February 2015

Delivered on: 20 February 2015

HUGHES J

[1] In this application the applicant seeks condonation for the late notification in terms of s 3(1) (a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act).

[2] On 19 February 2012 the applicant was arrested, on a charge of rape, he was incarcerated until he was acquitted on 29 July 2013. After being release he was unable to secure employment and funds to instruct or secure an attorney to pursue his case of unlawful arrest and detention against the respondents.

[3] Sometime in June 2014 he managed to obtained funds and he approached an attorney to assist him with his claim. It was at this stage that his attorney advised him of the requisite notification that had to be given within six months from the date of the cause of action, if one intended to institute proceedings against the respondents.

[4] The applicant in addressing the issue, of the delay in notifying the organ of state of his intention, argues as a layman he was not aware that a notification was necessary until he consulted with his attorney and he could not institute his claim earlier as he did not have funds to instruct an attorney. He further argues that whilst he was incarcerated he could not pursue his matter as he had no access to an attorney in prison.

[5] The respondents argue that the cause of action of the applicant arose on the date that he was arrested being 19 February 2012, and not 29 July 2014 being the date on which he was acquittal and released, as argued by the applicant.

[6] The respondents argued further that the applicant failed to provide an adequate explanation for the period that he was incarcerated. He also failed to provide an explanation for the period after his release up until he consulted with his attorney. The reasons he has advanced are not adequate because the public at large are layperson who do not have funds to pursue claims but they find ways to do so. What is striking in this case is that the does not even explain what steps he took to get his case on the go and whether he acquainted himself with the procedures that he had to follow.

[7] I set out below s 3 of the Act for easy reference :

"3 Notice of intended legal proceedings to be given to organ of state

- (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 a 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 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 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*
 - (b) *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."*

[8] The respondents are adamant that the cause of action arose on 19 February 2012 on the arrest of the applicant. The applicant contends otherwise, that is, that the date on which the cause of action arose was 29 July 2013; being the date he was acquitted and released. In the applicant's replying affidavit, paragraph 8.3, he sets explains that he could not give notice to the respondents after his arrest as he was incarcerated and *"his failure to give timorously notice was not at all due to his negligence or failure to act at all"*.

[9] The question to be answered is which of the dates advanced, 19 February 2012 or 29 July 2013, is the date that one calculates from whence the six months period commences.

[10] The answer is found in s3 (2) (a) and s3 (3) (a), according to s3 (2) (a) the six months notification commences *"from the date on which the debt becomes due"*.

S 3(3) (a) spells out exactly when a debt in terms of s3 (2) (a) becomes operative or due:

s3 (3) (a) states that *"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 it from acquiring such knowledge; ..."

[11] In **Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA)** at 209 Olivier JA said the following:

"Section 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge if he could have acquired it by exercising reasonable care. In my view the requirement 'exercising reasonable care' requires diligence not only in the ascertainment of the facts underlying the debt but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises."

[12] Taking the above into account together with s 3 (3) (a) *supra* my view is that the applicant would have had to have knowledge of the identity of the organ of state responsible for the debt as at the time of his arrest and incarceration. Further, as he alleges that he was unlawfully arrested and detained, he would have to have knowledge of the facts upon which the debt owed to him arose. This would have been within his knowledge at the time of his arrest, as he contends he did not commit the offence for which he was charged. Even if the applicant did not have this knowledge at the time of his arrest, he would have attained this knowledge had he exercised reasonable care to obtain it, this would have entailed a simple exercise of enquiring from those who arrested and incarcerated him. I therefor agree with the respondent that the debt became due on 19 February 2012.

[13] The respondents places reliance on the applicant's failure to notify the relevant organ of state within the prescribed six months and as a result the applicant seeks condonation for the late notification, in the circumstances I have a discretion to grant condonation subject to the criteria in s3 (4) (b) of the Act being met:

- (i) That the debt has not prescribed;
- (ii) That good cause exist for the failure by the creditor; and
- (iii) That the organ of state is not unreasonably prejudiced by the failure.

[14] It is common cause that the debt has not prescribed.

[15] The applicant states at paragraph 13 of his replying affidavit "*...that it is clear from annexure "SM1" to this founding affidavit that he acquired the relevant knowledge that he had to give notice to the Respondent during June 2014.*" The document SM1 is the notification dated 10 June 2014 which was served upon the Minister of Police on 12 June 2014. The applicant in the founding affidavit states that "*As a layman I was not aware of the time limits as required by the Act and due to the long period detained I was also out of pocket to consult a lawyer immediately.*"

[16] What emerges from the applicant is that as at 29 July 2013, upon his acquittal and release from incarceration, he was not aware of the requisite six months' notice period. He submits that he only became aware of this when he consulted with his attorney in June 2014. Further, he could not have notified the organ of state earlier as he had no funds to consult an attorney before June 2014.

[17] Does good cause exist for the applicant's failure to send the notification timeously and was it to the prejudice of the debtor? The aforesaid was addressed fully in **Madinda v Minister of Safety and Security 2008 (4) SA 312 SCA at 316E-G** where Heher JA said the following:

"'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 therefor." And at **317H-318D** *"One other factor in connection with 'good cause' in s3 (4) (b) (ii) is this: it is linked to the failure to act timeously. Therefore subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms. Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s3 (4), but it is not, in the statutory context, an element of 'good cause'. ...Absence of prejudice has often been*

regarded as an element of good cause in the context of earlier legislation. It was, no doubt, also an element in terms of s57 of Act 68 of 1995 (of the South African Police Services Act). But this Act the legislature has deemed it appropriate to treat absence of unreasonable prejudice as a specific factor of which an applicant must satisfy the court. The identification of separate requirements good cause and absence of unreasonable prejudice may be intended to emphasise the need to give due weight to both the individual's right to access to justice and the protection of state interest in receiving timeous and adequate notice. The structure of s3 (4) is now such that the court must be satisfied that all three requirements have been met."

[18] I have analysed the facts of this case in light of the guidance set out in the **Madinda v Minister of Safety and Security** *supra*. In establishing whether 'good cause' exist in the current case I note that the applicant's case is premised on his unlawful arrest and detention, for allegedly raping a minor, for which he claims damages. The applicant relies on the fact that as at 21 May 2012 the respondents were in possession of DNA results taken from the minor which reads as follows:

"No male DNA was obtained from the exhibit 10D7AB3126XX."

He states that at this stage the respondents should have withdrawn the charges against him, as his DNA was not found in the minor child. He was only acquitted of the charge on 29 July 2013 and as such remained in custody even after the DNA result were known to the respondents. This constitutes the merits of the case. However, this is but one aspect that needs to be considered when determining whether 'good cause' exists or not.

[19] I am also mindful of the fact that strong merits may mitigate fault whilst no merits may render mitigation pointless. In these circumstances as soon as the applicant became aware of the DNA results he had strong merit on his side against the respondents. In my view he was armed with the necessary proof to advance his claim and should have done so as soon as was reasonably possible.

[20] Even though he advances an explanation for the delay in notifying the respondents, of his incarcerated and not having funds to consult an attorney, in both his affidavits he does not set out what steps he took to overcome the dilemma he was in to try and advance his case.

[21] Say I afford him the benefit of the doubt, that he was unable to secure any form of consultation with an attorney, be it legal aid or the like, I have nothing before me that indicates that he wanted or intended to pursue his claim whilst he was incarcerated and immediately upon his release.

[22] Turning to deal with his release, hereto I am not placed with facts to consider what steps he took to secure funds, if any, or what steps he took to pursue his case. From the facts before me the applicant shows no urgency at all to pursue his case against the respondents.

[23] The issue of lack of funds as argued by the respondents counsel has been dealt with by the constitutional court in the matter of **Van Wyk v Unitas Hospital 2008 (2) SA 472 CC at 477F-G**, where the court held that lack of funds was not a compelling reason to nullify delay in the institution of legal proceedings and the furnishing of an explanation as to how one overcame the dilemma was vital for a court to consider in a cases of condonation.

[24] The explanation of the applicant for the delay was to my mind lacking in substances and superficial to say the least. The applicant has failed to set out in detail acceptable reasons and account for the entire period for the inordinate delay in instituting his claim and notifying the respondents.

[25] As was stated in **Madinda v Minister of Safety and Security at 317C-E**, there are two elements in s3 (4) that come to play; the applicants rights to have the merits of his case ventilated in court 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'*. The debt having arose on 19 February 2012 and the applicant only giving notice to the respondents on 10 June 2014, a period plus minus 2 years and 4 months had already lapsed. The matter has not prescribed as yet and thus is still alive. The respondents contend that they are prejudiced in the prosecution of thereof, I am not sure what this means, but in my view that on its own cannot amount to prejudice, as the respondents should have anticipated some sort of action from the applicant as his claim had not prescribed.

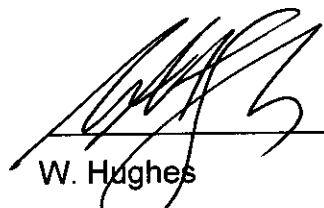
[26] It is evident from the above analysis that not all three requirements in terms of s3 (4) have been met. In my view, for the reasons set out above, the applicant has failed to give a full, reasonable and cogent explanation for the entire period and delay in notifying the respondents.

[27] Regarding the prospects of success I have not been provided with the entire docket to examine and consider this aspect. This is yet again the tardiness with which the applicant has handled his claim.

[28] For the reasons set out above it would not be in the interest of justice to grant the applicant condonation. I am also of the view that this is a case where no costs order would be the appropriate order.

[29] In the result the following order is made:

29.1
[29.1] The application to condone the late service of the notice contemplated in s3 (1) (a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 within the period laid down in s3 (2) (a) is dismissed.



W. Hughes
Judge of the High Court

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