

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



A

6/5/2015

Case number: 29788/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	6.5.2015
	DATE
	SIGNATURE

In the matter between:

TEBOBO PATRICK OLETSITSE

Plaintiff / Applicant

and

MINISTER OF POLICE

Defendant / Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant prays for the following relief:

"1. That a declaratory order be made, declaring that the Plaintiff / Applicant has complied with the requirements of Section 3 and 4 of the

Constitution (sic) of Legal Proceedings against Certain Organs of State Act, Act 40 of 2002;

2. *In the event of the above order not being made, the Plaintiff / Applicant applies for an order that the late delivery of the notice as contemplated in section 3 of the Institution of Constitution (sic) of Legal Proceedings against Certain Organs of State Act, Act 40 of 2002 be condoned.*
3. *That the Defendant / Respondent be ordered to pay the costs of this application in the event of opposition."*

FACTUAL BACK GROUND

- [2] On 19 May 2008, the applicant was arrested without a warrant by members of the South African Police Service (SAPS). The applicant alleges that the said members had no reasonable or probable cause to do so and had accordingly instituted a claim for damages against the defendant on the basis that he is vicariously liable for the actions of members of SAPS, when such members act within the course and scope of their duties as police officers.
- [3] Subsequent to his arrest, the applicant was detained for a period of 10 days. The applicant alleges that the detention was also unlawful and damages are claimed in this respect.
- [4] On 17 May 2011, the charges against the applicant were withdrawn.
- [5] The applicant sought legal advice after the charges were withdrawn and subsequently appointed his attorneys of record to pursue the claim against the respondent on his behalf.
- [6] In pursuance of their mandate, the applicant's attorneys' issued summons against the respondent, which summons was served on the respondent on 26 May 2011.
- [7] The respondent delivered a notice of intention to defend the action and filed two special pleas, to wit one of prescription and one of non-compliance with

the provisions of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 ("the Act").

- [8] Upon receipt of the respondent's plea, the applicant's attorneys realised that a notice in terms of the Act was not served. As a consequence and on 15 November 2011 attorneys Van Zyl le Roux Inc addressed a letter to the State Attorney explaining the oversight and requesting the State Attorney to accept the letter as the requisite notice in terms of the Act. The State Attorney was further requested to obtain the respondent's permission to condone the late service of the notice. No such instruction was received.
- [9] The matter was set down for trial in October 2012.
- [10] At a pre-trial conference held on 13 September 2012 it was agreed between the parties that the two special pleas will be dealt with first.
- [11] It was recorded at the pre-trial conference that the respective versions of the parties *"appear from the particulars of claim, the plea and the docket that will form part of the court bundle."*
- [12] At the trial, the respondent, despite the agreement between the parties, insisted that a formal application for condonation, for the failure to comply with the provisions of the Act, should be lodged. The presiding judge agreed and only the issue of prescription was dealt with at the trial.
- [13] The respondent's plea of prescription was partially upheld and the court ruled that whereas the applicant's claim for damages prior to 26 May 2008 had prescribed, his claim after the aforesaid date had not.
- [14] The present application was only launched during June 2014.

LEGISLATIVE FRAMEWORK

- [15] The relief claimed in the alternative prayer is based on the provisions of section 3(4) of the Act, which 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 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.” (own emphasis)*

ISSUES IN DISPUTE

[16] The issue pertaining to prescription has already been dealt with at the trial and requires no further attention.

[17] The respondent does, however, deny that:

- (i) the applicant has shown good cause for his failure
- (ii) it has been unreasonably prejudiced by the applicant’s failure.
- (iii) condonation should be granted to the applicant for this failure to

Comply with the Act.

GOOD CAUSE

[18] In determining whether good cause exists to condone the failure of a creditor to give the requisite notice, the court has to have regard to the reasons for the delay and the prospects of the applicant’s claim.

Reasons for delay

[19] The applicant’s explanation for the delay reads as follows:

“I at all relevant times honestly believed that I could only act against the defendant once the case against me had been disposed of. I respectfully submit that the delay in the delivery of the said notice on 15 September 2011

(sic) was due to my initial incorrect belief that the prosecution against me had to be completed. I respectfully submit that the delay was not as a result of a deliberate action or intention to prejudice the defendant. I did not have any knowledge of the legal process and I was not aware that a notice had to be submitted within 6 months after the claim had arisen.”

- [20] The applicant was unaware of the fact that notice, in terms of the Act, should be given prior to the institution of action. He was, furthermore, unaware that the six month period, within which the requisite notice had to be served, commenced on the dates he was arrested and released. Once the criminal charges against the applicant were withdrawn, he, however, took all reasonable steps to pursue a claim against the respondent.
- [21] The firm of attorneys appointed by the applicant, did not serve the requisite notice without delay. Due to an apparent misunderstanding between the respective attorneys firms, the notice was only served on 15 November 2011.
- [22] I am satisfied that the delay from 29 November 2008, being six months after the applicant was released to May 2011, the date on which he instructed his attorneys, was satisfactory explained by the applicant.
- [23] The reason for the delay from May 2011 to 15 November 2011 is explained by his attorneys in their letter dated 15 November 2011. I am of the view that the applicant is not to blame for the misunderstanding between the attorneys firms. It is clear from his actions that he, at all relevant times, wanted to pursue a claim for damages against the respondent.

Prospects of success

- [24] In respect of the prospects of success, the applicant, a police officer, avers that he was arrested on a charge of corruption *alternatively* fraud *further alternatively* theft. The applicant states that the police docket contains 15 affidavits and that he is not implicated in any of these affidavits. According to the applicant, his claim has good prospects of success.

[25] The respondent denies this allegation, but, notwithstanding an invitation to do so, failed to refer to any affidavit that implicates the applicant in the charges that were preferred against him.

[26] I am satisfied on the papers that the applicant's claim has good prospects of success.

UNREASONABLE PREJUDICE

[27] The applicant alleges that the respondent had until at least 17 May 2011, the date on which the charges against him were withdrawn, been investigating the matter. Furthermore, the docket pertaining to the investigation had been discovered and as a consequence, the respondent has not been unreasonably prejudiced by the applicant's failure to give timeous notice of the claim.

[28] The respondent avers that it had been unreasonably prejudiced due to the fact that *"some of the police who investigated the offences are no longer in the service, and cannot be traced."* No names are mentioned nor are the affidavits of these police officials identified. As a consequence and due to the vagueness of the allegation, I am not in a position to determine the relevance of their evidence in respect of the applicant's claim.

[29] The respondent furthermore state that *"Due to the inordinate delay, some of the contents of the docket had disappeared from the original docket."* Once again no facts underlying this broad statement are provided.

[30] Almost a month after the charges against the applicant were withdrawn, action was instituted. It is disconcerting that documents were removed from the docket in such a short space of time. Be that as it may, the prejudice suffered by the respondent due to the fact that documents were removed from a docket that is in its custody, is definitely not attributable to the applicant.

[31] Having had regard to the allegations *supra*, I am satisfied that the respondent has not been unreasonable prejudiced due to the applicant's delay.

CONDONATION

- [32] Mr Phaswane, counsel for the respondent, urged me to find that condonation should not be granted due to the inordinate delay in the launching of this application. It was clear at the trial in October 2012 that an application for condonation must be brought. The applicant, however, only served this application on 26 June 2014, one year and eight months later.
- [33] It is correct that the question of condonation, should be adjudicated separately from the delay explanation required in terms of section (3) (4) (b) (ii) of the Act.
- [34] This approach was confirmed by the Supreme Court of Appeal in *Madinda v Minister of Safety and Security* 2008 (4) SA 312 at para [20], to wit:
- “It is also true that, although her attorney received the rejection of the notice in the middle of October 2005, the appellant did not commence proceedings for condonation until July 2006. As I have earlier pointed out, unexplained delay which relates to the period after notice was de facto given will ordinarily relate not to the establishment of good cause but to condonation. The learned judge erred in his approach in this regard. Nor do I think that such delay can fairly be ascribed to disinterest on the applicant’s part.”*
- [35] In other words, even if I am satisfied that the applicant has complied with the requirements contained in section 3(4) (b), the application may still be dismissed due to an inordinate delay in the launching of the application.
- [36] The applicant does not deal with this delay. Mr Rossouw SC, counsel for the applicant, submitted that the delay was most probably due the failure by the applicant’s attorneys to launch the application timeously. The applicant’s attorney did not file an affidavit explaining the delay of some 20 months.
- [37] I am mindful of the fact that each case must be adjudicated on its own facts. Although the delay in launching the condonation application in the *Madinda* case was only nine months, I am, however, of the view that the facts herein are to such an extent similar to those in the *Madinda* case, that the following extract at 323 E – G, finds application herein:

"It was the delay thereafter until July 2006 which he should have explained but he did not. Applications for condonation should in general be brought as soon after the default as possible. Thereby possible further prejudice to the other party and misconception as to the intentions and bona fides of the applicant can be lessened. A delay in making the application should be fully explained. The failure to do so may adversely affect condonation or it may merely be a reason to censure the applicant or his or her legal advisers without lessening the force of the application. I think that the latter is the correct attitude to take in the present matter in relation to the evaluation of whether condonation should be granted. Under the present statutory dispensation there is no time limitation on the institution of action and the appellant had until September 2007 (where her claim would have prescribed) to issue summons. The matter was clearly very much alive during the first half of 2006 and the state had no reason to think otherwise. Nor has the respondent suggested that it was prejudice or misled by the additional delay."

- [38] I respectfully agree. The respondent knew from at least May 2011 that the applicant intends pursuing a claim for damages. The matter was on the roll for trial in October 2012. Although the delay in launching the application is lengthy and not explained, the respondent could have had no doubt that the applicant is adamant in pursuing his claim.

COSTS

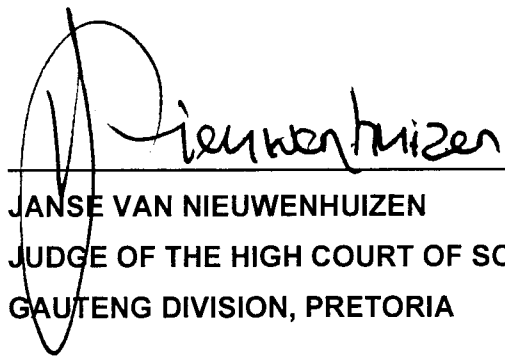
- [39] The respondent was justified in opposing the application for condonation. The lengthy delay in launching the application and the fact that the applicant seeks an indulgence justifies a cost order in favour of the respondent.

ORDER

- [40] The applicant did not make out a case for an order in terms of prayer 1 of the notice of motion.
- [41] I am satisfied that the applicant has made out a case for condonation and such order will follow.

I make the following order:

1. The late delivery by the applicant of the notice contemplated in section 3 of the Institution of Legal Proceedings against Certain Organs of State, 40 of 2002, is condoned.
2. The applicant is ordered to pay the costs of the application.



JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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