



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

Not reportable

Case no: 1839/2022

In the matter between

NTSANE NATHANIEL TLADI

APPLICANT

and

MINISTER OF POLICE

FIRST RESPONDENT

**THE DIRECTOR: NATIONAL PROSECUTING
AUTHORITY**

SECOND RESPONDENT

Neutral citation: *NTSANE v MINISTER OF POLICE & ANOTHER*
(1839/2022)

Coram: MAHLANGU AJ

Heard: 1 AUGUST 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be at 14h30 on 12 August 2024

Summary: Civil procedure – non-compliance with s 3 of Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002- Condonation of the late service of the notice of intention to institute legal proceedings in terms of section 3.

ORDER

1. The condonation application in terms of Act 40 Of 2002 is granted.
2. The first respondent to pay costs on a party and party scale A.

JUDGMENT

MAHLANGU AJ

INTRODUCTION

[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 instituted an action against the respondents on 22 December 2021, claiming damages for his alleged unlawful arrest and detention, and malicious prosecution. In his particulars of claim, the applicant avers that he duly complied with the provisions of the Act.

BACKGROUND FACTS

[2] The applicant was arrested on 4 October 2019. He appeared in court on 4 October 2019 where his matter was postponed on several occasions. He remained in custody until the matter was struck from roll on 2 July 2021. Upon his release, he consulted with a legal representative after which a notice was served on the respondents on 22 December 2021. The notice was served via email as well as physical service.

[3] The respondents served the applicant with the notice to defend the action on

19 May 2022. On 22 June 2022, the applicant brought an application to bar the respondent in terms of rule 27 of the Uniform Rules of Court, for their failure to file their plea. Subsequent to the notice to bar the respondents, they filed their plea on 25 June 2022. A special plea was raised denying that the applicant complied with the provisions of s 3(1) of the Act in that the applicant failed to give written notice of claim within six months from the date on which the cause of action arose as required by the Act.

[4] The applicant brought this application which was opposed by the first respondent on the basis that the applicant has failed to establish good cause for his non-compliance with the Act and has failed to prove that the first respondent will not suffer unreasonable prejudice due to the delay in serving them with the required notice. The first respondent further submitted that, the applicant does not deal with the good prospect of success on the merits of the claim and that he does not take this court into his confidence by accounting with proper detail and clarity on why such an undue delay occurred after he was released on 2 July 2021.

LEGAL PRINCIPLES

[5] Section 3(1)(a) provides that no legal proceedings for the recovery of a debt may be instituted against an organ of the State unless the creditor has given the relevant organ of State notice, in writing, of its intention to institute the legal proceedings in question. Section 3(2) of the Act provides that the notice contemplated in section 3(1)(a) of the Act must be delivered or served upon the organ of State in question 'within six months from the date on which the debt became due'.

[6] In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*¹ the following was stated:

'The conventional explanation for demanding prior notification of intention to sue organs of State 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

¹ In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] ZASCA 27; 2010 (4) SA 109 (SCA).

endeavour to settle them.”²

CONDONATION

[7] Section 3(4)(b) of the Act provides that a court may grant an application for condonation 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.’

The court must be satisfied the applicant has satisfied all the three requirements as they are conjunctive. In *Madinda v Minister of Safety and Security*³ (*Madinda*) the Supreme Court of Appeal held that ‘The structure of a s 3(4) is now such that the court must be satisfied that all three requirements have been met. Once it is so satisfied the discretion to condone operates according to the established principles in such matter, as to which see e.g. *United Plant Hire (Pty) Ltd v Hills and others* 1976 (1) SA 717 (A) at 720 E-G. . .’⁴ A similar view was expressed in the *Minister of Safety and Security v De Witt*⁵ (*De Witt*) where the following was mentioned:

‘The discretion may only be exercised, however, if the three criteria in s 3(4)(b) are met: that the debt has not been extinguished by prescription (at issue in this case); that good cause exists for the creditor’s failure; and that the organ of state has not been unduly prejudiced.’⁶

[8] Counsel for the first respondent relied on *De Witt* where the following was held:

‘In *Legal Aid Board Theron J* concluded that because s 3(1) is couched in peremptory terms, a court has no power to condone a failure to serve a notice prior to the creditor’s institution of action. Her finding that “The court does not have the power to condone the institution of legal proceedings in circumstances where the provisions of s 3(1) have not been complied with” is in my view, incorrect. It fails to take into account the purpose of condonation which is to forgive non-compliance or faulty compliance provided that the criteria in s 3(4)(b) are met and does not accord with an earlier statement in the judgement that s 3(4)(a) “confers upon the creditor the right to apply for condonation of the failure to comply with the provisions of s 3(1).”’⁷

² Ibid para 13.

³ *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA).

⁴ Ibid para 16.

⁵ *Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA).

⁶ Ibid para 13.

⁷ Ibid para 17.

[9] The applicant was detained for a period of 21 months. He was only able to consult with his legal representatives upon his release from custody. The notice in terms of the Act was served on the respondents after the consultation. According to the applicant, his legal representative was of a view that the cause of action arose on the date he was released. I am therefore of a view that the applicant cannot be denied an opportunity to claim against the respondents because of the mistake made by his legal representative.

PRESCRIPTION

[10] The claim against the respondent has not prescribed. The applicant was arrested on 4 October 2019. The notice in terms of the Act was served on the respondents on 22 December 2021. It is therefore my view that this claim has not prescribed.

GOOD CAUSE

[11] It is the applicant's contention that the attorney who issued the notice in terms of the Act was convinced that it had been effected within six months as required by s 3 of the Act. The applicant's attorney only became aware that the notice was not served in terms of the Act after being served with a special plea. The applicant's attorney submitted that he was always of a view that the cause of action arose on 21 July 2021 after the applicant was released from custody.

[12] In *Mandinda* the Court held:

"Good cause" looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex, it may be that only some of many of such possible factors become relevant. These may include prospects of success in the proposed action, the reason 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.⁸

The standard of proof is, therefore, not one on balance of probabilities but can rather be found in the phrase "if [the court] is satisfied in Section 3(4)(b) has long been recognized 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

⁸ Footnote 3 para 10.

by the parties.”.⁹

[13] Good cause also involves a consideration of the prospects of success on the merits of the case. It the first respondent’s submission that the applicant was arrested and detained for rape. The applicant only relied on the mistake made by his legal representative that, the legal representative thought the cause of action arose after his release from custody. Although there might be criticism levelled against the applicant for his failure to address the merits of this matter, I am satisfied that, his failure to serve the notice in terms of the Act is not his fault. It is my view that it is only fair not to punish the applicant for the negligence caused by his legal representative.

[14] The first respondent submitted that the applicant’s condonation application was made 22 months after he was served with a special plea. It was another delay made by the applicant after he became aware of the special plea. To this end, the Court in *Madinda* held the following:

‘One other factor in connection with “good cause” in s 3(4)(b)(ii) is this: it is linked to his failure to act timeously. Therefore, subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms. Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s 3(4), but it is not, in this statutory context, an element of “good cause”. This is a distinction which the learned judge did not draw or maintain and I think he was wrong not to do so.’¹⁰ (Emphasis added.)

[15] The applicant consulted the attorney after being released from custody. The attorney issued a notice in terms of the Act. I am of a view that the failure to comply with the Act by the applicant should not deny the applicant the opportunity to claim against the respondents. The delay to file the application for condonation can also not be used against the applicant.

[16] Applying the principles mentioned above, I am inclined to grant such

⁹ Ibid para 8.

¹⁰ Ibid para 14.

condonation. It is not contested that the claim against the first respondent had not prescribed at the time when the action was instituted. I have been satisfied that the applicant 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 respondents.

PREJUDICE

[17] It is trite that the applicant must establish the absence of unreasonable prejudice. The onus is on the applicant to set out, in some detail, that the respondents would not suffer any unreasonable prejudice as a result of the delay. 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 basis. The legislature specifically requires that a court must consider whether the organ of State is not unreasonably prejudiced by the failure to comply with the provisions of section 3.

[18] In *Madinda* explained this as follows:

‘But in this Act the legislature has deemed it appropriate to treat absence of *unreasonable* prejudice as a specific factor of which an applicant must satisfy the court. The identification of separate requirements of good cause and absence of unreasonable prejudice may be intended to emphasis the need to give due weight to both the individual’s right of access to justice and the protection of state interest in receiving timeous and adequate notice.’

The applicant therefore has to satisfy the court that the failure to serve the notice on time had not unreasonably prejudiced the respondent. It was the respondent’s contention that, the applicant did not give the proper explanation of the delay and would therefore be inherently prejudiced because of the long delay. In addition, some of the witnesses might also not be available to testify in this matter.

[19] Notwithstanding the above, I am of the view that the error did not occur as a result of the applicant’s conduct. It would be unreasonable to punish the applicant for a mistake perpetrated by his legal representative, which amounted to an infringement of his constitutional rights. In the circumstances, I have been persuaded that good cause exists for the granting of the condonation.

CONCLUSION

[20] I find no reason to deviate from the general practice with regard to costs. The applicant argued that the costs be costs in the main action. It was the first respondent's argument that the application be dismissed with costs. I am of a view that the costs should follow the results and that the respondents pays the costs.

[21] In the result, the following order is therefore made:

1. The condonation application in terms of Act 40 of 2002 is granted.
2. The first respondent to pay costs on a party and party scale A.

On behalf of applicant:

Instructed by:

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