



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

- (1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

12/11/2024

CASE NO: 1905/2022

In the matter between:

MINISTER OF POLICE

APPLICANT

and

MSHIYENI ISAIAH HADEBE

RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be November 2024 at 10:00.

JUDGMENT

MASHILE J

[1] The Applicant (“the Minister”) seeks relief that his late launching of an application to rescind the judgment and order (“the order”) of Roelofse AJ granted in favour of the Respondent (“Hadebe”) on 2 June 2023 be condoned as intended in Uniform Rule of Court 27. Once condoned, the Court is implored to rescind and set aside the order. The order traces its origins to a claim for wrongful arrest and detention that was instituted by Hadebe on 25 April 2022 and served on the Minister on 29 April 2022. The Minister did not defend the action until 8 June 2022.

Background Facts

[2] As will be evident from what is to follow below, this Court will rely on those facts described in the founding affidavit on behalf of the Minister and not seriously contended by Hadebe. On 20 June 2023, Hadebe served the order on the Minister. Armed with the order and proof of service upon the Minister, Hadebe proceeded to issue a warrant of attachment on 16 August 2023 against the property of the Minister. This stirred the Minister into action – launching and serving an urgent application in two parts, A and B, to stay execution pending the current condonation and rescission on 8 September 2023. On 19 September 2023, this Court granted an order staying execution pending condonation and rescission in favour of the Minister.

[3] Mr Joseph Siki Sibanyoni (“Sibanyoni”) is the deponent to the founding affidavit. He states that he is in the employ of the South African Police Services (“SAPS”), deployed in the Department of Litigation and Administration Legal Services, Provincial Offices. His department is responsible for all legal matters pertaining to the Minister for the entire province. Sibanyoni estimates that his department is served with hundreds of summonses every day.

[4] Sibanyoni alleges that on receipt of the summonses aforesaid, they must be registered on the central database. Ordinarily and considering the number of summonses received daily, this takes about a day or two. Once a summons has been registered on the central database, it is sent to one of fifteen legal officers in the litigation department. Each one of these legal officers is responsible for approximately one hundred and fifty files. All these files are at different stages of litigation process.

[5] All the files require attention from the legal officers. Sibanyoni states further that considering the volume of work that confronts each legal officer, it is possible that it could take about five days or so to attend to a new summons that has gone through the process. Upon the legal officer receiving the summons, the legal officer will open a new file and peruse the summons. Thereafter, establish where and when the incident occurred. The legal officer also needs to verify whether the Notice in terms of section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 has been complied with as this may assist with expedition of accessing relevant information quicker as a file could have been opened already.

[6] Where there is no file already opened, the legal officer will write to the Station Commander of the police station to which a claim relates requesting copies of the docket, the occurrence book, the cell register and other necessary relevant documents that could assist in the matter. Sibanyoni says that due to the police stations being understaffed, delays are often experienced in the police stations punctually providing the required information. The information is mainly necessary to assess the matter, whether to oppose or settle.

[7] As a result of the massive size of workload, the delays in obtaining documents and other information that could be relevant from the various police stations, the legal officers sometimes instruct the office of the State Attorney to enter appearance to defend while waiting for documents. Sibanyoni states that this is not the normal practice, but it is only done in exceptional circumstances. This approach may have ominous consequences for

the Minister especially where an appearance to defend has been served and filed followed by a plea. Subsequently, it may transpire in such circumstances that in fact, the matter should not have been defended. Unnecessary legal costs would have been incurred against the Minister.

[8] On 25 April 2022, Hadebe issued summons against the Minister. The summons was served on 29 April 2022. Sibanyoni is not sure of the date on which his attention was drawn to the existence of the summons. He states that it is probable that he was busy attending to other matters on behalf of the Applicant that required urgent attention. Sibanyoni concludes on this that it is possible that the summons may have landed at the bottom of the pile of hundreds of matters that were assigned to him. On 30 May 2022, the office of the State Attorney in Mbombela notified Sibanyoni's department that it has been served with summons in this matter and sought instructions.

[9] Sibanyoni immediately wrote back to the office of the State Attorney giving it instructions to serve and file a notice of intention to defend the claim. Simultaneously, Sibanyoni addressed a letter to the Station Commander at Dirkiesdorp Police Station requesting documentation related to Hadebe's arrest. On 8 June 2022, the office of the State Attorney served and filed a notice of intention to defend Hadebe's action. On 12 July 2022, Hadebe served and filed a notice of bar calling upon the Minister to deliver his plea, which the Minister failed to heed. The attorney appointed to handle the case in the office of the State Attorney was one Mr Masite.

[10] On 9 May 2023, the head of the office of the State Attorney in Mbombela, one Mr Ngobeni, advised Sibanyoni that Masite had resigned, his office lacked capacity to properly attend to the case and asked if he could be directed to appoint a correspondent attorney to assist. Having been furnished with instructions to appoint a correspondent attorney, on 18 May 2023, the office of the State Attorney appointed Messrs Chigo Attorneys ("Chigo Attorneys") to act as correspondent. On the same day, Chigo Attorneys served and filed a Notice of Appointment as Correspondent Attorneys of Record.

[11] Sibanyoni alleges that in consequence of Masite's resignation from the office of the State Attorney, staff and officials at the office of the State Attorney could not trace the file. The upshot of this was that the office of the State Attorney could not furnish Chigo Attorneys with sufficient instructions because they had no papers. On 14 June 2023, Chigo Attorneys turned to their counterparts, Attorneys of Hadebe, to request papers on this case. Hadebe's attorneys responded on 20 June 2023 advising that Roelofse AJ had already granted judgment in the amount of R200 000.00 in favour of Hadebe on 2 June 2023.

[12] On 20 June 2023, Hadebe's attorneys served the order upon the Minister. On 21 June 2023, Chigo Attorneys apprised the office of the State Attorney of developments regarding the order having been granted against the Minister on 2 June 2023. Additionally, Chigo Attorneys drew the attention of the office of the State Attorney to the fact that the matter had previously been set down on 18 May 2023 and that apparently the office of the State Attorney was represented albeit that they could not decipher who the representative was as they could not find the Court file after numerous attempts.

[13] Sibanyoni alleges that his wife and family live in Pretoria because of which he visits them monthly. On 10 July 2023, his wife fell very ill, and this caused him to take leave of absence from work. Thus, he was away from the office from 13 July 2023 until 21 August 2023. He is responsible for High Court Matters and has more than 1000 files currently under his attendance. While absent from work, his supervisor assisted with some of his matters, but this was not one of them. On his return to work on 21 August 2023, he learnt that Hadebe's attorneys had obtained judgment against the Minister.

[14] Having discovered that Hadebe's attorneys had an order against the Minister, he immediately instructed the office of the State Attorney to launch an application for the rescission of the order of 2 June 2023. Heeding his instructions, the office of the State Attorney in turn authorised Chigo Attorneys to initiate rescission proceedings against Hadebe. At that juncture, Sibanyoni had not yet received the police docket, which he

claims is critical for the assessment of a *bona fide* defence and therefore, whether to settle or not.

[15] On 11 August 2023, Sibanyoni finally received the documents from Dirkiesdorp Police Station among which was the Police Docket - CAS 76/11/2021. When he perused the docket, he was persuaded that Hadebe did not have a claim in the main action. According to him, the circumstances under which the arrest and detention happened were lawful and justifiable. On 16 August 2023, Hadebe's attorneys served a warrant of execution on Chigo Attorneys by e-mail. The e-mail message advised that the warrant would be served on the Minister at the Police Head Office in due course by the Sheriff.

[16] The above background is the premise on which the Minister would want this Court to grant condonation and thereafter rescind and set aside the order dated 2 June 2023. Sibanyoni adds that without the papers from the police station, Chigo Attorneys could not have been placed in a position to prepare, launch and serve the application. These documents only reached Sibanyoni on 11 August 2023 but there was no one to hand them over to Chigo Attorneys until his return on 21 August 2023. The remaining period of 14 days, between 21 August 2023 and 8 September 2023, was spent on preparation of this application and consulting with Counsel on it.

Assertions of the Parties

[17] The Minister believes that the factual background above demonstrates that he has shown good cause. The delay in launching the rescission application was caused by failure of the attorneys who represented him to execute their mandate appropriately and promptly. In the circumstances, the delay is excusable in that it was neither intentional nor negligent.

[18] On the other hand, Hadebe asserts that the Minister simply did not comply with Rule 31(2)(b) by failing to deliver its application for rescission within 20 days after Judgment was granted. In the second place, the Minister has failed to show: good cause; the degree of non-compliance with the Rules; the explanation therefore; the importance

of the case; the Applicant's interest in the finality of the Judgment of the Court; the convenience of the Court and the avoidance of unnecessary delay in the administration of justice, a reasonable explanation for their default; that the application is made *bona fide*; that the Applicant has a *bona fide* defence and *prima facie* prospects of success on its application for rescission.

[19] The allegation of the Minister that his attorneys failed to properly carry out their instructions is bare, and hearsay insofar as has not been confirmed by either the office of the State Attorney nor Chigo Attorneys. The Minister asserts that the delay was neither intentional nor negligent in that it was not caused by disregard of the Rules of Court, but no proper explanation is given by the Minister. The delay must have been deliberate in that the Minister chose to act outside of the ordained timelines prescribed by the Rules and stopping short of putting forward a *bona fide* defence.

[20] Hadebe further asserts that the Minister baldly states that there is no prejudice and that he believes that there are good prospects of success on the merits of a rescission application. However, the Minister does not address any aspect of possible prejudice and does not state a single fact to substantiate his belief in the alleged prospects of success of a rescission application. The Minister dismally fails to make out a case for the indulgence and relief sought.

Issues

[21] The first issue that requires the attention of this Court is what effect the notice of bar served on 12 July 2022 has on these proceedings. In other words, what will the practical effect of condoning and rescinding the order be in circumstances where the Minister has been *ipso facto* barred? A further question that arises is whether the Minister has made a case for condonation. If he has, the Court should consider the merits of the rescission application.

Legal Framework

[22] Dealing with condonation, Rule 27 of the Uniform Rules of Court is headed: Extension of time and removal of bar and condonation, and subrule (1) provides:

“In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.”

[23] The issue of good cause shown has received the attention of various Courts in this country. Thus, in *Naidoo v Hesslewood and Another*,¹ the Court stated the following:

“[3] The principles relating to applications for condonation are trite. Suffice to state that an applicant for condonation is required *inter alia* to address the following: the degree of non-compliance with the rules; the explanation therefor; the importance of the case; the respondent’s interest in the finality of the judgment of the court *a quo*; the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”

[24] It has been stated that these factors are not individually decisive but are interrelated and must be weighed against each other. In doing so, for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay. See in this regard the matter of *Academic and Professional Staff Association v Pretorius SC NO and Others*.² See also *Grootboom v National Prosecuting Authority and Another*³ where the Court held that:

“Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation. The

¹ *Naidoo v Hesslewood and Another* [2021] ZAGPPHC 783 para 3.

² *Academic and Professional Staff Association v Pretorius SC NO and Others* [2007] ZALC 118; [2008] 1 BLLR 1 (LC); (2008) 29 ILJ 318 (LC).

³ *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) para 50 to 51.

interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interest of justice.”

[25] Like in the case of rescission, a party cannot hide behind the incompetence of his attorney when seeking condonation. Thus, in *Saloojee and Another, NNO v Minister of Community Development*,⁴ it has been held that a litigant should generally not be absolved from the ordinary consequences of such a relationship, irrespective of the circumstances that resulted in the failure to comply.

[26] Turning to the Rescission application, to the extent that the Minister relies on Rule 31(2)(b) of the Uniform Rules of Court, it could be instructive to cite it in full below:

“A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.”

[27] For the rescission application to succeed, an applicant in the shoes of the Minister ought to allege and show the following:

27.1 Reasonable explanation of the default. If it turns out that his default was wilful or exceptionally negligent, a Court will not entertain his case;

27.2 The application must be *bona fide* and not be made with the intention of merely delaying the Plaintiff's claim; and

⁴ *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141D-F.

27.3 Demonstration of the existence of a *bona fide* defence against the Plaintiff's claim. It will be sufficient if an applicant makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief sought. An Applicant is not required to deal fully with the merits of the case and produce evidence that the probabilities are in his favour.⁵

[28] In the matter of *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Limited*,⁶ it was held that:

"More specifically in the context of a default judgment 'wilful' connotes deliberateness in the sense of knowledge of the action and of its consequences, ie its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct may be."

[29] The Constitutional Court in *Ferris and Another v FirstRand Bank Limited and Another*⁷ held that an attorney's negligence does not always constitute a reasonable explanation for default. Earlier than the Constitutional Court, the Appellate Division, as it then was, in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*,⁸ also had the following to say:

"I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a *reasonable* explanation. While the courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys. Even if one takes a

⁵ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477.

⁶ *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Limited* 1994 (3) SA 801 (C) at 803H.

⁷ *Ferris and Another v FirstRand Bank Limited and Another* [2013] ZACC 46; 2014 (3) SA 39 (CC) para 25.

⁸ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA) para 12.

benign view, the inadequacy of this explanation may well justify the refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success.”

Analysis

Effect of the Minister Being Ipso Facto Barred

[30] Before turning to the requirements of the factors that ought to be addressed in an application for condonation outlined in the *Naidoo* case *supra*, I deem it necessary to tersely consider the existence of the bar in this matter. To this end, Rule 26 of the Uniform Rules of Court deals with failure to deliver pleadings timeously and it provides:

“Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred. If any party fails to deliver any other pleading within the time laid down in these Rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and *ipso facto* barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading.”

[31] The impact of the service and filing of the notice of bar on 12 July 2022 by Hadebe is that the Minister has fundamentally been prohibited from taking any further step in the litigation without first uplifting the notice of bar. Conversely, having barred the Minister, Hadebe legitimately proceeded to apply for a default judgment, which this Court granted on 2 June 2023. Logically, to undo the absolute bar placed on the Minister would be to seek condonation to uplift the bar and only then apply for rescission to set aside the judgment. Alternatively, the Minister could have launched an all-in-one application being for the upliftment of the bar and to rescind.

[32] Assuming that the condonation to rescind were to be granted in this matter, the Minister will still have to deal with the absolute bar brought about by the 12 July 2022 notice of bar. Needless to state that the Minister's approach will necessarily imply multiplicity of applications and therefore, soaring legal costs in circumstances where this can be easily avoided. Apart from gratuitous legal costs, there is a different angle to this and that is that the rescission cannot succeed for as long as the bar exists. Simply put, the notice of bar is an impediment to the success of the rescission application. So, until uplifted it is futile to deal with the condonation for rescission. That said, I will nonetheless proceed to consider the merits of the condonation for the rescission application, but I must emphasise that it is an exercise in futility. It is strange that this point seems to have eluded both parties.

Condonation

The Degree of Lateness or Non-Compliance with the Prescribed Time Frames

[33] I deal now with the requirements as outlined in case law in particular *Naidoo's* case *supra* and many others that followed in its footsteps. For purposes of the condonation for rescission, this Court would be confined to restrict itself to the events that unfolded following the Minister acquiring knowledge of the order of 2 June 2023. This date can be regarded as 21 June 2023. However, the existence of the bar, which became effective five days after 12 July 2022 cannot be wished away. Having served a notice of intention to defend on 8 June 2022, the Minister seem to have gone into a deep slumber such that he ignored even the notice of bar.

[34] Once the claim became officially defended, Masite, handling this case on behalf of the Minister, totally kept quiet and the Minister would have this Court believe that his resignation, which only happened in 2023, was the cause of the delay. How possible this was is enigmatic. From 8 June 2022 to 9 May 2023, the date on which Ngobeni advised Sibanyoni that Masite had left, a period of almost twelve months had elapsed. There is just no account for what transpired during that period. It is manifest that what jolted the

Minister into action was the warrant of execution, not the notice of bar and not the order of 2 June 2023.

[35] Accepting that Masite left around April 2023, did Ngobeni only realise that the office of the State Attorney was snowed under ten to eleven months later? If that is the position, the Minister has the office of the State Attorney to blame and that would have nothing to do with Hadebe. Having requested the police docket on 30 May 2022, Sibanyoni never made any enquiries on how far the police were in providing the documents until advised of Masite's resignation. Even after Masite had resigned, which I assume would have been earlier than 9 May 2023, it still took the office of the State Attorney nine days to appoint a firm of local corresponding attorneys, Chigo Attorneys. If this was because the file could not be traced, I fail to appreciate how it should prejudice Hadebe.

[36] The appointment of Chigo Attorneys on 18 May 2023 was in vain without sufficient instructions. I need to be quick to point out that the police docket with which Chigo Attorneys was supposed to have been placed in possession from the onset, could have been obtained as early as a month or two following the request on 30 May 2022 to the Dirkiesdorp Police Station. Had this happened Chigo Attorneys would have been furnished with proper instructions and the judgment granted on 2 June 2023 probably avoided. Any litigant in a matter like this would have become anxious when noting that since the delivery of the notice of intention to defend in June 2022 nothing seemed to have occurred and that a judgment against the Minister would have been granted or imminent.

[37] I am entitled to assume that while Chigo Attorneys might not have been given full instructions, they would nonetheless have been placed in possession of the summons and the notice of intention to defend. Those papers, limited as they were, would have revealed that the Minister had not taken a step further since delivery of the notice of intention to defend. Any attorney in that invidious position would have written to the attorneys of the other side to establish the status of the matter. This did not happen, instead Chigo Attorneys wrote to the other side asking if they could be supplied with

copies of the file whereupon they were advised that judgment was granted on 2 June 2023.

[38] It is notable that it took Chigo Attorneys twenty-six days before writing to the attorneys of Hadebe enquiring about the file. The founding affidavit is silent on what transpired between 18 May 2023, the date on which Chigo Attorneys received instructions, and 14 June 2023, the date on which they addressed their letter to the attorneys of Hadebe. Quite apart from the aforesaid unexplained period, no proper account is extended on what happened. On 20 June 2023, the attorneys of Hadebe told Chigo Attorneys that Roelofse AJ granted judgment on 2 June 2023. The 20-day period referred to in Rule 31(2)(b) of the Uniform Rules of Court began to tick on 21 June 2023 and expired on 21 or, at most 22, July 2023.

[39] Sibanyoni was already mindful of the judgment when he departed for Pretoria on 13 July 2023, having acquired knowledge of it on 20 or latest, 21 June 2023. He had been two days in possession of the police docket when he left on 13 July 2023. He proffers no explanation for what he did between 21 June 2023 and 10 July 2023 when he received news of his wife's illness. Knowing that his department was often inundated with serious and/or urgent matters requiring constant monitoring, it was horrifically negligent to leave this file without making any of his colleagues aware that the twenty-day period within which to apply to rescind the order was to expire on 21 or 22 July 2023. This remissness has nothing to do with Hadebe and he should not be prejudiced by it. The Minister has made his bed and must lie on it.

[40] The Minister wants this Court to accept that due to Sibanyoni's leave of absence from work no colleague of his could have taken care of matters that required immediate attention. If the office is so busy, it begs the question, why were measures not adopted to ascertain that despite this, it retained some semblance of functionality. When Sibanyoni returned to work on 21 August 2023, it would have been clear that extraordinary measures needed to be taken to get it before Court. Strangely, it took another eighteen days and

not fourteen, as claimed by Sibanyoni, before the application was launched. This is not the type of application that would have taken eighteen days to prepare.

[41] Besides, the Minister does not explain what happened during the eighteen-day period. The Court is left to speculate and/or infer that the period was used for consultation and drafting of the papers. In these instances, a party cannot give a broad synopsis, but it is expected that a full daily account of what unfolded must be furnished. A party who does so is in most cases characteristic of one who is aware of his shortcomings on the issue of accountability. In the result, the Minister's contention that he has furnished a satisfactory explanation of the non-observance of the time frames in the Rules is rejected as devoid of any merit.

Prospects of Success in the Main Case

[42] Here the Minister contends that his defence would have been that the arrest was lawfully executed as contemplated in section 40(1)(g) of the Criminal Procedure Act 51 of 1977. The section, if successfully proved, will amount to a complete defence against the claim of Hadebe. The section provides that a peace officer may without warrant arrest any person who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.

[43] Like in the case of section 40(1)(b), over time four jurisdictional prerequisites for the successful reliance on section 40(1)(g) defence have crystallised and they are that:

- 43.1 The arrestor is a peace officer;
- 43.2 The arrestor in fact entertained suspicion;
- 43.3 The suspicion which he held was that the suspect had committed an offence which is referred to in Schedule 1 (not being the offence of escaping from lawful custody); and
- 43.4 The suspicion rests upon reasonable grounds.

See in this regard, *Duncan v Minister of Law and Order*,⁹ and *Stemar v Minister of Police and Another*.¹⁰

[44] In deciding whether the grounds were reasonable, the factual circumstances surrounding the arrest upon which the arresting officer acted upon ought to be construed objectively such that a reasonable person would have harboured such a suspicion. If the arresting officer acted on second hand information, the information must be such that a reasonable person would have believed that an offence of the nature has been committed.¹¹

[45] Positive demonstration of all the jurisdictional prerequisites as described above affords police officers the opportunity to exercise discretion whether to arrest. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*,¹² Chaskalson P held that the Bill of Rights required that the exercise of a discretion must also be objectively rational otherwise it is in effect arbitrary.

[46] There is no difference of opinion that the police officers who apprehended Hadebe were peace officers and that they entertained a suspicion that Hadebe had committed the offenses for which he had been accused. The aforesaid offences are one of those mentioned under Schedule 1. That being the position, the only issue which falls to be determined is whether such suspicion rested on reasonable grounds. It is the Minister's argument that the ground on which that suspicion rested was reasonable. Hadebe, on the other hand, contends otherwise.

[47] The Minister asserts that the arrest was effected after the conduct of investigations at the premises of Hadebe. In consequence of these investigations, the stolen livestock

⁹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

¹⁰ *Stemar v Minister of Police and Another* [2014] ZAGPPHC 295 para 14.

¹¹ See *R v Van Heerden* 1958 (3) SA 150 (T) at 152; see also *Duncan*, supra at 814D-E.

¹² *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) paras 85-86; See also *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) para 36.

was found in his possession. The arrest was therefore effected in terms of section 40 of the Criminal Procedure Act 51 of 1977, concludes the Minister. The allegation that the arrest followed investigations is bald and unsubstantiated. In other words, this Court is supposed to simply accept that they were conducted, and that the suspected stolen livestock was found in his possession.

[48] The Minister stops his enquiry at an early stage. Without probing the circumstances under which Hadebe came into possession of the livestock, the peace officers' suspicion could not have rested on reasonable grounds. The point is, could he not have proffered an innocent explanation of his possession of the livestock? One will never know because, *prima facie*, no such questions were posed to Hadebe.

[49] Even if the livestock was found to have been stolen, it would still have been unreasonable to arrest him without ascertaining that he was a flight risk and therefore likely not to attend Court proceedings. Given the facts in this matter, it is unavoidable to conclude that the police were rather eager to make arrest under circumstances where they could have probed, verified their investigations and made the arrest or, depending on the situation, requested Hadebe to visit the Police Station for a statement. I cannot agree with the Minister that the arrest was justifiable as contemplated in section 40(1)(g) of the Criminal Procedure Act 51 of 1977.

[50] To the extent that the Minister could be suggesting that it is not unlawful to arrest a person and then to release him before the expiry of forty-eight hours, I need to point out that any form of deprivation of another's freedom without proper justification is to be deplored in the strongest possible terms. It is of no moment that the period was less than forty-eight hours or not. There was no need to arrest Hadebe if confirmation of his innocence could have been accomplished without his unlawful deprivation of his freedom.

[51] The Minister's reference to the case of *Smith v Minister of Police*¹³ where Bloem J stated that, "the subsection provides that the person who has been lawfully arrested shall

¹³ *Smith v Minister of Police* [2023] ZAECKMHC 45 par 30.

be in lawful custody until lawfully discharged or released from custody”, is misguided and quoted out of context. The statement in *Smith* presumes that the arrest was justifiable whereas it is not the case in this matter.

[52] The two special pleas that the Minister asserts would have raised – Failure to comply with Judicial Matters Amendment Act 8 of 2017 read with the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 and section 3 of the State Liability Act 20 of 1957 would have been dead in the water. Section 3(2) of the Judicial Matters Amendment Act, 2017 provides that the [Plaintiff] or [Defendant], as the case may be, or his or her legal representative must, after any Court process instituting proceedings and in which the executive authority of a department is cited as nominal Defendant or Respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department and within five days after the service of the process serve a copy thereof on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued.

[53] I am at loss why the Minister would make this allegation when it is clear that Hadebe was arrested on 21 December 2021 and the statutory Notice in terms of section 3 of the Institution of legal Proceedings against certain Organs of State Act 40 of 2002 having been delivered to the Minister and the Provincial Commissioner Nelspruit at 7 Ferreira Street, Mbombela, on 21 January 2022, well within the six-month period, this defence rings hollow. The summons too was properly served on the National Commissioner of SAPS at 17th Floor, Old Telkom Towers, 152 Johannes Ramokhoase Street, Pretoria on 8 July 2022. It is trite that the objective of the Act is that the action should reach the Minister. Based on this matter, it is indubitable that the attention of the Minister was drawn to the claim.

Non-Joinder of The National Director of Public Prosecutions

[54] The allegation that Hadebe failed to join the National Director of Public Prosecutions (“NDPP”) is staggering. The Minister has stated in the founding affidavit, deposed to by Sibanyoni, that Hadebe was arrested and released within forty-eight hours.

The question is, if that is the case, where and how does the NDPP and/or the Minister of Justice and Constitutional Developments come into this? Had Hadebe been in custody beyond forty-eight hours, he would have been kept there at the behest of the NDPP so that his attendance of Court would be guaranteed. This is not what transpired because he was released prior to appearance in Court. Accordingly, reference to the Supreme Court of Appeal in the matter of *Minister for Justice and Constitutional Development and Others v Moleko*¹⁴ is misplaced and finds no application here.

[55] Over and above the lack of merit in these so-called defences raised by the Minister, I need to still accentuate that the hurdle to be overcome by the Minister on prospects of success remains the upliftment of the bar. What purpose will it serve to grant the current application if the Minister is still barred? Obviously, none. The belief that there are good prospects for success is a fallacy.

Prejudice

[56] Had the Minister properly attended to this matter as per the case management order, it could have been heard and concluded probably in the first quarter of 2023. To audaciously state that Hadebe would not suffer any prejudice if this Court were to grant condonation is oblivious of the fact that Hadebe has interest in and is entitled to a speedy resolution of his claim. Besides, to grant condonation in these circumstances will be to cause gratuitous delay in the administration of justice.

Conclusion

[57] A consideration of all the above, that the Minister has been barred and that prospects of success are practically not present, lead this Court to the decision that it will be an exercise in futility to accede to the Minister's application. Here the interest of justice clearly dictates that the application be dismissed with costs.

¹⁴ *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA).

[58] While on the issue of costs, perhaps it is appropriate to state that it would have taken the Minister to properly peruse the papers to notice that the two special defences that he said he would raise in the main case were condonation to be granted were spurious. I say this because it is clear from the papers that the section 3 Notice was properly delivered and that the service of the summons was also served upon the Minister and the office of the State Attorney. Additionally, it should not have required effort to realise that non-joinder of the NDPP or the Minister of Justice and Constitutional Developments was incorrect. For this reason, I hold that this Court needs to demonstrate its displeasure by ordering costs at a higher scale of party and party.

Order

[59] In the result, the application fails, and I make the following order:

- 1 The application is dismissed.
2. The Minister is directed to pay Hadebe's costs at Scale B of party and party.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES

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Date of Judgment:	12 November 2024