

ORIGINAL
DITTO



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

Case No. 4256/2023

In the matter between:

MOLEKE DANIEL MOLETSANE

APPLICANT

And

MINISTER OF POLICE

FIRST RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SECOND RESPONDENT

CORAM:

MAJOSI, AJ

HEARD ON:

23 MAY 2024

DELIVERED ON:

14 JUNE 2024

JUDGMENT

I INTRODUCTION

- [1] The applicant seeks an order condoning the late notification to institute legal proceedings against the respondents in terms of section 3 of the Institution of

Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act").
The application is opposed.

II BACKGROUND

- [2] The applicant, a policeman stationed at Brandfort, was arrested on the 4 of September 2020 in Kroonstad, Free State on charges of obstructing, interfering and hindering members of the South African Police Service in execution of their duties. He was granted bail on 7 September 2020 and the trial commenced on 16 May 2022. On the 26 May 2022, he was found not guilty.¹
- [3] On 15 January 2021, a notice in terms of section 3 of the Act was sent via registered mail to the first respondent. A further notice was sent to the second respondent by the same means on the 24 of May 2023. Summons was then issued on the 14 of August 2023 and served on the respondents by the sheriff.² The Respondents filed a notice of intention to defend on the 11 September 2023 and thereafter, a special plea raising the applicant's non-compliance with section 3 the of the Act and plea to the particulars of claim on the 19 of October 2023.
- [4] In replication, the applicant pleaded that the said notice for the first respondent was served within the prescribed period. It was admitted that the notice in respect of the second defendant was six months late and requested condonation failing which, a substantive application would be brought before court. Needless to say, the applicants were not granted the indulgence, hence the application is before this court for adjudication.
- [5] The applicant alleged in the founding affidavit that he is a lay person in law and does not have the requisite knowledge of the Act or its provisions as his level of education does not extend to tertiary level. He also mentioned that his sole reason for instructing his attorneys from the onset was to ensure that he is found

¹ Founding affidavit paragraph 6.

² Ibid, paragraph 5.

not guilty during the criminal proceedings as his court attendance was over a period of two years. He was advised that he can institute a claim against the first respondent hence the relevant notice was sent without any issues.

- [6] It was only after he was acquitted and his recovery from the trauma did he consult with his criminal trial lawyers who in turn referred him to his current attorneys. After consultation with them in May 2023, he was advised that he may also institute a claim against the second respondent for malicious prosecution.
- [7] Armed with this knowledge, he gave an instruction for them to proceed with the claim and subsequently learned that the second respondent would also have to be notified about the impending legal action. His current attorneys then caused a statutory notice to be sent out to the second respondent via registered mail on 24 May 2023 and also via email on the 23 May 2023, which was six months later than what is required.
- [8] After the defendants filed their special plea and plea on 19 October 2023 in the main action, the applicant addressed a letter to the respondents requesting condonation for the late filing of the notice and this was sent via email on the 6 of December 2023. This was in addition to their earlier replication dated the 30 of November 2023.
- [9] It was alleged by the applicant that copies of the police docket had not yet been provided and in all likelihood, an application to compel the respondents would have to be brought to assist in their trial preparation in the main action and that the respondents would not suffer any prejudice as the arrest, detention and prosecution took place from 2020 to 2022.
- [10] It was also asserted that the undisputed fact remains that the verdict of not guilty is indicative of the fact that he has good prospects of success in the main action as there were no facts to support his arrest without a warrant. In any event, he, as the plaintiff in the main action, bears the onus at trial that he was

maliciously prosecuted after his unlawful arrest and detention and that there will be no prejudice to the respondent should the court grant condonation.

- [11] The respondents contended in the answering affidavit that the applicants cause of action would for the first respondent would have arisen already on the 4 of September 2020 and that the notice that was served on the 15 of January 2021 as attached to the founding affidavit, had no actual proof that it was sent via registered post. This is due to the fact that the said slips did not indicate if it relates to this specific case.³
- [12] The Respondents alleged that the applicant failed to provide an explanation for the delay or show good cause as required for his failure to give notice within the prescribed six months period and that the prospects of success is not addressed in his application ⁴ as this was a clear indication that they had none.⁵ It was then submitted that the application be dismissed with costs on an attorney client scale.

III DISCUSSION

- [13] Section 3(1) of the Act states that no legal proceedings for the recovery of debt may be instituted against an organ of state unless the creditor has given it notice in writing of his or her intention to institute legal proceedings or the organ of state has consented thereto in writing and determines that it must be sent within six months from when the date became due together with the facts giving rise to the debt and that such particulars are within the knowledge of the creditor.
- [14] Section 3(4) of the Act states 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;

³ Respondents Answering affidavit, paragraphs 11 -13.

⁴ Ibid, paragraphs 6 – 8.

⁵ Ibid paragraphs 20 – 22.

- (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."

[15] In *Madinda v Minister of Safety and Security* 2008 (4) SA 312 SCA, Heher JA stated the following at 317 B – E

"...Good cause for the delay' is not simply a mechanical matter of cause and effect. The court must decide 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. Strong merits may mitigate fault; no merits may render mitigation pointless.

There are two main elements at play in s 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits.

If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success?

In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration"

[16] Counsel for the applicant and the respondents in their respective heads of argument provided the court with an expansive list of relevant case law. I will not repeat it in this judgment save to mention that both counsel referred me to

the *locus classicus* of *Madinda supra* as well as the case of *Premier Western Cape v Lakay*⁶ which deals with the issues *in casu*.

- [17] It is common cause that the respondents do not take issue with the debt being extinguished by prescription. The notice to the first respondent appears to have been given within the prescribed period. The respondents however indicate that the said notice was never received and the registered mail slips do not show that they specifically relate to this case.
- [18] I am not in agreement with this assertion. Upon perusal of the said notice dated 15 January 2021 and the registered slips attached, the very same reference number appears namely F03292 which appears on the notice to the first respondent substantially corresponds with the registered post slips. Though I accept that it ought to have been done for all three slips, it is apparent that all three were posted on the same date with their individual reference numbers and it is directed to three different offices of the first respondent.
- [19] Both parties are *ad item* that the notice to the second respondent was late by six months although the second respondent denies ever receiving it.⁷ The statutory notice is dated the 22 May 2023 has a reference number listed as W2743.⁸ Further perusal of the letter indicates that it was sent out via email and registered post.
- [20] The attached email indicates that it was sent on Tuesday, the 23 May 2023 at 08h33 to a recipient at National Prosecuting Authority. The registered letter according to the post office stamp from Menlo Park was sent out on 24 of May 2024 with a tracking number. Both also reflect the very same reference number to be W 2743. In my view, there can thus be no question that the statutory notice to the second defendant was sent out either.

⁶ 2012(2) SA 1 (SCA).

⁷ Answering affidavit, paragraph 15.

⁸ Indexed bundle P63, Annexure B

- [21] The point of contention is if the applicant has shown good cause and if the respondents are unreasonably prejudiced by his failure to deliver the statutory notice. It is apparent from the founding affidavit that the applicant only approached his current attorneys of record offices in May 2023 after being referred by his previous attorneys who handled his criminal case.
- [22] It was only then we he was made aware he may have a claim against the second respondent. Now it is no secret that there is a period of almost a year in between the not guilty verdict and him approaching the second set of attorneys in May 2023 and that the actual period of lateness is a mere six months.
- [23] Ordinarily, a more detailed explanation would have been preferable. It was however stated that it was the lack of legal knowledge on his part which caused the notice to be served late on the second respondent. His initial attorneys also did not have the requisite knowledge that a claim for malicious prosecution may be instituted as this information was only obtained from his current attorneys of record who according to him, are specialists in the field.
- [24] The actual notice to the second respondent as annexed to the founding affidavit reveals that the second respondent was informed of the fact representations were made to the senior control prosecutor that there was no prima facie case against the applicant and the witness statements contained in the docket as marked A1 and A2 were defective and not properly commissioned.
- [25] In my view, the explanation provided is sufficient considering that the notice to the second respondent is not for an extended period but a mere six months. The undisputed fact remains that the verdict of not guilty is may be indicative that he has good prospects of success in the main action as there were no facts to support his arrest without a warrant or his eventual prosecution by the second respondent after dismissing defence representations. It thus cannot be said that no good cause has not been shown to exercise the discretion provided for in the section 3(4) of the Act.

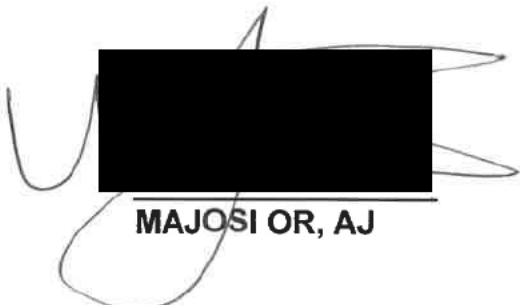
- [26] The only issue that remains is if the respondents would be unreasonably prejudiced by the applicant's failure to deliver the statutory notice within the prescribed period. The applicant averred that the respondents will not suffer any unreasonable prejudice as the onus rests on him to prove its case on a balance of probabilities. If condonation is not granted, he is likely to suffer more prejudice as he will not have access to justice and this is compounded by the fact that the contents of the docket has not yet been provided in order for him to prepare effectively for trial.
- [27] This would then also entail that he would have to incur further costs in court to compel the respondents to provide him with the required information and other information which may be relevant to his claims against the respondents. It is the applicant's case that he was wrongfully arrested and detained without a warrant and that the second respondent did not properly exercise their discretion in their decision to proceed to trial. With him being acquitted of all charges shows that they did not have evidence against him that justified prosecution. In my view, this is linked to his likely prospects of success as highlighted herein above.
- [28] The respondents have not indicated in their founding affidavit that their witnesses are no longer available or that they no longer have the contents of the docket including the investigating diary. It is also not known if they are unable to consult with the senior prosecutor who declined defence representations made before the trial commenced. In the absence thereof, I cannot conclude that they will suffer unreasonable prejudice.
- [29] In the prevailing circumstances alluded to herein above, I hereby find this debt has not been extinguished by prescription, that the applicant has shown good cause for his failure to serve the notice and timeously and that the respondents will not be unreasonably prejudiced.

- [30] It is trite that the costs follow the result. The parties have stated that costs should be awarded on an attorney and client scale. I am not persuaded that such a scale is appropriate in these circumstances considering the simplicity of the issues herein. Costs will thus be awarded on a party and party scale.

IV ORDER

- [31] Accordingly, I make the following order:

1. Condonation is granted for the applicant's failure to serve the notice contemplated in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.
2. The Respondents shall pay the cost of this application on a party and party scale, jointly and severally, the one paying the other to be absolved.



MAJOSI OR, AJ

Appearances

On behalf of the Applicant

Instructed by:

Adv. G.S.J Van Rensburg
c/o Jacobs Fourie Attorneys
BLOEMFONTEIN

On behalf of the Respondents

Instructed by:

Adv. Phakama
State Attorney
BLOEMFONTEIN