

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Application Number: 412/2014

In the matter between:-

NJANYANE JAN MASHIYA

Applicant

And

MINISTER OF POLICE

Respondent

JUDGMENT BY: MOLOI, J

HEARD ON: 22 MAY 2014

DELIVERED ON: 03 JUNE 2014

[1] This is an application in terms of section 3 (4) (a) for condonation of failure to give an organ of state notice as contemplated in section 3(2) of The Institution of Legal Proceedings against certain Organs of State Act No. 40 of 2002. (The Institution of Legal Proceedings Act).

[2] The applicant in this matter was injured in the right eye and on his head by an object that could have been a rubber bullet or pellets resulting in his loss of sight of the eye. This incident took place on 21 April 2010 while he was sitting on a camp chair waiting for his car to be washed at a carwash in Odendaalsrus. There were several police officers in the vicinity who were trying to disperse a large crowd of protesters. One police official fired the shots at him as they passed him in a police vehicle. He was taken by the people at the carwash and driven in his own vehicle to the police station where a report was made and a policeman who fired the shots was identified. He was thereafter taken to the Sir Oppenheimer Hospital where he was detained for treatment until his discharge on 29 April 2010.

[3] As a result of the shooting the applicant's right eye was permanently damaged, a rubber bullet or pellet was removed from the eye and a silicone ball was implanted in the eye socket. He would require future medical treatment. The applicant also suffered loss of income and will continue to suffer loss of income in the future as he lost his employment as a result of the incident.

[4] During May 2010 he consulted his attorney with a view to instituting a claim for compensation against the respondent. During consultation the attorney informed him such claim must be instituted within three years failing which it would be extinguished by prescription. Moreover the applicant did not know the law and what was required to be done. He was also advised to obtain the medical and hospital records in the meanwhile. He was never told about the notice required to be served within a period of six months from the date of the incident as required by section 3(2) of Act 40 of 2002. The attorney also required to be placed in funds to cover the litigation costs. He could not provide the required funds as he did not have money because he subsequently lost his job as a result of the injuries sustained during the incident.

[5] The applicant kept contact with his attorney throughout and discussed his problems in obtaining the hospital and medical records as well as the funds. Eventually in September 2011 he got funds and on 7 September 2011 his attorney dispatched per registered post a notice as contemplated in section 3(2) of Act 40 of 2002 to the respondent. He,

however, could not find proof of having done so as his attorney changed offices. As the funds he got were insufficient only in January 2013 he entered into an agreement with his attorney as to how he would pay the attorney's legal fees. A consultation was arranged with counsel and the summons was issued and served on 3 April 2013. During this consultation with counsel, the latter pointed out that the notice sent to respondent on 7 September 2011 was defective and, as a result, another notice was sent to the respondent on 22 January 2013.

- [6] The fee agreement concluded between the applicant and his attorney did not include counsel's fees and as such a condonation application required by section 3 (4) of Act 40 of 2002 could not be launched. This application could only be done late in December 2013 when the applicant, his attorney and counsel agreed to a contingency fee arrangement regarding the payment of fees. The application for condonation was thus launched on 31 January 2014 though dated 27 January 2014. The explanation above in paragraphs 4, 5 and 6 is offered to explain the failure to serve the notice envisaged in section 3(2) of Act 40 of 2002

timeously. The applicant further asserts that he has good prospects of success with the claim as he was shot and injured by police official while he was innocently sitting on a camp chair waiting for his car to be washed and he has been seriously injured. There was no reason nor justification for the police officer to fire at him. Furthermore the applicant contended that there would be no unreasonable prejudice suffered by the respondent should condonation be granted. The reason for this contention is that the incident was reported to the police at Odendaalsrus on 21 April 2010 and also notices were sent to respondent on 7 September 2011 and again on 22 January 2013 giving the respondent sufficient time to investigate the circumstances of this incident. The records were available and so also the police officers concerned. It would not be a problem for the respondent to locate the police officers concerned. The reason for the delay in serving the notice was attributed to the applicant's ignorance of the law as well as his attorney's not knowing the provisions of the Act in question. Furthermore the lack of funds to pay for the litigation also contributed to the delay.

- [7] On the other hand, the respondent contended that the applicant did not show good cause for the delay as he took inordinately long delay before he could take steps to prosecute the matter. The debt accrued on 21 April 2010; applicant had first consultation with his attorney during May 2010; the first notice was sent on 7 September 2011; a second notice was sent on 22 January 2013; summons was served on 3 April 2013; application was only launched on 31 January 2014 (dated 27 January 2014) and set down for hearing on 6 March 2014 on which date it was postponed for hearing on 22 May 2014. The time for serving the required notice had expired on 21 October 2010. Application for condonation, seeking indulgence from the court, should be done as speedily as possible as it is not a right. Moreover, it was argued, the applicant did not take the court into his confidence by not disclosing the amount of money he was required to raise and how much he received from the Provident Fund on his discharge from employment. The applicant's and his attorney's alleged lack of knowledge of the requirements of Act 40 of 2002 is, therefore, questionable.

[8] On behalf of the respondent it was in addition submitted that the prospects of success by the applicant are not as clear as the applicant sought to make out. According to respondent the contradictory explanations made to Dr Pienaar by the applicant clouded the issues even more. The applicant explained to Dr Pienaar that he went to collect his vehicle when he fell prey to a gunfight between the police and suspected criminals and got shot in the process. No specific person could be pointed out as the person who fired the shots. Furthermore the police officer who allegedly fired the shots at the applicant, Warrant Officer Modise, according to the applicant's witnesses, was not even on duty on the day of the incident. The effluxion of time between the date of the alleged incident and the date of the application being approximately five years, would prejudice the respondent as some witnesses might not be found and, even if found, their recollection of what transpired might not be reliable. The merits of the applicant's case can therefore not mitigate the fault attributable to him and his attorney and consequently, the court should dismiss the application.

[9] The court is given a discretion to grant an application for condonation if it is satisfied that (a) the debt has not been extinguished by prescription, (b) a good cause exist for the failure by the applicant to serve the requisite notice to the defendant and (c) the respondent would not be unreasonably prejudiced by that failure (See Sec 3(4) (b)). The discretion the court has must be exercised judiciously as in all cases involving a discretion. The standard of proof required for this exercise is not proof on a balance of probability but rather “the overall impression made on a court which brings a fair mind to the facts set up by the parties”: **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) and court must “look at all those factors which bear on the fairness of granting the relief between the parties and as affecting the proper administration of justice.”: **Madinda** at paragraph 10.

[10] It has been argued on behalf of the applicant that the claim had not been extinguished by prescription. In support of this assertion is the reason that two notices were served on the respondent. The first on 7 September 2011 (some eighteen (18) months after the debt arose) and the second on 22 January 2013 two (2) years and nine (9) months after the

debt arose). It was conceded these notices came long after the expiry of the six (6) month period within which they should have been served. Furthermore the summons was served on 3 April 2013, some seventeen (17) days before the claim was extinguished by prescription in terms of section 11 (d) of the Prescription Act No. 68 of 1969. The argument further was that the service of the summons interrupted the running of prescription. In this regard heavy emphasis was placed on the decision in **Minister of Safety and Security v De Witt** 2009 (1) SA 457 (SCA) in particular paragraph 11 on page 462 reading as follows:

“It follows that where notice at all is given by the creditor, and the organ of State relies on the failure, the creditor can nonetheless apply for condonation. *A fortiori*, if the notice is sent out of time, condonation may be granted. The argument that the application for condonation must precede the issue and service of summons (and that if it does not the summons is ineffective) is unpersuasive.

[11] It appears that the argument on behalf of the applicant is that for so long as the claim has not prescribed, the applicant can take as long as he wishes to bring an application for

condonation. This attitude suggests condonation is no longer an indulgence but a right to be exercised as and when one pleases. In **Uitenhage Transitional Local Council v South African Revenue Service** 2004 (1) SA 292 (SCA) at paragraph 6 the court said:

“Condonation is not to be had merely for the asking; a full, detailed and accurate account of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out”.

Some features of this matter cannot be overlooked in determining the reasonableness of the explanation given for the delay: Firstly, when did the applicant's attorney, who knew about the three-year prescription period, come to know about the requirements of serving a notice on the respondent; secondly when he sent the notice upon payment of the fees on 7 September 2011, why was the notice defective; thirdly, when the applicant consulted with both his attorney and counsel on 22 January 2013 how come

both did not raise the question of contingency fee until December 2013; fourthly, seeing the applicant kept regular contact with his legal team why was absolutely nothing done about this matter for the entire duration of the year 2012.

- [12] Two reasons are advanced as causes of the applicant's delay in asking for condonation for failure to act timeously in terms of the Act. Firstly, his lack of funds and secondly his lack of knowledge of the law. Surely his legal team knew about the contingency fee arrangement and should have thought about it immediately the applicant lost his employment since they so strongly believed in the strength of his case. Equally, the applicant's lack of knowledge of the legal requirements cannot be explained especially after his counsel came into the picture as long back as January 2013 and advised about the defect in the notice sent on 7 September 2011. Reliance of the applicant on the decision in **Mugwena and Another v Minister of Safety and Security** 2006 4) SA 150 (SCA) at paragraph 15 and reference to **Mohlomi v Minister of Defence** 1997 (1) SA CC does not take the applicant's case further. The explanation of the default must be reasonable enough so as

to exclude fault on the part of the applicant: **Grootboom v National Prosecuting Authority and Another** 2014 (2) SA 68 (CC) at par [23]. The conjunctive requirements that must be met as per section 3(4)(b) must be established by the applicant **Minister & Agriculture and Land Affairs v CJ Rance** (Pty) Ltd 2010 (4) SA 109 (SCA) at par [11]. See also **MEC, Department of Health, Free State v Khomoeng Jane Mothupi**, Appeal No. A241/2012 judgment of Kruger, Moloi and Lekale JJJ delivered on 29 May 2014.

- [13] It was contended on behalf of the applicant that his lack of knowledge of the law is a contributory factor to his failure to comply. The applicant's attorney admitted having had no knowledge of the provisions of section 3(2) and that must at least have been until 7 September 2011 as he thereafter served a notice albeit defective. Armed with this knowledge he, however, did little if anything at all to expedite the application for condonation. In **Dengetenge Holdings (Pty) Ltd vs Southern Sphere Mining Company Ltd and Others** (612/12[2013] ZASCA (11 March 2013) at paragraph 13 the following was said:

“What calls, for some acceptable explanation is not only the delay in the filing of the heads of argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay. (Commissioner for Land Revenue v Burger, 1956 (4) SA 446 (A) at 449 G-H). There are huge gaps in the chronological sequence advanced by Dengetenge” (my emphasis).

- [14] It was argued that as per **Madinda** the blame should not be placed on the applicant. It is not in every case that the applicant will avoid responsibility for the misdeeds or failures of his attorney or his lack of diligence: **Colyn v Tiger Food Industries LTd t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) 9 H. If in all cases litigants can escape blame by pleading ignorance of the law and avoid compliance therewith by the legal representative of procedural rules chaos will reign supreme. A legal representative conducts litigation for and on behalf of a client. A legal representative is only an agent of the client and the applicant cannot always escape liability for the default of the legal representative chosen by him: **Saloojee and Another NNO v Minister of**

Community Development 1965 (2) SA 135 (AD) at 141 C – D as confirmed in **Colyn v Tiger Food Industries Ltd**, supra.

- [15] Looking at the history of this matter it is unavoidable to qualify the delay in prosecuting the application for condonation as inordinately long. The attitude of the applicant to convert an indulgence which he seeks into a right cannot be tolerated. I am not satisfied that the requirements of section 3 (4) (b) were satisfactorily met. In addition the prospects of success of the applicant are not good at all in the light of the contradictory versions given by the applicant himself in his papers compared to what he told Dr B.J Pienaar and the fact that the alleged person who shot at the applicant was Warrant Officer Modise who it is already stated was not even on duty at all on the day in question. The applicant has consequently failed to make out a case for condonation sought.

ORDER:

The applicant's application for condonation is dismissed with costs.

K.J MOLOI

On behalf of the applicant:

Adv BS Mene

Instructed by:

SMO Seobe Attorneys Inc

BLOEMFONTEIN

On behalf of the respondent:

Adv A Williams

Instructed by:

State Attorney

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