



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

**Reportable / Not
reportable**

Case no: 6779/2007

In the matter between:

MOLALE D.R. PHALA

Applicant

and

**MINISTER OF SAFETY AND SECURITY
CAPTAIN MOHAPI**

First Respondent

Second Respondent

Coram: Cronje AJ

Heard: 15 August 2024

Delivered: 03 September 2024

Summary: Condonation – Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 – requirements – section 3(4) – requirements not met – application dismissed.

ORDER

1. The application for condonation is dismissed.
2. The applicant pays the costs of one counsel of the respondents, to be taxed on Scale B.

JUDGMENT

Cronje AJ

Introduction

[1] The applicant instituted action against the respondents, setting out the relief he sought under claims A-D. The respondents filed an amended plea wherein they relied on a special plea that the applicant did not comply with s 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act).

[2] The special plea came before Snellenburg AJ on 19 May 2022. He made the following order:

- '1. The First and Second Defendants' Special Plea of prescription to claim A in the particulars of claim is upheld.
2. The First and Second Defendants' Special Plea of prescription to claim B in the particulars of claim is upheld with regards to the Plaintiff's detention on 3 and 4 January 2005.
3. The First Defendant's Special Plea regarding the Plaintiff's non-compliance with s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is upheld.
4. The adjudication of claim B regarding the part of claim for unlawful detention that has not

prescribed, and claim B of the Plaintiff's particulars of claim are suspended pending an application for condonation in terms of s 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 which application must be served on the First Defendant within 30 days from date of this order. The Plaintiff must also seek condonation in the above said condonation application for the Plaintiff's failure to comply with the directive, issued by Daffue J during the pre-trial hearing on 20 May 2019, that the Plaintiff applies for condonation in terms of s 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 before or on 17 June 2019.

5. If the Plaintiff fails to comply with the order in paragraph 4 above, claim B and claim D of the particulars of claim must be deemed to be dismissed with costs.

6. The First Defendant shall pay the wasted costs occasioned by the postponement of the trial on 26 April 2022.

7. The Plaintiff shall pay the costs of the suit pertaining to the First and Second Special Plea, except the reserved costs referred to in paragraph 6 above.'

[3] The judgment of Snellenburg AJ was delivered on 12 October 2022. Within thirty days of Snellenburg AJ's order, the applicant applied for condonation for non-compliance with the Act as envisaged in Snellenburg AJ's order.

[4] In the founding affidavit, the Applicant states:

'5.1 Section 3 of Act 40 of 2002 requires any applicant to send such notice to the National Police or Provincial Commissioner within six (6) months from date on which the debt arose.

5.2 On 12 July 2005, the Applicant (Plaintiff) sent his notice to the National Commissioner in Pretoria who acknowledged receipt of the Notice on 13 July 2005.

5.3 We submit further that this was part of the bundle handed to the Honourable Court on the date of hearing of the Special Pleas. I attach copies of the documents herein marked annexure "A".

5.4 It was an issue placed before the Court during the amendment [sic] of the Special Pleas that there was no need for condonation or rather 'we need to replicate if we are of the view that it is not necessary to apply for condonation'.

5.5 The Applicant felt that there was no need to apply for condonation and replicated accordingly. I attach a copy of the replication dated 14 June 2017.

6.

6.1 We respectfully submit that the Applicant felt there was no need for condonation as we

held the view that Applicant was detained from 3-12 January 2005, and this formed a continuous act.

6.2 We submit that we viewed the release of the Applicant being the 12 January 2005, as the period from which the claim arose.

6.3 The notice in terms of Section 3 was sent on 12 July 2005 as per the annexure above, which date we accept as being within the six (6) months required by the Act.

7.

In light of the judgment we seek the Court's condonation of any period which is late as it will be at most be not more than nine (9) days.'

[5] It is apparent from the notice of motion that the Applicant brought the application for condonation for non-compliance with Act 40 of 2002. The founding affidavit, however, deals with only some of the three requirements in s 3(4). Those requirements are:

'(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.'

There can be no doubt that applicant was offered an opportunity to seek condonation, not only by Daffue J but also by Snellenburg AJ.

[6] The respondent states that a rule 37 conference was held before Daffue J on 20 May 2019, in which the order to apply for condonation was made. It states that the applicant now brings this application more than two years after that directive/order was granted. It also states that the application is fourteen years after the respondents first pleaded non-compliance with the Act. It argues that the application fails to address, in detail, the reasons for the lateness of the application, the *bona fides* of the application, prospects for success in the main action and prejudice to the respondents.

[7] In the heads of argument of both parties, there are various references to case law. I do not deem it necessary for purposes of this judgment to deal with them separately. The orders of Daffue J and Snellenburg AJ remain extant.

[8] The applicant should have addressed all the grounds for condonation. Therefore, there needs to be a proper application for condonation. Mr Motloung SC argued that applying for condonation is unnecessary and that the findings of Snellenburg AJ were incorrect. He argues that the Applicant, in any event, now complied with Snellenburg AJ's order in filing this application.

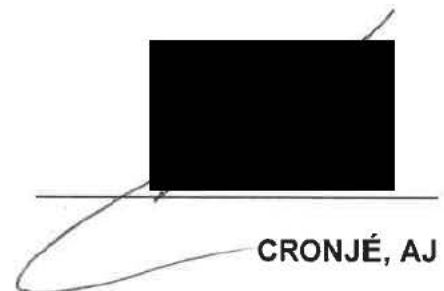
[9] It is common cause that there is no explanation why the applicant did not comply with the directives issued by Daffue J. Those directives were explicitly incorporated in para 4 of the order of Snellenburg AJ.

[10] If the applicant was dissatisfied with the order of Snellenburg AJ, which incorporated Daffue J's directive, the correct approach would have been to issue an application for rescission or an appeal against the directive of Daffue J and an appeal against the order of Snellenburg AJ. This application is neither. I, therefore, conclude that the applicant has not made a case for condonation.

The order:

[11] Wherefore I make the following order:

1. The application for condonation is dismissed.
2. The applicant pays the costs of one counsel of the respondents, to be taxed on Scale B.

A handwritten signature in grey ink, appearing to read 'CRONJÉ, AJ', is written over a solid black rectangular redaction box. The signature is written in a cursive style with a long horizontal stroke extending to the left.

Appearances:

For the Applicant

Adv S E Motlounq SC

Instructed by:

Qwelane Theron Van Niekerk
Bloemfontein

For the Respondents:

Adv L Manye
Adv N M Seleso

Instructed by:

Office of the State Attorney
Bloemfontein