IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO: 3615/2023

Reportable: Yes

In the matter between:

ENOCH MGIJIMA LOCAL MUNICIPALITY Applicant

and

Z[...] F[...] obo Y[...] A[...] F[...] Respondent

and

CASE NO: 3616/2023

ENOCH MGIJIMA LOCAL MUNICIPALITY Applicant

and

MXOLISI QUINTON MASAYIMANI Respondent

JUDGMENT ON APPLICATION FOR

LEAVE TO APPEAL

BRODY AJ:

[1] This is an opposed application for leave to appeal to the full court of this division against the judgment of this court granting condonation for the applicant's failure to serve the notices contemplated in section 3(1)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 ("the Act") within the period laid down in section 3(2)(a) of the Act, and costs.

[2] The two matters that initially came before this court were consolidated in one judgment as both matters were applications for condonation in terms of section 3(4) of the Act, involved the same defendant, the same legal teams, and very similar facts.

[3] As in the original judgment, the facts in the above matters are unique in that Ms F[...]'s minor child was electrocuted at Aloe T, Squatter Camp, Komani and within two days of that electrocution, Mr Masayimani, was electrocuted, apparently in the same place. Both electrocutions took place within the jurisdiction of the defendant municipality and both the electrocutions had very severe consequences for both the minor child and Mr Masayimani, who lost the use of his left arm. In both the matters that came before this court, for condonation, the defendant municipality did not react to the initial electrocution, despite it being reported to a Ward Councillor and the South African Police Services, and this then resulted in the second electrocution.

[4] The defendant municipality served and filed an extensive application for leave to appeal in which numerous grounds of appeal were raised, (and although there is much repetition), the essential complaints were that this court had:

[4.1] erred in placing an onus on the municipality to plead facts which could result in a conclusion that the plaintiffs were aware of their right to claim as early as the date when the causes of action arose;

[4.2] erred in not dismissing the applications on the basis that the plaintiffs had in their possession the minimum facts for prescription to run on the date of the electrocutions;

[4.3] erred in finding that the claims had in fact prescribed;

[4.4] erred in finding that the municipality had failed to plead any facts showing that the plaintiffs were aware of their right to claim, (and on a particular date);

[4.5] erred in failing to distinguish the facts and legal principles in RAF and another vs Mdeyide 2011(2) SA 26 (CC);

[4.6] erred and misdirected itself in placing reliance on the judgment of Dike vs South African Police Service (2023) ZAECBHC 34;

[4.7] erred in finding that the trial court should finally determine whether the matter has prescribed;

[4.8] erred in granting condonation for the late filing of the notices due to the plaintiffs' failure to provide a full and complete explanation for the delay;

[4.9] erred in granting condonation in the absence of a *prima facie* case against the municipality;

[4.10] erred in finding that the municipality had not been "unduly prejudiced" by the late filing of the notice as the municipality was unable to secure essential records.

[5] Ms Da Silva with Ms Booysen acted on behalf of the applicant, municipality and Mr Madokwe acted on behalf of the respondents (plaintiffs in the main actions).

[6] Ms Da Silva in the main referred to the Constitutional Court matter of Mtokonya vs Minister of Police (2017) ZACC 33; 2017(11) BCLR 1443 (CC); 2018(5) SA 22 (CC) in relation to the knowledge of identity of a debtor and the facts giving rise to a debt in terms of section 12(3) of the Prescription Act 68 of 1969.

[7] In the Mtokonya judgment the matter involved the unlawful arrest and detention by members of the South African Police Services and involved the interpretation of section 12(3) of the Prescription Act, in action proceedings, and after the parties had submitted an agreed statement in terms of rule 33. This judgment is instructive in the manner in which prescription is to be analysed and the court stated the following at paragraph [33] "… It is that, if the reason the creditor does not know of the existence of the debt is that the creditor has failed to acquire that knowledge by exercising reasonable care when he otherwise could have acquired it by exercising reasonable care, then the debt will have become due and prescription will have commenced running."

[8] At paragraph [37] the court stated:

> "The question that arises is whether knowledge of the conduct of the debtor is wrongful and actionable is knowledge of a fact. This is important because the knowledge that section 12(3) requires a creditor to have is "knowledge of facts from which the debt arises". It refers to the "facts from which the debt arises." It does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy."

[9] The court went further to state that,

> "[44] Whether the police's conduct against the applicant was wrongful and actionable is not a matter capable of proof. In my view, therefore, what the applicant said he did not know about the conduct of the police, namely, whether their conduct against him was

wrongful and actionable was not a fact and, therefore, falls outside of section 12(3). It is rather a conclusion of law. As I point out elsewhere in this judgment, the second judgment accepts that what the applicant says he did not know is a legal conclusion and not a fact. Once the second judgment has reached that conclusion, that should have been the end of the matter because that is the only question that the court is called upon to decide in determining the appeal before us.

[45] Knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact. The second judgment accepts that this is so. Therefore, such knowledge falls outside the phrase "knowledge of facts from which the debt arises" in section 12(3). The facts from which a debt arises are the facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor."

[10] The example given by the court is also instructive:

"[53] In January 2006 Mr Shange was 18 years, 5 months old when, after he had referred the matter to the office of the Public Protector on advice of his mother's friend, an advocate in that office informed him that he had a claim against the Member of the Executive Council for Education, Kwa Zulu-Natal (MEC). On 2 February 2006 Mr Shange's attorney dispatched to the National Minister of Education (instead of to the MEC for Education, Kwa Zulu-Natal) a notice in terms of section 3 of the Institution of Legal Proceedings against certain Organs of State Act (Act). That was a notice prescribed by section 3(1)(a) of the Act informing the addressee of Mr Shange's intention to institute legal proceedings. Mr Shange instituted action against the MEC and served summons on the MEC on 3 December 2008. He later gave the MEC the notice required by section 3(1)(a) of the Act and, because this was done late, applied for condonation in terms of section 3(4)(a) of the Act. Section 3(4)(b) of the Act provided that the court could grant condonation for that failure if it was satisfied, among other things, that the "debt" has not been extinguished by prescription."

[54] The MEC delivered a special plea in terms of which he sought the dismissal of Mr Shange's claim for non-compliance with section 3(1)(a) and 3(2)(a) of the Act. In considering whether to grant Mr Shange condonation, the court had to consider whether his claim had not prescribed. The Supreme Court of Appeal took the view that there were two joint debtors in that case, namely, the teacher and the MEC. The latter was said to be a joint debtor on the basis that she was vicariously liable for the delict committed by the teacher as it was committed within the course and scope of his employment. The Supreme Court of Appeal concluded that, on the facts of the case, Mr Shange did not know the MEC's identity as his joint debtor until he was so informed by the advocate in the Public Protector's office. The court then held that, for this reason, Mr Shange did not have the knowledge contemplated in section 12(3) of the Prescription Act in relation to the identity of the MEC as a joint debtor and, therefore, his claim against the MEC had not prescribed. He said that this was so because the prescription period had to be calculated from January 2006 when an advocate in the office of the Public Protector informed Mr Shange that he had a claim against the MEC."

[10] The aforesaid example given by the Constitutional Court in Mtokonya is substantially the same as the facts in this matter. Both plaintiffs were electrocuted in circumstances where the debtor may well have been Eskom, the municipality, or a private individual. The identity of the debtor only became known to both the plaintiffs when they were advised by

attorneys that the municipality was in all probability liable and that it should be sued for damages.

[11] The court further emphasised that it was bound by the issues raised in the rule 33 statement of the parties and could not go beyond that in its decision. The question raised for the court was a very limited one and this is confirmed at paragraph [72], where the court stated that:

> "… However, given that the parties chose to put that contention before the court as the contention that the court would have to uphold were rejected to decide whether the claim had prescribed, the court is not entitled to decide the appeal on the basis of any other question. That includes the question whether or not the respondent has shown that the applicant had knowledge of the identity of the Minister of Police as a debtor or co-debtor and the question whether the applicant had knowledge of the debt. Those were not issues between the parties in terms of the rule 33 statement."

[12] This was further confirmed when the court stated at [75]… "In the present case the court was never asked to decide whether the applicant had knowledge that the Minister was a co-debtor and whether that lack of knowledge, if that be the case, had prevented prescription from running."

[13] The court, in fact, indicated that it will be highly prejudicial to the respondent if the court were to go beyond the rule 33 statement.

[14] This court is of the view that the Mtokonya judgment is distinguishable from the present matter as it involved the arrest and detention of the plaintiff by members of the South African Police Services and the Constitutional Court was required to make a decision in regard to prescription in terms of very limited agreed facts as set out by the parties' rule 33 statement.

[15] Ms Da Silva also referred this court to the matter of Gericke vs Sack 1978(1) SA 821 AD in support of the contention that all that is required is for

a plaintiff to have knowledge of the facts which support a claim. In Gericke, Diemont JA emphasised the following:

> “The critical issue was the identity of respondent – when did appellant acquire knowledge or when she deemed to have acquired knowledge of the identity of the person who caused her injuries.”

[16] In regard to the onus, where prescription is raised, the court stated the following:

> “It was the respondent who challenged the appellant on the issue that the claim for damaged was prescribed – this he did by way of a special plea 5 months after the plea on the merits had been filed. The onus was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of the completion of the period of prescription… However, the Act specifically provides that prescription begins to run only when the debt becomes due and that it is not deemed to become due until the creditor has knowledge both of the identity of the debtor and of the facts from which the debt arises. It follows that if the debtor is to succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date.”

[17] Both the plaintiffs in the present matter, although severely injured, had to undergo hospitalisation, and both have extensive injuries that will require expert evidence during the trial. The extent of these injuries, and the exact nature of the claim, and quantum involved, would certainly have occurred some time after the initial electrocutions. In addition, the true identity of the debtor, is also a factor in the applications for condonation.

[18] In Gericke, the court went further to state the following:

> "The Act provides in express terms that prescription does not begin to run "until the creditor has knowledge of the identity of the debtor", not that prescription will begin to run as soon as the creditor has knowledge of facts or information from which it will be possible for him to deduce or discover the identity of the debtor."

[19] The court went further to state, "Regard will have to be had to the particular circumstances of each case, but for practical purposes it seems to me that there should be sufficient information for the process-server to be able to identity the debtor by name and address.

The conclusion to which I accordingly come is that even though the <u>onus</u> on the respondent was a light one and he failed to prove that the appellant had knowledge of his identity on 13 or 14 February 1971."

[20] As indicated in this court's judgment, no detail was given by the municipality as to the date when the plaintiffs acquired knowledge of the identity of the "debtor" and exactly when prescription began to run. In both matters the date of electrocution was simply pleaded as the date when prescription began to run. This is distinguishable from all the authorities where litigants are arrested and detained by members of the Police Services, who are all clearly employed by the Minister of Police.

[21] Reference was also made by both counsel to the matter of Madinda vs Minister of Safety & Security, Republic of South Africa (2008) ZASCA 34; (2008) 3 All SA 143 (SCA); 2008(4) SA 312 (SCA), which was also dealt with in the main judgment of this matter.

[22] In Madinda, the appellant too was an unemployed woman, aged 32 years, and who applied to the High Court for an order in terms of section 3(4) and her claim vested against the Minister of Safety & Security. In regard to section 3(4)(b) Heher JJA stated the following at paragraph [8]:

> "The phrase "if [the court] is satisfied" in section 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probabilities. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. CEG Die Afrikaanse Pers Beperk vs NESCR 1948(2) SA 295(C) at 297. I see no reason to place a stricter construction on it in the present context."

It is precisely this test that was applied by this court in the issue of condonation.

[23] "Good cause" was also dealt with in the judgment at paragraph [12] as follows:

> "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 that play in s4(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 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 the 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. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits have shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay:

an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interests, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration. The learned Judge *a quo* misdirected himself in ignoring them."

[24] There can be little doubt in this matter that the prospects of success are good and especially in regard to Mr Masayimani's claim where he was electrocuted, at the same place, two days later, without any prevention measures, or reaction, on the part of the municipality.

[25] In regard to prejudice the court stated the following at paragraph [15]:

> "Absence of prejudice has often been regarded as an element of good cause in the context of earlier legislation. It was, no doubt, also an element in determining whether interests of justice lay in terms of s57 of Act 68 of 1995. But in this Act the legislature has deemed it appropriate to treat absence of "unreasonable" prejudice as a specific factor of which an applicant must satisfy the court. An identification of separate requirements of good cause and absence of "unreasonable" prejudice may be intended to emphasise the need to give due weight to both the individuals' right of access to justice and the protection of State interest in receiving timeous and adequate notice."

[26] The pleaded case by the municipality in regard to both cases was a general suggestion that memories fade and that documents are unavailable. This court was unpersuaded by the alleged prejudice and concluded that there was no "unreasonable" prejudice *inter alia* for the following reasons:

[26.1] Ms F[...] reported the matter to a Ward Councillor of the municipality;

[26.2] Ms F[...] reported the matter to the South African Police Services and gave a statement to the police officers on duty; and

[26.3] Mr Masayimani's electrocution took place two days after Ms F[...]'s incident, and in the same place.

[27] Nowhere did the municipality plead, or even suggest, that witnesses were unavailable as they had relocated, gone abroad, or had died. Nowhere was it suggested that documents were missing because of a fire, or any other peril. It is inconceivable that in circumstances where a serious injury is experienced by a minor child, and then by an adult, (who then looses the use of his arm), two days apart, that there is no documentation or "poor memories" of the incidents.

[28] In Madinda the plaintiff's actions were described as follows:

> "18.2 A factor which is to be considered is that she used the first available opportunity to assert her determination to see justice done when, on the return home on the night of 11 September 2004 and despite her parlous physical condition, she wrote on a piece of paper that the police had assaulted her, enabling her sister to lay a complaint on her behalf."

[29] Ms F[...] acted with speed also and immediately saw a Ward Councillor and reported the matter to the South Africa Police Services, in her pursuit of justice.

[30] In relation to the argument that the plaintiff reasonably believed that the South African Police Services would obtain justice for her, the court said the following in Madinda:

> "Appearance, inexperience, naivete, and simple lack of intelligence, individually or in any accommodation, it seems to me, conduce to a reasonable belief that, once a complaint has been laid, the State, with the resources at its disposal, and as what she described in her reply as "the primary agent for the protection and enforcement of …. legal

rights" will follow it up; SF Mugwena's case, above, at 155H – 156E. Indeed there is a provision in the Criminal Procedure Act (s300(1) which enables a court to make a compensatory order having the effect of a civil judgment, so that her belief finds some basis in law as well.

18.4 The appellant was unaware of the requirement of notice until she approached an attorney during May 2005, some two months after the statutory period expired. She was first led to seek help because she saw no apparent progress in the investigation of her claim. It is significant that her initial reaction was to visit her local police station to find out what was happening. There she was advised that the police only investigate complaints with the view to criminal prosecution and that if she wanted to claim damages she should consult an attorney, immediately. She followed that advice. The overall impression that her affidavit creates is that, despite a long initial period of physical debility, she at all times harboured a genuine grievance which she pursued according to a limited comprehension of what was necessary in order to enforce her legal rights. The fact that, from her final discharge from hospital in December 2004 until early May 2005, she waited in ill-founded anticipation and inactivity for some progress in the matter, even if it be a matter for mild disapprobation, it is not sufficient to negate her genuine intention to pursue her claim."

[31] There can be no doubt that Ms F[...] sought justice for her minor child, and had a genuine intention to pursue her claim to finality. Unlike the plaintiff in the Madinda matter, the South African Police Services never advised her to seek assistance from an attorney to prosecute her claim civilly.

[32] This court had no doubt that the prospects of success and explanation for the delays were both in favour of the plaintiffs. Both plaintiffs consulted attorneys as soon as could reasonably be expected, given their misconception, and these in turn reacted expeditiously. A further short delay was explained by Ms

F[...]'s attorney as a need to obtain hospital records in respect of the minor child's injuries. This is fully understandable as the amount of the claim is always relevant to the extent of the injuries.

[33] In Madinda the court further stated the following in regard to ""unreasonable"" prejudice:

> "The approach to the existence of ""unreasonable"" prejudice (not simply any level of prejudice, an aspect which the judgment of the court *a quo* blurs) requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus is on an applicant to bring an application within the terms of the statute, the court should be slow to assume prejudice for which the respondent itself does not lay a basis."

[34] As indicated above, this court was not satisfied that a basis had been made by the municipality for "unreasonable" prejudice.

[35] Ms Da Silva also referred this court to the matter of Minister of Police vs Zamani (2021) ZAECBHC1. My brother, Mbenenge JP found in that matter that there was not a hard and fast rule relating to when prescription starts to run, and especially in matters against the Minister of Police.

[36] Finally, Ms Da Silva referred to the Minister of Police vs Dike matter, (2023) ZAECBHC34 and argued that the decision by my sister, Norman J, was clearly "wrong".

[37] Mr Madokwe handed in the judgment of my sister Norman J, relating to the application for leave to appeal where the application was dismissed with costs. It was common cause in that matter that the Supreme Court of Appeal declined to grant leave to appeal against my sister, Norman J's refusal to grant leave.

[38] In the Dike judgment my sister, Norman J, stated the following, which is highly relevant to this application for leave to appeal:

> "[10] Courts are obliged when interpreting any legislation to promote the spirit, the purpose and the objects of the Bill of Rights. The Prescription Act is no exception. In McCleod vs Kweyiya it was stated that:
>
> > "[13] It is the negligence, and not an innocent inaction that s12(3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself. In MEC for Education, Kwa Zulu-Natal vs Shange 2012(5) SA 313 (SCA)…."
>
> [11] In Minister of Police vs Zamani the court did not depart from the established principles when it determined the issue of prescription. This court was not determining prescription but was dealing with it as a factor to be considered in dealing with condonation. There was accordingly no reason to distinguish it.
>
> [12] I had referred in the main judgment to the decision in Gericke vs Sack, where the Appellate Division stated:
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> > "It follows that if the debtor is to succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date. As aforementioned no such allegations were made in the answering affidavit".

[39] Ms Da Silva also made reference to the matter of Minister of Public Works vs Roux Property Fund (Pty) Limited (2020) ZASCA 119 where the issue of non-compliance with section 3(1) also arose. The court in Minister of Public Works

vs Roux Property Fund also made reference to the Madinda judgment and emphasised that for purposes of condonation the court did not require proof on a balance of probabilities but “the overall impression made on a court which brings a fair mind to the facts set up by the party”.

[40] That court also emphasised that prescription is a “mixed question of fact and law”. “It is not a matter of impression, unlike the questions of good cause and prejudice in the other sub-sections. The court must therefore be satisfied that the claim has not prescribed in order to grant condonation.”

[41] In this matter the court was not satisfied that the claim had prescribed, on the basis of the papers and therefore that this issue could be revisited by the trial court, after hearing evidence.

[42] The illustration of how the municipality dealt with the issue of the identity of the respondent is to be found in the papers where Ms F[...] stated the following in her particulars of claim:

> “24. I must mention that, before the interaction with Mr Tyatyeka, my mother and I did not consult any attorney in respect of the civil claim. We did not know that we have a civil claim and a right to sue someone pursuant to my son’s electrocution. Furthermore, before the consultation with Mr Tyatyeka, I did not know the identity of the respondent.”

[43] In the municipality’s plea this issue is dealt with as follows:

> “21.1 The defendant denies that it was responsible for the installation of electricity, maintenance, upkeep and appropriate regular inspections of the area in question (that of the squatter camp, Queenstown), either as alleged or at all.”

[44] Although further amplification is given to that denial, the general gist of the denial is that it was not the responsibility of the municipality to maintain the

electricity network and nor was it aware of the "illegal connections". In contrast to this pleading, the answering affidavit to the application for condonation by the municipality, states *inter alia* the following:

> "72.8 The applicant was at all times aware that the respondent was allegedly responsible for the electrical supply within its district. Thus, the applicant ought reasonably to have been aware that any claim for her injuries and that of her child laid against the respondent."

[45] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the Judge concerned is of the opinion that the appeal has a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[46] In Valley of the Kings Thaba Motswere (Pty) Ltd and another vs AL Mayya International (2016) ZAECGHC137 my brother Smith stated the following:

> "[4] There can be little doubt that the use of the word "would" in section 17(1)(a)(i) of the Superior Courts Act implies that the test for leave to appeal is now more onerous. The intention clearly being to avoid our courts of appeal being flooded with frivolous appeals that are doomed to fail. I am, however, of the respectful view that the "measure of certainty" standard propounded by the learned Judge in Mont Chevaux Trust may be placing the bar to high. It would, in my respectful view, be unreasonably onerous to require an applicant for leave to appeal to convince a Judge – who invariably would have provided extensive reasons for his or her findings and conclusions – that there is a "measure of certainty" that another court will upset those findings. It seems to me that a contextual construction of the phrase "reasonable prospect of success" still requires of the Judge, whose judgment is sought to be appealed against, to consider, objectably and

dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party. …”

[47] This court is not persuaded that it misdirected itself by granting condonation to both Ms F[...] and Mr Masyamani, and especially in circumstances where the issue of prescription is one factor, amongst many others.

[48] There are accordingly no reasonable prospects of success and there is no other compelling reason to grant leave to appeal. The applicant has failed to meet the threshold set out in section 17 of the Act, and accordingly the application for leave must fail.

[49] In the result, the following order is made:

[49.1] The application for leave to appeal is dismissed.

[49.2] The respondent (defendant in the main actions) is ordered to pay the applicant’s (plaintiffs in the main actions) costs on scale B as contemplated by rule 69(7).

B B BRODY

ACTING JUDGE OF THE HIGH COURT

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Matter heard on : 15 November 2024

Judgment delivered on : 21 November 2024