



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

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

Case Number: 4391/2022

In the matter between:

TEFO STEPHAN MATHOPO

Applicant

and

MINISTER OF POLICE
NATIONAL DIRECTOR OF PUBLIC PROSECUTION

First Respondent
Second Respondent

In re:

TEFO STEPHAN MATHOPO

Plaintiff

and

MINISTER OF POLICE
NATIONAL DIRECTOR OF PUBLIC PROSECUTION

First Defendant
Second Defendant

JUDGMENT BY: REINDERS, J

HEARD ON: 7 MARCH 2024

DELIVERED ON: 10 JUNE 2024

This judgment was handed down in open court and distributed to the parties by way of electronic communication.

- [1] This is an opposed application for condonation in terms of section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 ('the Act'). The applicant is the plaintiff in the main action ('the main action') under case number 4391/2022 and the first respondent is the first defendant, whilst the second respondent is the second defendant in the main action. For sake of clarity I will refer to the parties as in the main action.
- [2] The plaintiff instituted action against the defendants, respectively the Ministers of Police and Public Prosecutions, on 9 September 2022 (served on the defendants during October 2022), claiming damages for his alleged unlawful arrest and detention. The defendants, having filed its notice of intention to defend, only filed its plea on 17 May 2023. In his particulars of claim plaintiff avers that, prior to the institution of the proceedings, he duly complied with the provisions of the Act.
- [3] First defendant however raised a special plea of non-compliance and averred that the notice in terms of s 3(1)(a) ['the notice'] was due on 3 August 2019. No such a special plea was filed on behalf of second defendant. It is common cause that the notice was given by registered post on 22 April 2022 (Annexures 'TSM1' and 'TSM2' to the plaintiff's founding affidavit).
- [4] The first defendant contended that, although the plaintiff's claim against it had not prescribed, the notice was filed late for a considerable period of time as the cause of action for the plaintiff's averred unlawful arrest had arisen on the date of his arrest. During argument I was referred to a judgment by myself being the unreported judgment of **Mothobi Albert Tlake v The minister of Police and Another**.¹ Counsel for the first defendant invited my attention to a recent judgment in this division, **Phala v Minister of Safety and Security and Another**.² Having considered the authorities referred to in the latter judgment, I shall approach this matter on the basis that the applicant needs condonation as is the purpose of the application before me.

¹ [377/2014] FSHC (20 October 2017).

² (6779/2007) [2022] ZAFSHC 263; [2023] 1 All SA 227 (FB) (12 October 2022).

- [5] The plaintiff avers that on 4 February 2019 he was arrested without a warrant for his arrest on a charge of rape where after he was detained. A bail application was unsuccessful and he remained in custody until his acquittal on 6 April 2022 in terms of section 174 of the Criminal Procedure Act 51 of 1977. According to the plaintiff he obtained a new legal representative during April 2021, who is the plaintiff's attorney of record herein. Plaintiff avers that only on 6 April 2022 after consultation with the attorney, did he realise that he had a claim against the defendants at which time the attorney advised him of the prescribed notice that would have to be send. The notice was drafted on 21 April 2022 and send by registered post on 22 April 2022. As no answer came forth, the summons as mentioned was issued. The plaintiff, having been met with a special plea, approached this court for condonation.
- [6] The first defendant in its opposing papers complains of the lengthy delay, avers that the plaintiff's version is not a reasonable explanation and that the plaintiff hasn't shown good cause for its delay. It admits the plaintiff's allegations of being arrested, his detention and appearances in court. It concedes that the plaintiff was discharged in terms of section 174 of the CPA. In response to the allegations by the plaintiff that he was wrongfully and unlawfully arrested by members of the first defendant and unlawfully detained, first defendant denies the arrest and detention to be unlawful and states that same would be justified during the civil trial. It denied that its employees laid charges against plaintiff based on false information.
- [7] Section 3 (4) of the Act provides for condonation and reads as follow:
- (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) ...

[8] It was held in ***Madinda v Minister of Safety and Security***³, that the court may grant an application for condonation if satisfied that the three requirements have been met. The test in doing so are not proof on a balance of probabilities, but "the overall impression made on a court which brings a fair mind to the facts set up by the parties." (emphasis added)

8.1 The requirement of 'good cause' involves an examination of 'all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice', and may include, depending on the circumstances, 'prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefore.'⁴ (emphasis added)

8.2 Heher JA held at para [12] that good cause for delay is not 'simply a mechanical matter of cause and effect' but involves the court in deciding 'whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously'; and in this process, '[s]trong merits may mitigate fault; no merits may render mitigation pointless'."

See also: ***Minister of Agriculture and Land Affairs v CJ Ranch (Pty) Ltd***⁵

[9] Applying the above principles to the merits of the application I am inclined to grant the condonation sought by the plaintiff. It is not contested that the plaintiff's claims against the defendants had not prescribed at the time when the action

³ 2008 (4) SA 312 (SCA) at para [8].

⁴ At para [10].

⁵ 2010 (4) SA 109 (SCA) at para [37].

was instituted. I do not find the plaintiff's explanation so unconvincing that I should reject it. Shortly after having been acquitted the proposed notice was sent to the defendants giving corroboration for his version of when he gained knowledge of the prescribed notice.

Although the onus is on the plaintiff to show that the defendants had not been unreasonably prejudiced, the defendants do not complain of any prejudice. On the contrary, the first defendant avers that at the trial it will show that the arrest and detention were lawful and justified. There is no denial in first defendant's answering affidavit to the plaintiff's averment that the defendants had been in a position to file a plea with sufficient detail to set out its defence despite the late filing of the notice. In fact, the defendants pleaded in the main action that Constable Pule Patrick May was the arresting officer who had "formed a reasonable suspicion that the Plaintiff was involved in the commission of a Schedule 1 offence and arrested him." In my view plaintiff did not display a flagrant disregard for the provisions of the Act, nor are any of his actions indicative of him not having an interest in proceeding with his intended legal action against the defendants. Taking into account all relevant considerations, I am satisfied that the plaintiff has shown good cause for his failure to timeously give the notice as prescribed by the Act.

- [10] The plaintiff moves for an indulgence which would normally result in liability for payment of the costs of the application. I am, however, of the view that in proceedings of this nature where a litigant is not vexatious but approaches the court to vindicate his alleged claims for damages, such a cost order would not be warranted. The defendants (more specifically the first defendant) however in my view was not unreasonable in opposing the application. I deem an appropriate cost order to be that each party be liable for its own costs (inclusive of the cost which stood over for later adjudication on 22 February 2024)

- [11] I therefore make the following orders:

- 11.1 Condonation is granted for the applicant's failure 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 period laid down in section 3(2)(a) of the Act.

11.2 Each party to pay its own costs.


C REINDERS, J

On behalf of the Applicant:

Instructed by:

Adv. NM Bahlekazi

Lengau Attorneys

c/o Mpobole & Ismail Attorneys

BLOEMFONTEIN

On behalf of the First Respondent:

Instructed by:

Adv. NM Seleso

State Attorneys

BLOEMFONTEIN