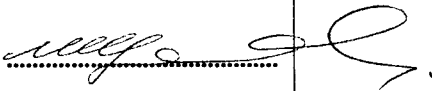




IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 18999/2012

|                                                      |                                                                                    |
|------------------------------------------------------|------------------------------------------------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE                   |                                                                                    |
| (1) REPORTABLE: <del>YES</del> /NO.                  |                                                                                    |
| (2) OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO. |                                                                                    |
| (3) REVISED.                                         |                                                                                    |
| 19/03/2015                                           |  |
| DATE                                                 | SIGNATURE                                                                          |

19/3/2015

IN THE MATTER BETWEEN

ALFRED RAY DLAMINI

Plaintiff/Applicant

and

MINISTER OF SAFETY & SECURITY

1<sup>st</sup> Defendant/Respondent

MINISTR OF JUSTICE & CONSTITUTIONAL

DEVELOPMENT

2<sup>nd</sup> Defendant/Respondent

NATIONAL PROSECUTING AUTHORITY

OF SOUTH AFRICA

3<sup>rd</sup> Defendant/Respondent

---

JUDGMENT

LEGODI, J

[1] This is an application in terms of section 3(4) of the Legal Proceedings Against Certain Organs of the State Act No 40 of 2002. The relevant part of the section reads as follows:

*(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 had 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".*

[2] In terms of subsection (1), 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 in question notice in writing of his/her or its intention to institute the legal proceedings in question or the organ of state in question has consented in writing to the institution of the legal proceedings without such a notice or upon receipt of a notice which does not comply with all statutory requirements. In terms of subsection (2), a notice must be 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).

[3] The applicant instituted action proceedings against the Minister of Safety and Security, Minister of Justice and Constitutional Development, and National Prosecuting Authority of South Africa. They are the first, second and third respondents respectively. He claims a total sum of R1 800 000 against the respondents.

[4] His claim is based on the unlawful arrest, unlawful detention, malicious prosecution and assault. The application for condonation is for the late filing of section 4(1) notice read with subsection 4(2). The application is opposed by the respondents. The grounds for the opposition are varied. The important grounds of opposition are that the claims have prescribed, that there are no prospects of success on merits and lastly, that no cause exists for the failure by the applicant to give notice in terms of the Act.

[5] As a background, on the 8 October 2007, the applicant was arrested. On the 10 October 2007, he appeared in court on three charges of robbery with aggravating circumstances, one count of attempted rape, unlawful possession of fire arm and ammunition. On the 22 February 2010 he was found not guilty and discharged in terms of section 174 of the Criminal Procedure Act, on counts 3, 5 and 6, that is, attempted rape, unlawful possession of fire arm and ammunition respectively. On the 17 April 2011 he was acquitted of the remaining charges of robbery with aggravating circumstances.

[6] During or about November 2011, he consulted a lawyer. He was advised that he can sue the police for unlawful arrest and detention. On the 30 November 2011 a notice in terms of section 3(1) was issued against the police, first respondent. In the notice, the applicant confined himself to the unlawful arrest and detention. On the 17 April 2012 summons were then served on the police, Minister of Safety and Security. Later, an advocate advised that notice in terms of section 3(1) be issued against the second respondent, the Minister of

Justice and Constitutional Development. Summons was then amended. On the 5 September 2012, another notice in terms of section 3(1) was served on the third respondent, the National Prosecuting Authority. The summons were further amended and delivered. The respondents' plea was further delivered on the 24 July 2013. In the plea, the respondents denied allegations against them and also pleaded that the notices were not served in terms of the provisions of the Act.

[7] In the particulars of claim, the plaintiff's cause of action against the first respondent is pleaded as unlawful arrest and detention or alternatively, malicious arrest and detention. In paragraph 4 thereof, a further cause of action is pleaded, that is, assault. Then in paragraph 8 of the particulars of claim, malicious prosecution is pleaded, alleging that the second and or the third respondents and its staff members or agents persisted unreasonably in opposing the bail and did not notify the prosecution that they did not have enough evidence to prosecute the applicant. In the alternative, is pleaded that, the second and the third respondents, namely the prosecutor and or its agents or staff members, persisted in its prosecution knowing that it did not have evidence to prosecute the applicant.

#### PRESCRIPTION AND FAILURE TO GIVE A NOTICE

[8] Coming back to the requirements for condonation under section 3(4), prescription is one other requirement which the court must consider. If it is satisfied that the debt has not extinguished by prescription and other two requirements are met, condonation may be granted. Starting with the claim against the police, or first respondent, the debt arose on the 10 October 2007 when the applicant was reminded in custody by court of law. That is, the alleged unlawful arrest and detention by the police from the 8 April 2007 to 10 October 2007 when he first appeared in court. Whilst the applicant sought to suggest that he was detained for more than 48 hours before taken to court, this was not persisted during argument. The summons in this case was served on the 17 April 2012, long time after the expiry of three years since the arrest and detention of the applicant by the police.

[9] On behalf of the applicant, it was suggested that the applicant knew only round about November 2011, that is, after acquittal on all the charges, that he has a claim against the police and the other respondents. The explanation for failure to give statutory notice timeously should be seen in context. The applicant was at all times upon his arrest legally represented. Advice could long have been given about unlawful arrest and detention if there was any.

[10] The statement in the founding affidavit: *'In November 2011, I consulted with my legal representative regarding advice on how to pursue this matter I was advised that on any facts I have a prospect of success against the first respondent and that I should pursue a claim against the first respondent'*, without more, in my view, is not satisfactory and therefore, prescription is not averted.

#### PROSPECT OF SUCCESS AGAINST THE FIRST RESPONDENT (THE POLICE)

[11] Whilst section 3(4)(b) in subparagraph (i) thereof requires the court to be satisfied that the debt has not been extinguished by prescription, the authorities are not confined only to prescription, but also to the merits as a whole. In *MEC FOR EDUCATION, KZN v SHANGE* 2012 (5) SA 313 (SCA) at par 15, Snyders JA dealing with the requirement and sub-paragraph (b)(ii) stated:

*"The provisions of s 3 (4) (b) (ii) of the Act have been considered in several judgments. For present purposes, it is not necessary to repeat all of the relevant considerations, but only to state that the court is to exercise a wide discretion, that 'good cause' may include a number of factors that are entirely dependent on the fact of each case, and that the prospect, of success of the intended claim play a significant role".* The underlining is my emphasis. In *Madunda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at 317 (C), Heher JA stated:

*"Strong merits may mitigate fault, no merits may render mitigation pointless".*

[12] The applicant was arrested for both schedule 1 and 6 offences. The police were therefore entitled to arrest without a warrant, in terms of section 40 of the Criminal Procedure Act. The first respondent or the police without more cannot be held to be acting unlawfully when arresting without a warrant for offences falling under schedule 1. Further, the remand of the applicant was authorized by court of law and the first respondent plays no role in that regard. Secondly, once a matter is brought to court, the prosecution takes charge. They make the decisions whether or not to oppose bail based on what is in the docket. The other difficulty with regard to the claim against the first respondent is that the applicant placed no facts before me dealing with the merits of the case.

[13] I am not satisfied that the applicant's claim against the first respondent based on the unlawful arrest and detention has not been extinguished by prescription, neither is there evidence showing the prospects of success on the merits. This then brings me to the other claims:

#### ASSAULT

[14] In paragraph 8.2 of the founding affidavit, the applicant alluded to the fact that during his arrest he was assaulted by the members of the first respondent in an effort to confess to offences he was not guilty of. That would have been on the 8 October 2007. In this regard, I am not satisfied that the applicant's claim has not been extinguished by prescription. In addition, there is no explanation as to why the statutory notice was not given. I now turn to deal with the other claims.

#### MALICIOUS PROSECUTION

[15] In paragraph 7 of this judgment, I dealt with how the cause of action for malicious prosecution is couched. It is directed mainly at the second and third respondents. I fail to understand how the second respondent can be held liable for malicious prosecution. In paragraph 2.1 of the particulars of claim, the second respondent is said to be sued and cited in his official capacity. But the Minister

plays no role in the prosecution of cases. That is a matter within the sole domain of the third respondent. Therefore, if there is a case for malicious prosecution, that should be put at the door of the third respondent.

[16] This brings me to deal with the second requirement in terms of subsection (4) (b) (ii) of section 3. That is, whether good cause has been shown to exist for the failure by the applicant to give a statutory notice. I must immediately say, the prescription does not find application in the claim based on malicious prosecution. On the 22 February 2010 the applicant was discharged in terms of section 174 of Act 51 of 1977 on the attempted rape charge, unlawful possession of fire arm and ammunitions charges. He was also discharged on the remaining charges of robbery with aggravating circumstances on the 17 August 2011. On the 5 September 2012 statutory notice was issued against the third respondent. On the 5 September 2012 he was also discharged on the remaining charges of robbery with aggravating circumstances. On the 5 September 2012 statutory notice was issued against the third respondent. By that time, the six months period had long lapsed since the applicant was acquitted and since the applicant became aware that he could institute a claim against the third respondent. The explanation for failure to give statutory notice timeously is explained in the founding affidavit as follows:

*"23.6 The third respondent was served with the notice on the 05<sup>th</sup> September 2012, about seven months after the expiry of the six months period. This was also because, upon further consultations with the counsel, my attorney was further advised that he also needs to add the third respondent as a party to the proceedings. My attorney then served the said notice and a notice to amend summons and particulars of claim.*

*23.7 The non-compliance with section 3(2) with regards to the notices served on the second and third respondents cannot be attributed to me but my attorney. On merits my claim is good and bona fide because the respondents unlawfully arrested, detained and malicious prosecuted me."*

[17] The applicant seeks to blame every failure to comply with the statutory notices on his lawyers. On his own version, he consulted a lawyer in November 2011 after having obtained relevant information from the police. He issued notice in terms of section 3(1) for unlawful arrest and detention against the first respondent only. That was done on the 30 November 2011. On the 20 June 2012 statutory notice was served against the second respondent allegedly after his attorney consulted with an advocate. On the 5 September 2012 further statutory notice was issued against the third respondent. It is not an excuse to blame the attorney for non-compliance with statutory notice. There will never be a finality to matters if every time an attorney is blamed for the delay the requirement in subparagraph (b) (ii) of section 3 (4) (b), is met. I am not satisfied with the explanation for failure to give statutory notice timeously.

[18] However, whilst I am not satisfied with the explanation for failure to give notice to the third respondent in terms of section 3(1), I still need to look at the merits of the case. The applicant was not only acquitted on all the charges, but in respect of the three charges he was discharged at the end of the state case, and thus suggesting that there was no evidence at the end of the state case upon which a reasonable person might convict. I am mindful of the fact that merits in the present application have not been spelt out. But the discharge of the applicant on all the charges in the circumstances has a bearing on the prospects of success on merits.

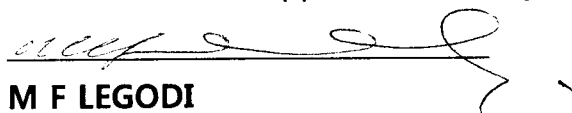
[19] The third respondent did not argue that it would be prejudiced should condonation be granted. I am therefore satisfied that the granting of condonation for the late filing of section 3(1) based on malicious prosecution against the third respondent is justified.

[20] Consequently an order is hereby made as follows:

20.1 The application for condonation for the late giving of notice in terms of section 3(1) against the first respondent is hereby refused;

20.2 The application for the late giving of notice in terms of section 3(1) of the Act against the third respondent for malicious prosecution is hereby granted;

20.3 The applicant is hereby ordered to pay the costs of the application.



**M F LEGODI**

**JUDGE OF THE HIGH COURT**

FOR THE PLAINTIFF/APPLICANT:

INSTRUCTED BY:

ADV T MORETLWE

MAHLANGU MASHOKO ATTORNEYS

262 Madiba Street

502 Karling Building

PRETORIA

TEL: 012 323 5268

REF: CIV/149/MS

FOR THE RESPONDENTS:

ADV M BARNARD

INSTRUCTED BY:

THE STATE ATTORNEY

Salu Building

255 Francis Baard Street

PRETORIA

0002

TEL: 012 309 1535

REF: SYBRAND BOTES 1048/12/Z60

Judgment reserved on: 03 March 2015

Judgment handed down on: 19 March 2015