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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2013/33619

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. NO
.....	
SIGNATURE	DATE 19 November 2024

In the matter between:

P[...], C[...]

Applicant

And

**MINISTER OF SAFETY AND CONSTITUTIONAL
DEVELOPMENT**

First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 19 November 2024.

MAHON AJ:

[1] This is an application for condonation under section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act"). The Applicant seeks to condone his failure to comply with section 3(2)(a) of the Act, which requires notice of intended legal proceedings to be served on the relevant organ of state within six months of the date the debt becomes due.

[2] The Respondents oppose this application, citing procedural non-compliance, lack of good cause, and the prejudice they allege would result from condonation being granted.

[3] The central issues for determination are:

[3.1] Whether the Applicant has shown good cause for his non-compliance with section 3(2)(a) of the Act.

[3.2] Whether the Respondents would suffer unreasonable prejudice if condonation is granted.

[3.3] Whether the Applicant's claim has prospects of success on the merits.

[4] The Applicant, a businessman and owner of A[...] L[...] C[...]s H[...], was arrested on 11 September 2009, on charges relating to allegations of sexual assault of minors under his care. The arrest occurred at the children's home despite his offer to surrender himself at the police station.

[5] The Applicant appeared in court on 14 September 2009, and the matter was postponed for further investigation. By October 2010, all of the charges against the Applicant had been withdrawn.

[6] The Applicant initiated a civil claim for damages on 10 September 2013, shortly before the debt was due to prescribe by virtue of the provisions of section 11(d) of the Prescription Act 68 of 1969. No notice under section 3(2)(a) of the Act had been served.

[7] Because the Respondents had failed to deliver their plea to the Applicant's particulars of claim, on 31 January 2014 the Applicant delivered a notice of bar as contemplated in Uniform Rule 26, which required the Respondents to deliver their plea within five days after the day upon which the notice was delivered. That period expired on 7 February 2014 without delivery of the plea, with the result that the Respondents were *ipso facto* barred from doing so, unless the bar was uplifted.

[8] Despite having been barred, on 17 February 2014 the Respondents delivered a plea in which the Respondents raised a special plea regarding non-compliance with the Act.

[9] No further procedural steps were taken by any of the parties until 21 February 2021, some 7 years later, when the Applicant delivered a notice of substitution of attorneys of record. Even then, no further procedural steps were taken until August of 2021, when the Applicant instructed his Attorney of Record to request the Respondents to abandon their special plea. The Respondents, however, declined the proposal.

[10] The request, however, seemingly prompted the Respondents to shake the inertia which they had thus far shared with the Applicant, and they delivered an application for upliftment of the bar on 7 September 2021, resulting in an upliftment of the bar by order of court dated 26 May 2022. In their founding affidavit in the upliftment application, the Respondents foreshadowed an intended amendment to their pleadings.

[11] However, the amendment referred to was not delivered. Curiously, the Applicant sat supine rather than following up with the Respondents in regard to the elusive amendment. The Applicant could also have simply adopted the position that pleadings had closed and progressed the matter, but did not do so. This further stagnation continued until March of the following year, that is, for more than 9 months, until the Applicant's attorney wrote to the Respondents proposing that the

parties agree that pleadings were closed. The Respondents furnished their agreement on 27 March 2023.

[12] Although the matter then seemed to gain a semblance of impetus as discovery notices were delivered, the Applicant still did nothing to address its non-compliance with section 3(2)(a) of the Act until it launched the present application on 29 November 2023.

[13] Against this background, it is evident that the present application for condonation was launched:

- [13.1] more than 9 years after the action was instituted;
- [13.2] more than 9 years after the Applicant's non-compliance with section 3(2)(a) of the Act was raised by the Respondents (albeit in a plea which was irregular for having been delivered under bar);
- [13.3] more than 2 years after the Respondents sought to uplift the bar; and
- [13.4] a year and a half after the bar had been uplifted (and the Applicant was able to react to the Respondent's regularised special plea).

[14] The Applicant argues that he meets the statutory requirements for condonation in that:

- [14.1] The claim was initiated within the three-year prescription period.
- [14.2] The Applicant was unaware of the notice requirement due to lack of legal advice and financial constraints, which delayed his pursuit of legal remedies; and
- [14.3] The Applicant contends that the Respondents have access to relevant documents and witnesses and that the absence of notice has not impacted their ability to defend the claim.

[15] Insofar as the substantive merits of his main claim are concerned, the Applicant asserts that his arrest and prosecution were unwarranted and based on unreliable allegations, that the withdrawal of the charges indicates the lack of a

reasonable basis for the prosecution, and that he suffered reputational and financial harm, including the collapse of his businesses, due to the Respondents' actions.

[16] The Applicant contends that his claim has strong prospects of success, supported by the lack of credible evidence for his prosecution and the Respondents' failure to refute key aspects of his case. He argues that the Respondents would not suffer significant prejudice if condonation is granted, as they have had ample time and resources to prepare their defence. He asserts that timeous notice would not have materially altered their position.

[17] Despite being legally represented throughout the proceedings, the Applicant did not act to rectify the non-compliance after the Respondents raised their special plea in February 2014. Even if one were to assume in the Applicant's favour that he was under no obligation to react to the contents of the special plea until such time as the bar had been uplifted, it must nonetheless be borne in mind that the Applicant must have considered that the bar would ultimately be uplifted as he did not oppose the upliftment application. He therefore had a number of years to anticipate the upliftment of the bar and to deal with the special plea in the form of an application for condonation.

[18] Despite this, he waited a further year and a half after the upliftment was granted, before bringing the present application. One would have expected the Applicant, who by that stage had been waiting for almost 9 years to have his day in court, would have been anxious to bring the proceedings to finality.

[19] The Applicant has not provided a reasonable or detailed explanation for the delay in bringing the condonation application.

[20] The explanations offered (e.g., financial constraints and lack of knowledge of legal requirements) are vague, unsupported by evidence, and fail to account for extended periods of inaction.

[21] The Applicant has failed to demonstrate diligence or take prompt steps to remedy his non-compliance after becoming aware of it.

[22] The Respondents argue that they would suffer unreasonable prejudice if condonation is granted due to:

[22.1] The significant passage of time, which has affected the availability of witnesses and the preservation of evidence;

[22.2] The challenges in reconstructing the facts and circumstances surrounding the Applicant's arrest and prosecution, given the elapsed time; and

[22.3] The fact that the absence of notice deprived the Respondents of the opportunity to investigate and preserve evidence at an earlier stage.

[23] Insofar as the prospects of success in the main action are concerned, the Respondents argue that the Applicant's claim lacks substantive merit as the arrest was executed pursuant to lawfully issued warrants supported by sworn statements from multiple complainants.

[24] The Respondents contend that their actions were conducted in good faith, in accordance with their legal and constitutional obligations.

[25] In my assessment, the Applicant has failed to demonstrate good cause for his delay. As a general principle, condonation is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in instituting action, but also, where this is the case, any delay in seeking condonation, must be given. An Applicant, whenever he realises that he has not complied with a statutory requirement for which condonation will be sought, must apply for condonation as soon as possible.

[26] This principle has been consistently applied by our courts in numerous different instances where condonation for non-compliance with the rules of court is

sought.¹ I see no reason why a different threshold should apply in circumstances where one is dealing with condonation under section 3(4) of the Act.

[27] Furthermore, an Applicant for condonation is required to give an explanation which covers the entire period of delay.² This applies not only to the delay in instituting the action. It applies also to the significant delay in seeking condonation itself.

[28] The Applicant became aware of the charges against him being withdrawn by October 2010. Under section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, the Applicant was required to provide notice to the Respondents within six months. Despite this, no notice was served, and the Applicant only instituted legal proceedings in September 2013, nearly three years after the charges were withdrawn.

[29] While the Applicant narrowly avoided prescription of his claim, this delay itself lacks a comprehensive and cogent explanation. The mere assertion of financial difficulties and ignorance of the legal requirements does not suffice to meet the threshold set by courts for good cause.

[30] Even more concerning is the delay in seeking condonation after the Respondents raised their special plea of non-compliance in February 2014. The Applicant took no steps to remedy the issue or address the special plea for nearly a decade, only filing the current application for condonation in November 2023. The Applicant's inaction following the Respondents' special plea in 2014 and even after consulting attorneys in August 2021 demonstrates a lack of urgency and diligence.

[31] Even accepting the Applicant's explanation that he became aware of the need for condonation in August 2021, there is no explanation for the two-year delay between that time and the filing of the condonation application in November 2023 or

¹ See, for example, *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) at 40I – 41E and *SA Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA).

² *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para [22]

for the period of 1 and a half years between the upliftment of the bar and the launching of the present application. Gaps in the timeline, vague references to financial constraints, and reliance on alleged attorney delays are insufficient to justify the lack of action.

[32] The Applicant's delay undermines the very purpose of statutory time bars, which are intended to ensure prompt resolution of disputes and to protect the interests of the Respondents. The Respondents have argued that the passage of time has adversely affected their ability to defend the claim, with potential evidence being lost and witnesses being unavailable. This prejudice further underscores the importance of prompt action when seeking condonation.

[33] To grant condonation after an inordinate delay and in the absence of a reasonable explanation under the circumstance of this case would undermine the principle of finality and would not be in the interests of justice

[34] In conclusion:

[34.1] In considering the application for condonation, it is clear that the Applicant has failed to satisfy the requirements of section 3(4) of the Act. The Applicant has not provided a satisfactory explanation for either the delay in instituting the action or the substantial delay in seeking condonation. These delays, which span several years, have not been adequately justified with specific and credible evidence.

[34.2] Condonation is not a mere formality. It requires a full and acceptable explanation for all periods of delay, a requirement the Applicant has failed to satisfy.

[34.3] The Applicant's inaction following the upliftment of the bar and the subsequent failure to promptly pursue condonation undermine his case. The delay in launching the present application is particularly egregious given the Applicant's awareness of the statutory non-compliance and the need for remedial action as early as February 2014.

[34.4] The prejudice to the Respondents is also significant, with the passage of time affecting the availability of evidence and the ability to mount an effective defence. This is precisely the type of harm that statutory time bars seek to prevent. Granting condonation in such circumstances would undermine the purpose of the Act and the principle of finality in litigation.

[34.5] For these reasons, the application for condonation must fail.

[35] In regard to the question of costs, I am of the view that scale B would be appropriate.

[36] In the circumstances, the following order is made:

1. The application is dismissed with costs on scale B.

D MAHON

Acting Judge of the High Court
Johannesburg

Date of hearing: 20 August 2024

Date of judgment: 19 November 2024

APPEARANCES:

For the Applicant: RJ de Beer SC

Instructed by: Arthur Moore

For the Respondent: N Matidza

Instructed by: State Attorney Johannesburg