

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 4805/2020

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE: 15/01/24 SIGNATURE: [REDACTED]	

In the matter between:

LINDA SHINGWENYANA

APPLICANT

And

MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

FIRST RESPONDENT

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS

SECOND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS
[POLOKWANE]

THIRD RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant was arrested on 22nd February 2013 and charged with 30 counts of theft. On 30th July 2014 the applicant and the prosecution entered into a plea agreement in terms of section 105A of the *Criminal Procedure Act 51 of 1977* (CPA). In terms of the agreement the applicant was found guilty on 30th counts of theft. The applicant was sentenced to 5 years imprisonment wholly suspended on condition that she was not convicted of fraud or theft during the period of suspension. It was a further condition of the agreement that the applicant pay back the complainant in the sum of R70 000.00 in monthly instalments of R1 207.00 until the capital amount was paid in full.
- [2] The applicant allegedly defaulted with her monthly payments during December 2014 and January 2015. The third respondent brought the applicant to court for the operation of the suspended sentence. However, the applicant paid her arrears in full and the third respondent removed the matter from the roll and her sentence was suspended further. During November 2016 the applicant was allegedly again in default with her monthly payments. A warrant of arrest was authorised against the applicant. The applicant was only arrested on 31st May 2018.
- [3] The applicant appeared in court on 1st June 2018 and was remanded in custody. A trial was held, and on 31st January 2019 the suspended sentence imposed on 30th July 2014 to be put into operation. The applicant was detained at Polokwane Correctional Service Centre. Aggrieved by the decision of the regional court to put the suspended sentence into operation, the applicant brought a review application in the High Court. Thereafter the applicant applied

to be released on bail pending the finalisation of the review application. Her application to be released on bail was refused and she appealed that decision. She was released on bail on 24th June 2019 after she was successful with her appeal. She was also successful on her review application when the order of the regional court to put the suspended sentence into operation was set aside by the High Court on 25th October 2019.

- [4] On 23rd June 2020 the applicant issued a notice in terms of section 3 of Act 40 of 2002 against the respondents. The combined summons was issued on 30th July 2020 against the respondents. The applicant's cause of action is the alleged unlawful detention for the period 31st January 2019 up to 4th June 2019. The respondents have defended the applicant's action and have raised several special pleas. One of the respondents' special plea is the applicant's alleged failure to comply with the provisions of section 3 of the Judicial Amendment Act 8 of 2017 read with Act 40 of 2002 (Act). According to the respondents' special plea, the alleged wrongful and unlawful detention arose on 31st January 2019, and therefore the six months period contemplated in section 3 of the Act lapsed on 30th July 2019.
- [5] That led to the applicant launching a condonation application for non-compliance with the provisions of section 3 (1) and (2) of the Act. In his condonation application the applicant had conceded that the cause of action arose on 31st January 2019, and that the time period within which the notice in terms of section 3 of the Act was supposed to be issued lapsed on 30th July 2019, and that the applicant had failed to give that notice within the stipulated time period.
- [6] In his founding affidavit for the condonation application the applicant has stated that she was arrested and charged with several counts of theft. She entered

into a plea agreement with the prosecution wherein he was sentenced to 5 years imprisonment which was suspended for 5 years on condition that she repay the complainant R70 000.00 in monthly instalments. During July 2018 she could no longer afford to pay the monthly instalments per the court order. A warrant of arrest was issued against her and on 31st January 2019 the suspended sentence was put into operation, and she started serving the 5 years sentence. She brought a review application and was released on bail on 24th June 2019. On 25th October 2019 her review application was successful when the order of the regional court to put the suspended sentence into operation was reviewed and set aside.

- [7] On receipt of the outcome of the review, she did not immediately instruct her attorneys to institute a civil claim against the respondents. She contacted her attorneys to institute a civil claim against the respondents during December and was informed that her legal representative has been hospitalized, and further that their office was closing for festive season. During January 2020 when she visited her attorney's office, she was informed that the mother her attorney had died as a result of covid-19 related illness and her attorney will be out of office for an indefinite period of time mourning the death his mother. She managed to consult with her attorney towards the end of January 2020, and she gave her attorney instructions to immediately institute an action against the respondents.
- [8] Due to the strict covid-19 regulations her attorney could not institute the action against the respondents as the issuing of legal proceedings was suspended at that time period. From the 24th May 2020 to 9th June 2020 the applicant's attorney was hospitalized. The notice in terms of section 3 of the Act was only issued on 23rd June 2020. The applicant avers that the cause of action arose

on 25th October 2019 when her review application was successful and the order of the regional court was reviewed and set aside. According to the applicant her notice was sent two months outside the six months' time period allowed by section 3 of the Act. Should condonation not be granted, she will be prejudiced as her main action will have to be withdrawn.

[9] The respondents are opposing the applicant's condonation application. In the answering affidavit the respondents have stated that the applicant has failed to satisfy the requirements of good cause for the court to exercise its discretion whether to grant condonation. That the applicant had failed to satisfy the requirements as provided for in section 3(4)(b) of the Act. It is the respondents' contention that the applicant's cause of action arose on 31st January 2019 when her suspended sentence was put into operation, and that her explanation for the delay should start from the 30th July 2019.

[10] The applicant is seeking condonation application for her failure to serve the notice of intention to bring legal proceedings within the six months period provided for in section 3(2)(a) of the Act. It is trite that in an application for condonation factors which should be considered include the degree of non-compliance; the explanation therefor; the importance of the case; a respondent's interest in the finality of the judgment of the court below; the convenience of this court and the avoidance of unnecessary delay in the administration of justice. A full, detailed and accurate account of the cause of delay and their effects must be given so as to enable the court to understand

clearly the reasons and to assess the responsibility. (See *Mulaudzi v Old Mutual Life Assurance*¹).

- [11] Condonation for late service of the notice in terms of section 3(2) is regulated by section 3(4)(a) of the Act. In order to enable the court to exercise its discretion whether to grant the condonation, the applicant had to satisfy the court that the (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. In *Madinda v Minister of Safety and Security*² Heher JA said:

"The phrase 'if [the court] is satisfied' in s 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties".

- [12] What this court is required to determine is whether the applicant has submitted acceptable reasons for her delay in not serving the notice timeously. From the onset, the applicant's condonation application is scanty. The applicant did not provide a full, detailed and accurate account of the cause of her delay in issuing the notice within the prescribed time period. The applicant's cause of action is based on her detention from 31st January 2019 up to 4th June 2019. The prescribed notice was issued on 23rd June 2020. In paragraph 6.4 of the founding affidavit, the applicant alleges that her claim for wrongful and unlawful detention arose and fell due on 31st January 2019. In paragraph 6.6 of the founding affidavit the applicant alleges that the period of six months as contemplated in the Act lapsed on or about 30th July 2019. In paragraph 9.4 the applicant alleges that the cause of action against the respondents arose on 25th

¹ 2017 (6) SA 90 (SCA) at para 26

² 2008 (4) SA 312 (SCA) at para 8

October 2019 when the order of the regional court was set aside on review. In paragraph 9.5 the applicant alleges that his notice was issued on 23rd June 2020 which makes it to be 2 months outside the prescribed time period.

- [13] The applicant had stated two dates for the same cause of action without claiming the other date in the alternative. The applicant had failed to set out the grounds why she is of the view that the 25th October 2019 is the date on which her cause of action arose. It is not for the court to assume as to why the applicant is of the view that the cause of action arose on 25th October 2019. If she was not certain whether she would have good chance of prospects of success before her review application was finalised, that should be clearly stated in his founding affidavit by giving a full and detailed account of what made her to believe so. However, in this application the applicant has failed to do so.

- [14] In *Truter and Another v Deyse*³ Van Heerden JA said:

"In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:

'A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with the action. Such facts must enable a court to arrive at a certain legal conclusion regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault'".

- [15] The applicant has been in custody from 31st January 2019 to 24th June 2019. Her cause of action arose the date on which she was detained. When she was released on bail on 24th June 2019 she had the entire facts which she needed to prove her claim. She was aware that if she was going to sue the respondents

³ 2006 (4) SA 168 (SCA) at para 17

for unlawful detention will be for the time period she had spent in detention, and was aware of that time period. Therefore, the issuing of the notice was not depended on the outcome of the review application. Section 12(3) of the *Prescription Act*⁴ provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arose: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it in exercising reasonable care.

[16] When the applicant was released from detention on 24th June 2019 the six months period had not yet expired. She was aware of who the debtors were, and the facts from which the debt arose. The six months period had expired on 30th July 2019. The applicant was therefore required to give a full and accurate explanation of her failure to issue the notice on time, which was supposed to have been issued on or before the 31st July 2019, and she had failed to do so. She is merely stating that she was awaiting the out of the review application without stating what had prevented her from issuing the notice before receipt of the outcome of the review. She has also stated that she did not immediately instruct her attorneys to proceed to institute a civil claim against the respondents without giving an explanation of what prevented her to do so. That in itself shows that she was aware of material facts necessary for her to institute a civil claim against respondents, but deliberately ignored to act.

[17] Even if one was to accept that the applicant became aware of the facts from which the debt arose on 25th October 2019, the applicant has still failed to give a full, detailed and accurate account of her failure to issue the notice within the stipulated time period after the 25th October 2019. After the 25th October 2019

⁴ 68 of 1969

the applicant only consulted her attorneys during December 2019, she does not explain why she did not consult immediately after receipt of the outcome of the review and instruct her attorneys to issue the notice.

[18] According to the applicant she could not consult with her attorney during December 2019 as her attorney was hospitalised and the attorney's office was closing for festive seasons. The applicant only managed to consult with her attorneys during the end of January 2020 and she instructed her attorneys to immediately institute a civil claim against the respondents. However, her attorneys did not immediately issue the required notice as instructed, but did so on 23rd June 2020. The applicant had further stated that on 23rd March 2020 the country was subjected to lock down and that the operation of the laws were either suspended or the periods extended by the Regulation, and that is the reason why the notice was not timeously issued.

[19] The hard lock down only came into operation on 26th March 2020. The applicant did not even attempt to explain why the notice was not issued between the period end of January 2020 and 25th March 2020 since the country was not yet subjected to hard lock down. Further, the applicant had instructed her attorney to immediately institute a civil claim against the respondents during the end of January 2020, and no explanation was given as to what prevented her attorney to act in accordance with her instructions. In my view, the applicant had failed to show good cause for her failure to comply with the requirements of section 3(2) of the Act.

[20] In result the following order is made:

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

[REDACTED]
KGANYAGO, J.

JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

Counsel for the applicant	: HA Mushwana
Instructed by	: Mushwana Inc
Counsel for the respondent	: Adv Kgare MN
Instructed by	: State Attorney Polokwane
Date heard	: 9th October 2023
Electronically circulated on	: 15th January 2024