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

Reportable Yes/No
Case No: **816/2022**

In the matter between:

SHADRACK MAHLOMOLA MOKOENA Applicant

and

THE MINISTER OF POLICE First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTION SERVICES Second Respondent

CORAM: **Hefer AJ**

Heard: **17 October 2024**

Delivered: **7 November 2024**

Summary:

ORDER

1. The applicant is granted condonation in terms of s 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 for the late notification of his intention to institute legal proceedings against the first respondent.
2. Each party is to pay its own costs.

JUDGMENT

Hefer AJ

[1] The applicant instituted action against the respondents, claiming damages arising from the alleged unlawful arrest and prosecution of the applicant.

[2] In response to the applicant's allegation to the effect that the required notices in terms of s 3(1)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) had been delivered to both respondents on or about 31 August 2021, the first respondent raised a special plea.

[3] In terms of this special plea, the first respondent denies that the plaintiff had complied with the provisions of s 3(2) of the Act in that the first respondent had been arrested and detained more than two years before the delivery of such notice to first respondent.

[4] Section 3(2) of the Act requires a plaintiff to send a notice of its intention to institute an action to the organ of state against which legal action is about to be instituted, within a period of six months from when the debt became due.

[5] It is common cause that the action instituted by the applicant, constitutes legal proceedings for recovery of a debt against both respondents.

[6] Before dealing with the merits of the application, Mr *Zietsman*, appearing on behalf of the applicant, applied for leave to allow the applicant to introduce a supplementary affidavit to the founding affidavit. This application was opposed by the first respondent.

[7] According to the applicant, the filing of a supplementary affidavit was necessitated due to the fact that it was only upon receipt of the police case docket from the Offices of the State Attorney, that the attorney, acting on behalf of the applicant, had been able to consult properly with the applicant.

[8] Prior to this, and at the stage when the founding affidavit had been deposed to, the applicant could not provide all the documentary evidence and properly explain the merits of the matter as the first respondent had failed and/or refused to furnish the applicant's attorneys with the complete contents of the police case docket. This is according to the applicant.

[9] In further support of the application for leave to allow the introduction of the supplementary affidavit, the relevant portion thereof reads as follows:

'The information we now wish to place before the Honourable Court is in amplification of the averments we have already made in the founding papers. It was also decided to rather supplement the founding papers, than to start with a new application alternatively reply to the first respondent's opposing papers and produce new evidence which will be dismissed by the Honourable Court and be severely scrutinized by the first respondent's legal team. To supplement the founding papers will have a far less drastic cost implication to all parties involved and will put the court in a position to properly assess the application on the merits now being produced to this Honourable Court. Supplemented information will contribute and assist the court in making an informed decision in this regard as prayed for in the notice of motion.'

[10] It is this portion of the supplementary affidavit, dealing with the motivation for filing a supplementary affidavit, which needs to be dealt with.

[11] The founding-as well as the supplementary affidavit were deposed to, not by the applicant himself, but rather by the attorney acting on behalf of the applicant. From the facts as set out and contained in the supplementary affidavit, it appears that the facts which the applicant sought to rely upon must have been within the knowledge himself pertaining to the circumstances surrounding the arrest of the applicant. Putting it differently, the facts regarding to the arrest of the applicant were not ascertained from the contents of the police docket, the relevant portions being placed before Court. These facts could and should have been placed before Court in the founding affidavit from the beginning.

[12] The inference was inevitable that the failure to include such facts in the founding affidavit, can only be attributed to the actions of the draftsman of the founding affidavit, more in particular the deponent to such affidavit, being the attorney himself. The attorney is the one who should have known that such facts should have been contained in the founding affidavit.

[13] The inference of professional oversight is further fortified by the contradiction between the contents of the founding affidavit and that of the supplementary affidavit regarding the date when the first and then a later notice in terms of s 3 of the Act had been sent to the first respondent. It was, as conceded by Mr Zietsman, an obvious mistake in the drafting of either one of such affidavits which cannot be attributed to the applicant himself. It can also not affect the credibility of the applicant himself as argued by Mr Mazibuko, appearing on behalf of the first respondent.

[14] The unsatisfactory manner in which the filing of a further affidavit was dealt with by the applicant's attorney, is further evident from the passage quoted from the founding affidavit above. The applicant's attorney clearly realised that the applicant would need the leave of the Court to file a further affidavit in the form of a re-joinder. Realising that such application for leave would have necessitated an explanation for

not including the relevant facts before Court from the beginning, the applicant opted to rather place a supplementary affidavit before Court. However, an application to file a supplementary affidavit, also necessitates a full explanation why such facts were not included in the founding affidavit from the start. Such application is not in terms of the Uniform Rules of Court.

[15] In his heads of argument, Mr Zietsman stated that a party may in terms of rule 6(5)*(e)* apply to Court for leave to file a further affidavit in motion proceedings. This provision is however in respect of a re-joinder and not a supplementary affidavit.

[16] The authority relied upon by Mr Zietsman did, however, assist the applicant. In *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd*,[1] the Western Cape High Court considered whether certain further affidavits could be admitted into evidence. Davis J, in motivating his ruling to admit such affidavits, with reference to *Mkwanazi v Van der Merwe and Another*[2] as well as *Barclays Western Bank Ltd v Gunas and Another*,[3] confirmed that the relevant considerations in this regard should be:

> '(i) The reason why the evidence was not led timeously.
> (ii) The degree of materiality of the evidence.
> (iii) The possibility that it may have been shaped to relieve the pinch of the shoe.
> (iv) The balance of prejudice, viz the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.
> (v) The stage which the particular litigation has reached ...
> (vi) The 'healing balm' of an appropriate order as to costs.
> (vii) The general need for finality in judicial proceedings.
> (viii) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client.'[4]

[17] Taking into account all these considerations, in particular the degree of materiality of the evidence (regarding the reasonable grounds of suspicion of the time

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[1] *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C).
[2] *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A).
[3] *Barclays Western Bank Ltd v Gunas and Another* 1981 (3) SA 91 (D).
[4] Footnote 1 at 617.

of the applicant's arrest), the prejudice which the plaintiff will suffer if such application was to be refused, the healing balm of an appropriate cost order as well as the appropriateness in all the circumstances of visiting the fault of the attorney upon the head of his client, I ruled that such supplementary affidavit is to be accepted into evidence and that the applicant is to pay the costs of such application.

[18] Returning to the merits of the application, in terms of s 3(4) of the Act:

'(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 the court having jurisdiction for condonation of such failure;

(b) The court may grant an application referred to in paragraph (a) if it 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."

[19] In *Minister of Agriculture and Land Affairs v CJ Rance*[5] it was held that the requirements as contained in s 3(4) of the Act are conjunctive and must be established by the applicant for condonation.[6] In *eThekwini Municipality v Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel*[7] it was held that the factors set out in s 3(4) must be considered in light of the well settled principles of condonation. In this regard, the Supreme Court of Appeal referred to the matter of *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd*[8] where it re-stated the factors which need to be taken into account when considering an application for condonation as follows:

'A full, detailed and accurate account of the causes of the delay and the effects must be furnished as to enable the court to understand clearly the reasons and assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the

[5] *Minister of Agriculture and Land Affairs v CJ Rance* [2010] ZASCA 27; 2010 (4) SA 109 (SCA).
[6] Ibid para 11.
[7] *eThekwini Municipality v Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel* 2021 ZASCA 96 para 10.
[8] *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd* [2017] ZASCA 88; 2017 (6) SA 90 (SCA) para 26.

convenience of this court and the avoidance of unnecessary delay in the administration of justice.'

In addition, the Court has held in *Madinda v Minister of Safety and Security*[9] (*Madinda*) that

'The phrase "if [the court] is satisfied" in s 3(4)*(b)* has long been recognised as setting a standard which is not proof on a balance of probability. <u>Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties.</u>'[10] (Emphasis added).

[20] As far as the good cause requirement is concerned, the Court held that:

'"[G]ood 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 such possible factors become relevant. These may include the success in the proposed action, the reasons 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 therefor.'[11]

. . .

'"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 the case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutory prescribed limit for the giving of notice. Sub-paragraph (iii) calls for the court to be satisfied as to the latter. Logically, sub-paragraph (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.'[12]

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[9] *Madinda v Minister of Safety and Security* [2008] ZASCA 342008 (3) All SA 143 (SCA).

[10] Ibid para 8.

[11] Ibid para 10.

[12] Ibid para 12.

[21] The present application is opposed by the first respondent who in essence, contends that:

(a) The applicant has not shown good cause for his failure to timeously give notice in terms of s 3; and

(b) The first respondent has been unreasonably prejudiced by the applicant's failure to comply with s 3 of the Act.

[22] In deciding whether the applicant has given a reasonable explanation for his failure to timeously serve a notice in terms of s 3(2), it is necessary to consider when the applicant had all the necessary information in terms of s 3(4) to enable him to formulate the notice.[13]

Failure to show good cause:

[23] According to Mr Mazibuko, the applicant has failed *in casu* to show a good cause for filing the required notice timeously, for the reasons which follow below.

Absence of reasonable explanation:

[24] It is common cause that the applicant was arrested by an employee of the first respondent on 9 March 2019. On this day, according to first respondent, all material facts giving rise to the applicant's claim became known to him. Furthermore, it is true that the cause of action in respect of the action against the first respondent arose on the date of the arrest.

[25] As held in *Madinda*, however, a Court should consider 'the overall impression made on a court which brings a fair mind to the facts set up by the parties.'[14] Considering the relevant facts before Court in the present matter, it is common cause that the applicant had been arrested, detained and subsequently charged on charges

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[13] Footnote 7 para 11.

[14] Footnote 9 para 8.

of stock theft. Since his release on bail on the 20th of March 2019, the applicant was burdened with these criminal charges against him.

[26] It appears from the charge sheet, that the applicant has been acquitted on 17 May 2021. It is not unreasonable to expect that the first priority of the applicant up until the date of acquittal would have been the potential conviction and incarceration pursuant to such potential conviction. It is also not unreasonable to accept that a person, in the shoes of the applicant, may only after being acquitted by a court of law, consider appropriate actions against the relative authorities, such as the South African Police Service and the Minister of Police, in respect of a potential claim based on unlawful arrest.

[27] It is true as argued by Mr Mazibuko on authority of the matter of *Van Wyk v Unitas Park Hospital*[15] that: '. . . the explanation [for the delay] must cover the entire period of delay.'

[28] Applying the latter to the present facts before Court, the applicant and the deponent to the founding affidavit are indeed silent in respect of the period since acquittal of the applicant till the consultation with the first attorney who then referred the applicant to his present attorney of record somewhere around August 2021.

[29] But considering the 'full picture' in this regard I do, however, take into consideration that approximately three to four months had expired since the date of acquittal of the applicant and the first of two notices in terms of section 3 (2) of the Act being sent to the first respondent on behalf of the applicant.

Lack of reasonable prospects of success:

[30] As already indicated, with reference to the relevant authorities, good cause for the delay usually comprehends the prospect of success of the main action. In this regard, Mr Mazibuko's contention, with reference to *Scheepers v Minister of Safety*

[15] *Van Wyk v Unitas Park Hospital* [2007] ZACC 24; 2008 (2) SA 140 (CC) para 22.

and Security[16] to the effect that the mere fact that the person was not prosecuted after the arrest or that the person was later acquitted does not on its own (and *per se*) render the arrest unlawful, is correct.

[31] The first respondent's contention that the applicant's attorney has made the assertion that the applicant has a good prospect of success in the main action without having been put in possession of the police docket pertaining to the charges which the applicant had been faced with, is also correct. However, this is where the contents of the supplementary affidavit become relevant.

[32] The correspondence and facts before Court show that, prior to the present application being launched by the applicant, the attorney acting on behalf of the applicant has already, approximately four months prior to the application being launched by the applicant, requested the state attorney to furnish him with the police docket, to which the state attorney and first respondent failed to respond. Such docket was, however, made available to the applicant after the present application had been launched, which necessitated the filing of the supplementary affidavit.

[33] Of importance with regards to the contents of the supplementary affidavit is that this affidavit expanded upon the explanation provided by the applicant regarding how he came into possession of the particular stolen livestock on that particular day, how he dealt with such livestock and the explanation he had provided to the arresting officer at the time. Suffice it to say that the explanation provided by the applicant was plausible to such an extent that I consider the applicant's prospect of success in the main action to be good.

Unreasonable prejudice:

[34] As far as the third requirement of s 3(4) of the Act is concerned, it was held in *Minister of Public Works v Roux Property Fund (Pty) Ltd*[17] (*Roux Property Fund*) that:

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[16] *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG).
[17] *Minister of Public Works v Roux Property Fund (Pty) Ltd* 2020 ZASCA 119.

'. . . it is not all and any prejudice that precludes the grant of condonation. It is only unreasonable prejudice. The availability of witnesses and records will be of particular importance under this head, but other features may also be relevant.'[18]

[35] In *Roux Property Fund*, the Court took into consideration that key witnesses who had previously been in the employment of the relevant government department had since been dismissed from its employ. The inordinate delay of more than three and a half years between the time the respondent (applicant in the Court *a quo*), was aware that it was required to bring the condonation application and the time that it brought the application was prejudicial to the organ of state.

[36] In the present matter, the application for condonation was launched approximately one year after the first delayed notice in terms of section 3 (1)(a) of the Act had been sent to the first respondent. Further, unlike in *Roux Property Fund*, the first respondent does not reply on either the unavailability of witnesses or records. The first respondent merely states that:

'. . . due to fallibility of human memory, employees of an organ of state concerned may not remember how the events giving rise to a debt claimed unfolded.'

[37] It is true that the first respondent's employees do indeed deal with thousands of matters on an annual basis. However, there is no factual basis for the contention that such witnesses, and particularly the arresting officer, will not be able to refresh his memory in support of his evidence to be led before Court.

[38] I am therefore satisfied that the application for condonation should succeed and that the applicant should not be denied his constitutional right of access to court.

[39] As far as costs is concerned, the applicant, is on the one hand, successful in this application before Court. On the other hand, the applicant seeks an indulgence from the Court in applying for condonation for non-adherence to the applicable legislation. I also do not deem the opposition by the first respondent to the applicant's

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[18] Ibid para 20.

application to be unreasonable. In view thereof, I deem it appropriate that each party is to pay its own costs.

Order

Therefore, I make the following order:

1. The applicant is granted condonation in terms of s 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 for the late notification of his intention to institute legal proceedings against the first respondent.

2. Each party is to pay its own costs.

[redacted]

HEFER AJ

Appearances:

On behalf of the applicant:	Adv C Zietsman
Instructed by:	Loubser Van Wyk Inc. Plaintiff's attorney c/o Jacobs Fourie Attorneys Bloemfontein
On behalf of the first respondent:	Adv MS Mazibuko
Instructed by:	State Attorney Bloemfontein