

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **2021-50610**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
27.09.2024	
DATE	SIGNATURE

BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ

In the matter between:

NKANYISO NGWAZI

Applicant

and

MINISTER OF POLICE

Respondent

Summary: **STATE** – Actions against – Application for condonation for failure to give timeous notice in terms of section 3(1) of the Legal Proceedings against Certain Organs of State Act, Act 40 of 2002

REQUIREMENTS – Prospects of success play significant role – strong merits may mitigate fault – *prima facie* withdrawal of charges constituting strong prospect of success – condonation granted

JUDGMENT

INTRODUCTION

[1] The plaintiff, Mr Nkanyiso Ngwazi on or about 6 December 2021 issued action proceedings against the respondent, the Minister of the South African Police. In terms of the particulars of claim attached to the summons, Mr Ngwazi alleges that:

- 1.1 on 26 October 2018 he was arrested by members of the South African Police Services;
- 1.2 the arrest took place at his place of employment;
- 1.3 he was arrested on suspicion of having committed a criminal offence, namely house robbery;
- 1.4 he was detained, unlawfully so, at the Norwood Police Station from 26 October 2018 to 5 November 2018, and subsequent thereto, he was further unlawfully detained at the Sun City prison;
- 1.5 he was unlawfully arrested and as a consequence suffered damages in the amount of R750,000.00.

[2] Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 ("the Act") provides that:

- "(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/her/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 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) For purpose of subsection 2(a): -

- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired it by exercising reasonable care unless the organ of state wilfully prevented him or her from acquiring such knowledge; and
- (b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date

(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.”

[3] The respondent in its plea to the applicant's particulars of claim raises a special plea premised on the non-compliance of section 3 of the Act. As such the jurisdictional requirement set out in section 3(4)(a) has been complied with.

[4] In support of the application for condonation, Mr Ngwazi alleges that:

- 4.1. he was arrested and incarcerated between the period 26 October 2018 and 1 July 2019;
- 4.2. he sought legal advice for the first time on 23 January 2020, seven months after he was released from prison;

- 4.3. on 29 January 2020, the applicant's legal representative presented the respondent with a request for access to information in terms of the Promotion of Access to Information Act, Act 2 of 2000;
- 4.4. in March 2020 and due to the stringent COVID – 19 protocols the plaintiff could not proceed with the matter as litigation of this nature did not qualify as an essential service;
- 4.5. the respondent did not respond to the request made in terms of the Promotion of Access to Information Act, Act 2 of 2000 and as a consequence, Mr Ngwazi and out of fear that his claim may prescribe, on 19 May 2021 presented the respondent with a notice in terms of section 3 of the Act;
- 4.6. the respondent furnished the applicant with the requested docket on 20 September 2021, almost 20 months after the initial request was made on 29 January 2020

[5] The respondent opposes Mr Ngwazi's application for condonation on the following grounds:

- 5.1. a failure by Mr Ngwazi to provide a sufficient explanation as to what steps he took to prosecute his claim and issue the proper notice in respect of the period 1 July 2019, being the date upon which the charges against the applicant was withdrawn and 23 January 2020 when Mr Ngwazi sought legal advice;
- 5.2. a failure to have provided a full explanation in respect of the period 23 January 2020, his first consultation with his legal team and the delivery of the notice in terms of section 3 of the Act on 19 May 2021; and
- 5.3. Mr Ngwazi failed to address the issue of prejudice at all which renders the request for condonation fatally flawed.

[6] The respondent's grounds of opposition are therefore twofold, (a) the failure have provided a full explanation for his delay in having delivered the notice eventually and (b) the failure to address the issue of prejudice.

LEGAL FRAMEWORK

- [7] The Supreme Court of Appeal in *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*¹ explained the purpose of the notice as follows:

"In deciding whether to grant an application for condonation, failure to serve notice of intended legal proceedings against an Organ of State, as intended in s3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, it is instructive to bear in mind that such notices are required because State organs, with their extensive bureaucracy and range of activities, need sufficient opportunity to investigate and consider claims against them, and to decide, before getting embroiled in litigation at public expense, whether they ought to accept, reject or endeavour to settle them. Rules that limit the time in which litigation may be launched against State organs also serve to prevent procrastination and limit its deleterious consequences."

- [8] The Supreme Court of Appeal in the *Minister of Agriculture and Land Affairs supra* continued to hold that:

"Section 3(4)(b) of the Act sets out the conditions under which a court may condone a failure to serve notice of intention to institute proceedings against an organ of State. It may do so 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'. In general terms the interests of justice play an important role in condonation applications. The applicant is required to set out fully the explanation for the delay, and the explanation must be reasonable and cover the entire period of the delay. 'Good cause' may include a number of factors which will vary from case to case on differing facts. **The prospects of success of the intended claim play a significant role, since strong merits may mitigate fault and a lack of merits render mitigation pointless.** Since the court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant, a paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of an intended action. Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant. Whereas good cause primarily concerns the applicant's conduct and its motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the protection of its interests by receiving timely notice. Lastly, condonation must be applied for as soon as the party concerned realises that it is required."²

[emphasis added]

¹ 2010 (4) SA 109 (SCA) at [13] to [14]; 113C - G

² *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at [11] and [35] – [39]; 112I – 113A and 117B – 118C

- [9] In **Madinda v Minister of Safety and Security**³ the Supreme Court of Appeal held that the prejudice anticipated by section 3(4) of the Act, presupposes that the court must be satisfied that all three requirements had been complied with. Once the requirements have been complied with, the discretion to condone the non-compliance with the provisions of the Act operates according to the established principles in such matters.⁴
- [10] There is no doubt that Mr Ngwazi's explanation for his various delays do not constitute a full and comprehensive explanation as required. However, this application seems to hinge on the applicant's prospects of success. As referred to by the Supreme Court of Appeal in *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd supra*, "*The prospects of success of the intended claim play a significant role, since strong merits may mitigate fault and a lack of merits renders mitigation pointless.*"
- [11] It does not appear to be in dispute that Mr Ngwazi was and remained in detention for the alleged periods after which all charges against him were withdrawn. This, to me appears to suggest that Mr Ngwazi, in this application, may have established prospects of success to mitigate any shortcomings in his explanation as far as his delays are concerned. I am furthermore persuaded to exercise my discretion in favour of the applicant by virtue of the fact that apart from the attack on Mr Ngwazi's explanation the application, save for the aspect of prejudice, is not genuinely opposed.
- [12] It was argued on behalf the respondent that the application for condonation is fatally flawed by virtue of the applicant having failed to deal with the requirement of prejudice. I am unable to agree with this submission by virtue of the fact that Mr Ngwazi have alleged that the respondent will not suffer any prejudice. The allegations were met with a bare denial. As such I am able to infer that respondent will not suffer any prejudice and to the extent that any prejudice may exist that such prejudice will be unreasonable.

³ 2008 (4) SA 312 (SCA)

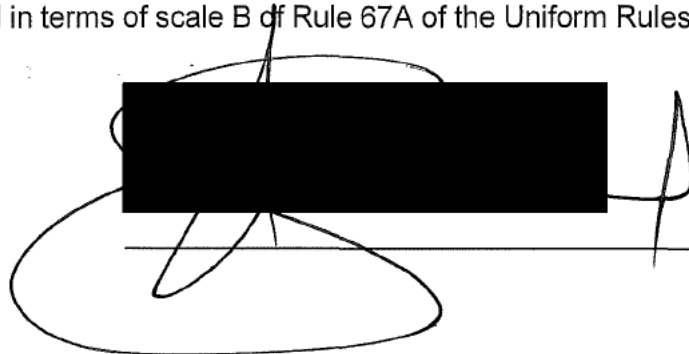
⁴ *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E - G

[13] Consequently, and in the interest of justice, I exercise my discretion in favour of the Mr Ngwazi and condone the non-compliance with section 3 of the Act.

THE ORDER

[14] Consequently, I make the following order:

1. The applicant's non-compliance with section 3(1)(a) read with section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002, in respect of his claim against the respondent under case number 50610/2021 is condoned.
2. The respondent is directed to pay the applicant's costs of this application, such costs to be taxed in terms of scale B of Rule 67A of the Uniform Rules of Court.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a series of loops and a final vertical stroke. The signature is written over a horizontal line.

AUCAMP S
JUDGE OF THE HIGH COURT
JOHANNESBURG

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on **27 September 2024**

HEARD ON:
DATE OF JUDGEMENT:

15 April 2024
25 September 2024

For the Applicant:

Adv A Chowan
Instructed by Berkowitz Cohen Wartski
Attorneys

For the Respondent:

Mr D Lebenya
Instructed by The State Attorney