



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

Reportable / Not reportable

Case no: 1308/2021

In the matter between

TSHEPANG POELLO DAVID MOTAUNG

APPLICANT

and

THE MINISTER OF DEPARTMENT OF POLICE

1ST RESPONDENT

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

2ND RESPONDENT

Neutral citation: *Tshepang Poello David Motaung v The Minister of the Department of Police And Another*

Coram: **T L MANYE, AJ**

Heard: **16 MAY 2024**

Delivered: **12 SEPTEMBER 2024**

Summary: *Civil Procedure - non-compliance with section 3 of the institution of legal proceedings against certain organs of state – application for condonation*

ORDER

1. Condonation application for non-compliance with the provisions of Section 3 of Act 40 of 2002, is granted.
2. The Applicant to pay the taxed party and party costs on scale B.

JUDGMENT

T L MANYE, AJ

INTRODUCTION:

- [1] This is an application for condonation in terms of Section 3(4)(b) of the Institution of Legal Proceedings against Certain Organs of State.¹ *In casu*, the Applicant instituted action proceedings against the Respondents on 25th March 2021 claiming damages for his unlawful arrest without a warrant, detention, and malicious prosecution.
- [2] The Applicant in his particulars of claim alleges compliance with the provisions of Section 3 in that a proper notice was delivered to the First and Second Respondent prior to the institution of action proceedings and as such the Applicant has complied by delivering the notice in terms of the Act.²
- [3] The Respondents for their part opposed this application for condonation in terms of Section 3(4)(a) of Act 40 of 2002.³

¹ Act 40 of 2002

² Para 3.29 of the particulars of claim

³ Institution of Legal Proceedings against Certain Organs of State

BACKGROUND:

- [4] The Applicant was allegedly unlawfully arrested on 31st March 2018. He was thereafter detained at Bayswater police station for allegedly having committed the offence of rape.
- [5] He appeared in Court on 3 April 2018 for bail application which was denied with the result that he remained in further detention. He once again appeared in court on the 24th April 2018 for another bail application which was opposed and was denied resulting in the Applicant remaining in further detention. Applicant was eventually granted bail on the 22nd June 2018.
- [6] It is not in dispute that during the criminal trial on the charge of rape on the 5th August 2018 the Applicant was found not guilty for alleged offence of rape and was acquitted.
- [7] After his acquittal on the 23rd October 2018 the Applicant was dismissed from employment with the First Respondent following internal disciplinary proceedings against him. After his dismissal Applicant sought to pursue and declared an unfair labour dispute supposedly for his dismissal from employment with the First Respondent. The pursuit of a labour dispute continued from 2018 after his release where he was assisted by the legal representative that had assisted him with the criminal case. This legal representative referred the Applicant to another attorney who would be able to assist him with a labour dispute. It appears that the Applicant had to go through two (2) attorneys both in 2018/2019 before eventually ending up with the current attorney of record and the deponent to this founding affidavit on the 5th February 2021.
- [8] The deponent to the founding affidavit states that on the 12th February 2021 after a formal Power of Attorney was concluded and as a consequence of consultation, the

Applicant was advised that he may have a claim against the Respondents.

- [9] It was only then that the current attorney of record was instructed to proceed with these proceedings.
- [10] According to the deponent to the founding affidavit the Power of Attorney to proceed with these proceedings was only received on the 12th February 2021. In paragraph 47 of the founding affidavit the deponent alleges that the statutory notice was delivered on the 5th February 2021 less than six (6) months after the initial consultation with the Applicant. I pause to have regard to the discrepancy in relation to when the first consultation took place and when the statutory notice was issued. The Respondents in the answering affidavit did not take issue with the discrepancy in my view correctly so as it would not take the matter any further.
- [11] The deponent states further in paragraph 49 of the affidavit that in the event that this Honourable Court finds that the Applicant did/ought reasonably to have had knowledge of the facts giving rise to the debt and identity of the debtor at an earlier stage, the Applicant seeks condonation for the late filing of the statutory notice.
- [12] Section 3(3)(a) of Act 40 of 2002⁴ provides that:
- “for purposes of subsection 2(a) ‘a debt may not be regarded as being due until the creditor has knowledge of the identity of the Organ of State and the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he/she/it could have acquired by reasonable care unless the Organ of State wilfully prevented him/her/it from acquiring such knowledge.”*
- [13] Section 3(4)(b) of the Institution of Legal Proceedings against Certain Organs of

⁴ Institution of Proceedings against Certain Organs of State

State⁵ provides that the Court may grant condonation if it is satisfied that:

“the debt has not been extinguished by prescription; good cause exists for the failure by the creditor; and the Organ of State was not unreasonably prejudiced by the failure to comply with the provisions of Section 3.”

[14] In **Minister of Safety and Security v De Witt**⁶ the Court held that the three (3) requirements of Section 3 of the Act referred to *supra* are conjunctive, and the Court must be satisfied that the requirements have been met before it can exercise its discretion and condone non-compliance with the Act.

[15] The Respondents' opposition is 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 Respondents will not suffer unreasonable prejudice due to delay in serving the required notice. The Respondents further submitted that, the Applicant did not deal with the good prospects of success on the merits of the claim, and that he has not taken this Court into its confidence by accounting with proper details and clarity on why such undue delay occurred after his release on 28 June 2018.

[16] Section 3(1)(a)⁷ provides that no legal proceedings for recovery of a debt may be instituted against an Organ of State unless the creditor has given the relevant Organ of State notice, in writing, of his intention to institute the legal proceedings in question. Section 3(2) 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 (6) months from the date on which the debt became due*”.

[17] The Supreme Court of Appeal in **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd** held that:

‘the requirements in Section 3(4) are conjunctive and must be established by the

⁵ Act 40 of 2002

⁶ 2009 ZASCA 103; 2001 (1) SA 457 SCA at para [30]

⁷ Act 40 of 2002

Applicant for condonation.⁸

[18] Similarly in **Madinda v Minister of Safety and Security**⁹ the Court held that “*the structure of a Section 3(4) is now that the Court must be satisfied that all three requirements have been met. Once it is satisfied the discretion to condone operates according to the established principle in such matter, as to which was expressed similarly in Minister of Safety and Security v De Witt where the following was mentioned: ‘the discretion may only be exercised, however, if the three criteria in Section 3(4)(b) are met, that the debt has not been extinguished by prescription (at issue in casu); that good cause exists for creditors’ failure; and that the Organ of State has not been unduly prejudiced.*”¹⁰

[19] Counsel for the Respondents relied on **Saloojee and another, N.N.O v Minister of Community Development**¹¹ where the following was stated: “There is a limit beyond which a litigant cannot escape the result of his attorney’s lack of diligence or the insufficiency of the explanation tendered to hold otherwise might have a disastrous effect upon the observance of the rules of this Court. Considerations *ad misericordia* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this Court was due to negligence on the part of the attorney. The attorney, after all, is a representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”

[20] The Applicant’s current attorney and the deponent to the founding affidavit alleges that he only managed to consult with the Applicant for the first time on the 5th

⁸ 2010 ZASCA 27; 2010 (4) SA 109 (SCA)

⁹ 2008 ZASCA 34; 2008 (4) SA 312 (SCA)

¹⁰ 2008 ZASCA 103; 2009 (1) SA 457 (SCA)

¹¹ 1965 (2) SA 135 (A)

February 2021. *Ex facie* the papers it appears that the Notice in terms of the Act was served on the Respondent after the consultation *albeit* on the same day. The Applicant's attorney further makes a case that Applicant's cause of action arose on the same day (5th February 2021) when the Applicant became aware that he may have legal remedies available to him against the Respondents. I am of the view that the view expressed by the Applicant's legal representative is incorrect though it cannot be held against the Applicant to deny him an opportunity to claim against the Respondents because of the incorrect legal advice.

- [21] The Constitutional Court in **Brümmer v Gorfil Brother Investment (Pty) Ltd and others**¹² the Court stated:

"This Court has held that an application for leave to appeal will be granted if it is in the interest of justice to do so and that the existence of prospects of success, although an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interest of justice. It is appropriate that an application for condonation be considered on the same basis and that such application should be granted if it is in the best interest of justice and refused if it is not. The interest of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and the cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and reasonableness of the Applicant's explanation for the delay of defect."

- [22] It is common cause that the claim against the Respondent has not prescribed. The notice in terms of the Act was served on the Respondents on 5th February 2021.

- [23] It is the Applicant's deponent (an attorney) who issued the notice in terms of the Act. He was convinced that the notice was issued within six (6) months as required by Section 3 of the Act. The attorney only became aware that the notice was not served in terms of the Act after being served with a special plea of non-compliance

¹² 2000 ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 CC

with the provisions of Section 3 of Act 40 of 2002. The Applicant's attorney maintain that he was always of the view that the cause of action arose 5th February 2021 when the Applicant became aware for the first time or was informed of his possible action against the Respondents.

[24] In **Madinda** *supra* the following was stated:

*'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/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 Section 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 the delay beyond the statutory prescribed limit for the giving of a notice.'*¹³

[25] Applying the principle above, I am inclined to grant the condonation. As I already mentioned above it is not in dispute that at the time the action was instituted the claim against the Respondent had not prescribed. It is for the above that I am satisfied that the Applicant did not display a flagrant disregard of the processes needed in terms of the Act in respect of his intended action against the Respondents.

[26] It is also further *trite* that the Applicant must establish the absence of unreasonable prejudice to the Respondents. This places an onus on the Applicant to set out that the Respondent will not suffer unreasonable prejudice as a result of the delay in issuing the Notice in terms of the provisions of Act 40 of 2002. It is also so that the Respondents in their opposing affidavit have not made out a case that they were in any way to be unreasonably prejudiced by the late delivery of the statutory notice. This Court will therefore be slow to assume prejudice for which the Respondents have not made out such a case.

¹³ Madinda v Minister of Safety and Security 2008 (4) SA 312 at p. 317 at para C - D

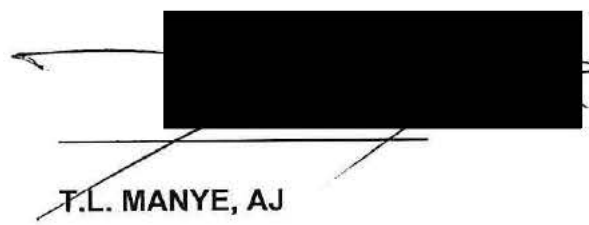
[27] As already stated above, Section 34 of the Constitution of the Republic¹⁴ stated that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent impartial tribunal or forum. It is for the above that I find that it would be in the interest of justice not to deny the Applicant the opportunity to pursue his claim, were he to be punished for the mistaken belief of his legal representative that would amount to infringement of his constitutional right.

[28] It is my considered view that the exercise of discretion should favour for the granting of the condonation application.

[29] Notwithstanding the above finding, the Applicant for condonation seeks court's indulgence for non-compliance with the court's rules or statutory requirements. I am of the view that Respondents' opposition of the application was not unreasonable under the circumstance and ought not unreasonably bear the costs of opposition.

[30] In view of the above the following order is made:

1. Condonation application for non-compliance with the provisions of Section 3 of Act 40 of 2002, is granted.
2. The Applicant to pay the taxed party and party costs on scale B.



T.L. MANYE, AJ

¹⁴ Act 108 of 1996

Appearances

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