



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Appeal case no: **A107/2023**
Court *a quo* case no: **3025/2019**

In the matter between:

MINISTER OF POLICE

Appellant
Respondent in the court *a quo*

and

NOMSA INNOCENTIA MASEKO

Respondent
Applicant in the court *a quo*

CORAM: JJ MHLAMBI ADJP, JP DAFFUE J *et* ST MGUDLWA AJ

HEARD ON: 25 MARCH 2024

DELIVERED ON: 30 APRIL 2024

ORDER

1. The appeal succeeds in part.
2. The order of the court *a quo* is set aside and replaced with the following:
 - 2.1 Condonation is granted to the applicant for failing to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 within the prescribed period and in accordance with that Act.
 - 2.2 The applicant shall pay the costs of the application, including the respondent's costs of opposition.

3. There shall be no order as to the costs of the appeal.
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INTRODUCTION

[1] At around 22h00 on Friday night, 30 June 2017, *ie* in the middle of the Free State winter, an unemployed woman, aged 38 years at the time, was arrested without a warrant of arrest in the presence of her two minor children. She was taken into custody and detained in a police cell until Monday 3 July 2017. She was released from police custody at around 12h00 that day. No criminal prosecution was instituted against her.

[2] The woman had no option than to seek condonation in terms of s 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (Act 40 of 2002) for her failure to timeously serve a notice of her intention to institute legal proceedings against the Minister of Police (the Minister). The Minister opposed her application. After hearing argument, Mpama AJ handed down judgment in favour of the woman. The Minister appealed to the full bench of the Free State High Court with leave of the court *a quo*.

THE PARTIES

[3] The Minister, being the unsuccessful respondent in the application for condonation and the defendant in the action proceedings instituted against him, is the appellant in the appeal before us. Adv GJM Wright appeared for the Minister on instructions of the State Attorney's office in Bloemfontein.

[4] Ms Nomsa Innocentia Maseko, residing in Galeshewe, Kimberley, is the unemployed woman referred to above, she being the plaintiff in her action against the Minister and the successful applicant in the application for condonation.

[5] Ms Maseko was represented by an attorney during the application for condonation, but there was no appearance on her behalf during the application for leave to appeal or in the appeal before us. We have been informed by Adv Wright that her attorney had been in contact with Ms Maseko's attorney the morning before the appeal was heard. He informed her that they were abiding the decision of this court. In contrast with the detailed heads of argument drafted by Adv Wright, an experienced

and diligent legal practitioner, we were not favoured with any heads of argument on behalf of Ms Maseko.

[6] In order to avoid confusion, I shall refer hereinafter to the appellant as the Minister and to the respondent as Ms Maseko.

JUDGMENT OF THE COURT A QUO

[7] The court *a quo* considered the delays in not only serving the notice of demand timeously, but also the further delays in launching the application for condonation and the failure to properly explain these delays. Having considered that, it commented as follows:¹

'I do not intend to make a pronouncement on the weakness or strength of the applicant's [Ms Maseko's] case against the respondent [the Minister of Police] as such is reserved for the trial court. However, to me an examination of the statements reveal that the applicant has made a prima facie or will be able to make a prima facie case against the respondent. I find that the merits of the applicant's case mitigate her fault for the delay. The respondent averred that it is prejudiced by the non-compliance with the Act. Nonetheless, the court has not been told by the respondent that due to a late filing of the notice, some evidential material is missing, the witnesses are untraceable (or the respondent will struggle to secure some witnesses) and as such not in a position to properly defend the matter. The respondent made a blanket statement of prejudice without stating specifically how he will be prejudiced.'

[8] The court *a quo* continued in paragraph 14, relying on the right of access to court guaranteed in s 34 of the Constitution. It stated that whenever there is a failure to comply with time limitations, our courts may in their discretion grant condonation when the principles of justice and fairness demand that.

[9] In dealing with costs, the court *a quo* stated that it could not be said that the Minister was unreasonable in opposing the matter or that he was a vexatious litigant. Having said this, it decided to grant no order as to costs.

THE GROUNDS OF APPEAL

[10] The Minister raised seven grounds of appeal. He averred that the court *a quo* erred:

- a. in finding that Ms Maseko had shown on a balance of probabilities that there existed good cause for her failure to comply with the notice requirement;

¹ Judgment, para 13.

- b. in not finding that Ms Maseko had failed to explain her failure to timeously give notice, either fully or properly;
- c. in finding that the merits of Ms Maseko's case based on unlawful arrest and detention mitigated her fault for delaying in giving notice;
- d. in finding that the appellant was not unreasonably prejudiced by the late service of the letter of demand;
- e. in failing to consider that Ms Maseko had given no explanation for the delay in launching the application for condonation;
- f. in not exercising its discretion against granting condonation due to Ms Maseko's failure to provide proper reasons for the delay in launching the condonation application;
- g. in not ordering Ms Maseko to pay the costs of the condonation application.

ACT 40 OF 2002

[11] The relevant portion of s 3 of Act 40 of 2002 reads as follows:

'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)

(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.' (emphasis added)

[12] Furthermore, Ms Maseko was required to comply with s 4 of the Act. She was obliged to serve the notice of demand by delivering it by hand, or sending it by certified mail, or by sending it by electronic mail, or by transmitting it by facsimile. In the last two instances she also had to comply with subsec 4(2). The notice had to be served on both the National Commissioner of Police as well as the Provincial Commissioner, Free State.

EVALUATION OF THE FACTS, THE MINISTER'S SUBMISSIONS AND RELEVANT AUTHORITIES

[13] The Minister's legal representatives elected to bind the pleadings into the appeal record. It is clear from a perusal of the pleadings and application for condonation that the attorney representing Ms Maseko at the time is inexperienced and totally out of his depth.

[14] The particulars of claim read to an extent as an affidavit and not as a pleading. Severally sentences start with the words: '[T]he plaintiff says ...'. Fact of the matter is that evidence has been pleaded that cannot be disregarded. At a stage a replication was filed out of time which was not only withdrawn, but substituted by another replication which was also filed hopelessly out of time. These documents were not attached to the application papers, but form part of the appeal record and could not be disregarded. I shall soon return to an aspect raised therein.

[15] It is apposite to briefly refer to the pleadings before I deal with the allegations contained in the condonation application. It is alleged in the particulars of claim that:

- a. upon her arrest the arresting officers were requested by Ms Maseko to search her 'shanty' [a reference to her residence] to look for the alleged stolen items, but they refused;
- b. she told the arresting officers that she had not committed any offence, but they responded that she had opened cases against her husband in the past, that he was also arrested and that she must be arrested too;
- c. there was no reasonable justification for arresting Ms Maseko;
- d. she was arrested without a warrant of arrest;
- e. proper notice was given to the Minister in terms of s 3 of Act 40 of 2002.

[16] In his plea the Minister confirms that Ms Maseko did not formally appear in court and was released from custody on 3 July 2017 and that the arrest was effected without a warrant. He alleges that the arresting officers held a reasonable suspicion that Ms Maseko had committed a Schedule 1 offence, to wit theft and therefore the arrest was justified and lawful.

[17] Pertaining to the notice of demand alleged to be given by Ms Maseko, a special plea was filed which reads as follows:²

'No notice was sent to the Defendant in terms of the provisions of the Act; alternatively, no notice in terms of the Act was received by the Defendant and/or its relevant officials.' (emphasis added)

The special plea and plea were filed on 12 February 2020.

[18] After the close pleadings Ms Maseko's attorney served a discovery affidavit on the State Attorney. At the request of the State Attorney, a notice in terms of rule 35(6) was served. The following two documents referred to in the discovery affidavit were attached to the notice which also forms part of the appeal record:

- a. Ms Maseko's notice in terms of s 3 of Act 40 of 2002;
- b. a letter from the National Commissioner: SA Police Service dated 17 May 2019, acknowledging receipt of Ms Maseko's notice in terms of s 3.

The aforesaid letter, signed by a certain Capt MI Tlali on behalf of the National Commissioner, predated the special plea. The first two paragraphs read as follows:

'MATLEJOANE ATTORNEYS

2 HOLLAND STREET

KIMBERLEY

8300

Dear Sir/Madam

YOUR CLIENT: NOMSA INNOCENTIA MASEKO

Receipt of your letter NiMaseko/FS/2019 dated **2019-04-26**, received in the office of the National Commissioner/Minister/Provincial Commissioner on **2019-05-02**, is hereby acknowledged.

Your letter has been forwarded to the province **in whose jurisdiction the cause of action arose**, with a view to investigate and to attend to the matter in consultation with the State Attorney concerned.'

² Para 1.4 of special plea, p 58.

[19] On 20 July 2020 Ms Maseko deposed to a founding affidavit in support of her application for condonation. She averred that she filed the required notice on 26 April 2019 and attached a copy thereof addressed to the National Commissioner as annexure "NIM1". She alleged further that the notice was emailed to both the Provincial and the National offices of the South African Police Service. The document attached as annexure "NIM2" does not show that the notice was sent to the correct email addresses. It may therefore be accepted that the Provisional Commissioner, Free State did not receive a similar letter of demand directly from Ms Maseko's attorney, but as indicated above, the National Commissioner had already acknowledged receipt of the demand the previous year.

[20] Ms Maseko tried to explain the delay of nearly 16 months by relying on hearsay. She alleged that her brother, a police officer, informed her 'early in 2019' of her right to sue for unlawful arrest and detention. The vagueness of her explanation is evident.

[21] Ms Maseko made the point that her claim had not prescribed in terms of the Prescription Act 68 of 1969, that the Minister would not suffer any prejudice if condonation was granted and that she had good prospects of success in respect of her claim for unlawful arrest and detention.

[22] The answering affidavit on behalf of the Minister was deposed to by a Warrant Officer stationed at the Provincial Commissioner Free State in Bloemfontein, he being the Legal Administrative Officer: Legal and Policy Services in Bloemfontein. This affidavit was deposed to and filed on 2 September 2020. Notwithstanding the notice of demand of 26 April 2019 attached to Ms Maseko's founding affidavit, the Minister's deponent in numerous paragraphs repeatedly denied that the South African Police Service or any official thereof ever received any notice whatsoever.

[23] These allegations cannot simply be swept under the carpet. I quote these:³

'4.5 The Respondent, however, still denies that the SAPS received any notice. The Applicant alleges that the notice of **26 APRIL 2019** was sent by email. The copy of the email which had been attached to the Applicant's Founding Affidavit does not give any indication that it was received by any of the intended recipients. Furthermore, it does not indicate the actual email addresses which were used for the intended recipients.

³ Answering affidavit, paras 4.5, 4.6, 12.2, 13.2 and 14.

4.6 The Applicant was obliged to send her notice to the **National Commissioner** of the SAPS (on behalf of the Respondent) as well as the **Provincial Commissioner** of the SAPS. I reiterate that no notice was in fact received by any official of the SAPS.

12.2 It is denied that the Applicant's served any notice.... The Respondent did not receive any notice.

13.2 The contents of annexure "NIM1" are noted. It is denied that any official of the SAPS received such notice.

14. Annexure "NIM2" does not prove that the notice was in fact sent and/or received by the Provincial Commissioner of the SAPS or the National Commissioner.' (my underlining)

[24] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁴ the court dealt with the manner in which applications for final relief should be adjudicated in the following manner:

'[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be.' (emphasis added)

[24] When the answering affidavit was deposed to, the Minister's deponent should have been aware of the fact that the National Commissioner had received a notice and even confirmed receipt thereof. He, a senior official, was in my view expected to contact his colleague at the National Commissioner's office to establish whether the notice had in fact been received (as it turned out to be the case). He apparently decided not to do that, but to rely on a misrepresentation that no official in the whole of the South African Police Service had received the notice.

[25] In my view, this incorrect allegation permeates the opposition of the condonation application. I say this, bearing in mind that the Minister would be fully

⁴ 2008 (3) SA 371 (SCA) para 13.

entitled to consent in writing to the institution of legal proceedings without the required notice, or upon receipt of a notice which did not comply with the strict requirements of Act 40 of 2002. The plea was filed on 12 February 2020. Bearing in mind the waiting list for trial actions in this division, the trial could have been finalised at the end of 2020, or the first half of 2021. This is now three years later and there is still no finality.

[26] Inordinate delays in litigating damage the interests of justice as Didcott J pointed out in *Mohlomi v Minister of Defence*⁵ (*Mohlomi*). Logic dictates that it may be extremely difficult for an organ of state to deal with a claim instituted against it just before prescription is interrupted and without any notice or demand whatsoever. The authorities are clear. Documentary evidence may not be available anymore and/or witnesses might have passed on in the meantime and/or might not be available to testify anymore. But, it is not the purpose of the demand requirement to prevent a worthy litigant from access to justice in accordance with s 34 of the Constitution. The purpose was explained as follows by Didcott J in *Mohlomi*⁶:

'The conventional explanation for demanding prior notification of any intention to sue such an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.'

[27] The court *a quo* appreciated that Ms Maseko's attempts to justify the various delays were weak. However, the prospects of success are a relevant consideration in order to deal with the requirement of good cause for the delay. In line with what Heher JA stated in *Madinda v Minister of Safety and Security, Republic of South Africa*⁷ (*Madinda*), Ms Maseko had to satisfy the court *a quo* that the Minister had not been unreasonably prejudiced by the failure to serve the notice timeously. The learned justice proceeded in this regard as follows:

'This must inevitably depend on the most probable inference to be drawn from the facts which are to be regarded as proved in the context of the motion proceedings launched by an applicant. The approach to the existence of *unreasonable* prejudice (not simply any level of prejudice, an aspect which the judgment of the court *a quo* blurs) requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent.

⁵ 1997 (1) SA 124 (CC) para 11.

⁶ *Ibid* para 9.

⁷ 2008 (4) SA 312 (SCA) para 21.

Although the onus is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.'

[28] I do not agree with Adv Wright that the court *a quo* held that there was an onus on the Minister to show the absence of unreasonable prejudice. The grounds of prejudice to be relied upon would be particularly within the knowledge of the Minister and his officials. In *casu*, no allegation has been made on behalf of the Minister that the arresting officers were not available anymore. Furthermore, the husband of Ms Maseko, a Warrant Officer in the South African Police Service, was the complainant in the case of fraud. His witness statement as well as that of his neighbour, alleging that Ms Maseko had committed theft, were attached to the answering affidavit and there is no evidence that any of these two witnesses are not available anymore. Warrant Officer Maseko and his witness deposed to their witness statements on 27 June 2017 (a Tuesday), confirming therein that the theft had been committed on 30 March 2017, *ie* three months earlier. Yet, the arresting officers decided to wait until Friday night, 30 June 2017 to arrest Ms Maseko. Warrant Officer Maseko confirmed in his witness statement that protection orders had been obtained against him by Ms Maseko earlier and that she was staying with her 'kids' in the informal settlement (apparently in a 'shanty' as she referred to her residence).

[29] Having considered all aspects mentioned herein, I am satisfied that the following dictum in *Madinda*⁸ is apposite:

'[29] One is now in a position to assess the combined weight to be attributed to the three elements of s 3(4)(b)(i) (ii) and (iii) which were established, in the context of the discretion to grant or refuse condonation. Given the absence of unreasonable prejudice to the SAPS from the equation and the persuasive, though not flawless, reliance on good cause, no court exercising a discretion unaffected by the misdirections which tainted the assessment of the trial judge, would have deprived the appellant of the opportunity to have her claim tested according to the dictates of law and justice. Condonation should therefore have been granted. It follows that the appeal must succeed.'

[30] I am satisfied that the court *a quo* considered the relevant circumstances in a balanced fashion. It did not misdirect itself as to the requirements that Ms Maseko had to meet in order to be successful.

⁸ *Ibid* para 29.

[31] Unlike as the Supreme Court of Appeal ruled in *Madinda* pertaining to costs and notwithstanding what I have mentioned above pertaining to the Minister's right to consent in terms of s 3(1)(b) of Act 40 of 2002, I am satisfied that the court *a quo* erred in making no order as to costs. Ms Maseko sought an indulgence. The general rule is clear. The litigant seeking an indulgence shall pay the costs of the condonation application even in the event of they being successful, including the opponent's costs of opposition, unless the court finds such opposition to be unreasonable. Ms Maseko's application for condonation deserves to be severely criticized and was it not for the balanced approach to be followed, specifically pertaining to the *prima facie* good prospects of success and the lack of proof that the Minister would be unreasonably prejudiced, the application should have been dismissed. There was no sound reason why the court *a quo* refused to follow the general rule, especially bearing in mind the finding that the Minister was not unreasonable in opposing the application and that he was not a vexatious litigant. It erred in stating that there were appropriate grounds – without mentioning any – that warranted a deviation from the general rule. Ms Maseko should have been ordered to pay the Minister's costs of opposition of the application.

[32] Consequently, the appeal should succeed partially only. Although the Minister is partially successful, I am satisfied that, bearing in mind what I have said earlier, no order should be made in respect of the costs of the appeal. The award of costs was attacked in the last of seven grounds of appeal. Very little was submitted in respect thereof in either the heads of argument or during oral argument. The Minister failed in his attempt to obtain the setting aside of the court *a quo*'s decision on the merits of the condonation application. No order should be made in respect of the costs of the appeal.

[33] The following orders are issued:

1. The appeal succeeds in part.
2. The order of the court *a quo* is set aside and replaced with the following:
 - 2.1 Condonation is granted to the applicant for failing to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 within the prescribed period and in accordance with that Act.
 - 2.2 The applicant shall pay the costs of the application, including the respondent's costs of opposition.

3. There shall be no order as to the costs of the appeal



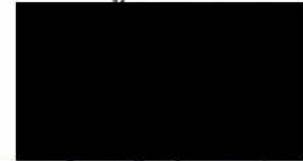
JP DAFFUE J

I concur



JJ MHLAMBI ADJP

I concur



ST MGUDLWA AJ

On behalf of the Appellant:
Instructed by:

Adv GJM Wright
State Attorney
BLOEMFONTEIN

On behalf of the Respondent:

No Appearance