



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
- (2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
- (3) REVISED

DATE: **14 FEBRUARY 2025**

SIGNATURE : 

CASE NUMBER: A137/23

In the matter between:

VELAPHI NDABA

APPELLANT

and

MINISTER OF POLICE

1ST RESPONDENT

**NATIONAL PROSECUTING AUTHORITY
OF SOUTH AFRICA**

2ND RESPONDENT

JUDGMENT

MNGQIBISA-THUSI J

- [1] The appellant, Mr Velaphi Ndaba, is appealing against the whole of the judgment and order handed down on 18 August 2022 (per Phahlane J), dismissing his application in terms of section 3(4) of the Institution of Civil Proceedings Against Certain Organs of State 40 of 2002 ("the Act"), in which he sought condonation for failing to comply with the provisions of section 3 of the Act read with section 4(1) of the Act.
- [2] The appeal is with leave of the court *a quo* and is unopposed. Consequently, there was no appearance on behalf of the respondents.
- [3] On 13 August 2013, the appellant was arrested and detained by members of the South African Police Service ("SAPS") on two counts of robbery with aggravating circumstances. He was granted bail on 18 September 2013. Following several appearances, the appellant was eventually acquitted on both counts on 17 June 2015.
- [4] On 2 July 2015, the appellant's attorneys sent letters, in accordance with section 3(1) read with section 3(2) of the Act, to the National Commissioner of Police ("National Commissioner"), the National Director of Public Prosecutions ("NDPP"), and the Minister of Justice and Correctional Services. These letters provided notice of the appellant's intention to initiate civil proceedings.
- [5] On 11 May 2016, the appellant's attorneys received a letter (dated 2 November 2015) from the National Commissioner acknowledging receipt of the section 3 notice and further informing the appellant that the letter giving notice would be forwarded to the relevant Provincial Police Commissioner, in particular the Kwa-Zulu Natal provincial commissioner, in whose jurisdiction the cause of action arose, for further investigation.
- [6] In the meantime, on 28 April 2016, the appellant instituted an action against the respondents, claiming damages for an alleged unlawful arrest and detention and alleged loss of income. On 16 November 2016, the

respondents filed a plea defending the appellant's action. Over and above defending the action on the merits, the respondents also raised a special plea that the appellant had failed to comply with the provisions of section 3 of the Act on the grounds that:

- [6.1] No notice of intention to institute the present proceedings was given by the appellant to the respondents before instituting the action;
- [6.2] alternatively, no written notice was given within 6 months from date when the cause of action arose; or
- [6.3] further alternatively, no written notice was given in accordance with the Act.

[7] Section 3 of the Act reads in part as follows:

- “(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless—*
 - (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or*
 - (b) the organ of state in question has consented in writing to the institution of that legal proceeding[s]—*
 - (i) without such notice; or*
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).*
- (2) A notice must—*
 - (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and*
 - (b) briefly set out—*
 - (i) the facts giving rise to the debt; and*
 - (ii) such particulars of such debt as are within the knowledge of the creditor.*
- (3) . . .*

- (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 a court having jurisdiction for condonation of such failure.*
- (b) *The court may grant an application referred to in paragraph (a) if it is 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.*
- (c) *If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.”*

[8] In terms of section 3(4)(b), condonation can be granted where no notice in terms of section 3 was sent or where a notice which was sent is defective in some way. In order to succeed in an application for condonation, the following requirements had to be satisfied:

[8.1] that the debt has not been extinguished by prescription;

[8.2] that good cause exists for the failure to comply; and

[8.3] that the organ of state was not unduly prejudiced.

[9] It is not in dispute that the section 3 notice was served on the respondents before instituting his action or that the cause of action had become prescribed. However, in complying with the provisions of section 3, the appellant did not fully comply with the provisions of the Act, in that he did not comply with section 4(1) of the Act.

[10] Section 4(1)(a) of the Act reads as follows:

“Service of notice”

4(1) *A notice must be served on an organ of state by delivering it by hand or sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is-*

(a) *a national or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department."*

[11] With regard to contemplated legal proceedings against the Department of Police, schedule 1 of the Public Service Act provides that service of the notice must be effected on the National Commissioner of Police and also the Provincial Commissioner of Police of the province in which the cause of action arose. It is not in issue that no notice was sent by the appellant to the Provincial Commissioner of Police in Kwa-Zulu Natal.

[12] In light of the respondents' special plea, during 2022, the appellant launched an application seeking condonation in terms of section 3(4) of the Act for failure to serve the section 3 notice on the Kwa-Zulu Natal Provincial Commissioner in order to rectify the initial oversight.

[13] In refusing condonation, the court *a quo* held that the provisions of section 3 of the Act are peremptory and have to be complied with and that the appellant failed to show good cause for failure to comply. Furthermore, the court *a quo* also found that the deponent to the appellant's founding affidavit had failed to explain the steps taken to remedy the non-compliance.

[14] The appellant is appealing against the judgment and order of the court *a quo* on the ground that the court erred in:

[14.1] failing to consider the purposes of the Act by adopting a strict and mechanical approach in interpreting the relevant section;

- [14.2] in its finding that the deponent to the founding affidavit did not give an explanation setting-out good cause for non-compliance;
- [14.3] in considering the element of good cause in isolation and ignoring all other relevant facts;
- [14.4] in failing to take into consideration that the first respondent suffered no prejudice as a result of the appellant's non-compliance; and
- [14.5] in finding that there was no substantial compliance with the Act.
- [15] With regard to the Appellate Court's discretion where condonation in terms of section 3(4) has been refused, the Supreme Court of Appeal in *Premier, Western Cape v Lakay*¹ stated that :
- “[14] ...if condonation is refused by a court, an appellate court is in my view at liberty to decide the same question according to its own view as to whether the statutory requirements have been fulfilled, and to substitute its decision for the decision of the court of first instance simply because it considers its decision preferable.”
- [16] Counsel for the appellant submitted that the issue was not about strict compliance with the section but rather the determination of the purpose of the section and if the purpose is achieved, strict compliance with the prescribed manner of service was not fatal to the application for condonation. According to the appellant, the purpose of a section 3 notice is to give the organ of state and opportunity to investigate a claim and either pay if the investigation shows that the organ of state is indeed liable, or defend the claim.
- [17] Counsel for the appellant further submitted that it is not in dispute that the National Commissioner had acknowledged receipt of the section 3 notice and had undertaken to forward the notice to the Kwa-Zulu Natal Police Commissioner for consideration and action. Counsel argued that as the first

¹ 2012 (2) SA 1 (SCA).

respondent was defending the action, it is clear that knowledge of the impending action was communicated and that the first respondent suffered no prejudice by the non-service of the initial notice on the Kwa-Zulu Natal Provincial Commissioner. With regard to the requirement of 'good cause' it was submitted that in his founding affidavit the deponent had explained that it was unclear why the appellant's erstwhile attorney had not served the notice on the Kwa-Zulu Natal Provincial Commissioner.

- [18] With regard to the time-frame over which it took the appellant to apply for condonation, counsel submitted that the court *a quo* erred in its finding since section 3(4) sets out the requirements for obtaining condonation for non-compliance with section 3, and that the court's finding in this regard, fell outside the scope of section 3(4). It is not in dispute that at the time the appellant instituted his claim, the claim had not prescribed. Further, the notice in terms of section 3 of the Act was served on the first respondent and on the National Police Commissioner and such notice was given within 6 months of the cause of action.
- [19] The question that arises is whether the appellant in effecting service of the notice has complied with the provisions of section 3 in view of the purpose of the Act². It cannot be gainsaid that the purpose of giving notice to an organ of state is to give timeous and adequate notice so that the state can investigate the claim and decide on its cause of action.
- [20] It was correctly pointed out by appellant's counsel, taking into account that service was effected on the National Commissioner who had undertaken to forward the notice to the Kwa-Zulu Natal Provincial Commissioner, that the court *a quo* misdirected itself in interpreting the section without taking into account the purpose of the Act. Hence, the first respondent, besides raising the special plea also filed a plea defending the appellant's claim, indicative of the fact that the respondent had knowledge of the claim and had adequate

² *African Christian Democratic Party (ACPP) v Electoral Commission and others* 2006 (3) SA 305 (CC) at para 25. See also *Moodliar NO and others v Hendricks NO and others* 2011 (2) SA 199 (WCC) at para 22 where the court held that "insistence that a court cannot under any circumstances condone a deviation from strict compliance may, to some extent, run counter to the inherent jurisdiction of the court."

time to investigate the claim and make a decision to resist the claim by filing a plea.

[21] The reason for non-service on the Kwa-Zulu Natal Provincial Commissioner cannot be imputed on the appellant. The appellant entrusted the processing of his claim to his attorneys and was entitled to accept that his attorney would take all the necessary steps to comply with the relevant statutory provision. As appears from the founding affidavit in the application for condonation, there is no plausible explanation proffered as to why the appellant's erstwhile attorney did not serve the notice on the Kwa-Zulu Natal Provincial Commissioner as she was required to do.

[22] However, taking into account that the National Police Commissioner had undertaken to forward the notice to the Kwa-Zulu Natal Provincial Commissioner for investigation, I am satisfied that the first respondent had timeous knowledge of the appellant's claim and hence suffered no prejudice. It does not lie in the mouth of the first respondent, to gainsay the notification given by the National Commissioner that the notice would be forwarded to the Provincial Commissioner. No such case was made on behalf of the first respondent. I am also of the view that the appellant's right of access to court cannot be circumvented through an overly technical approach by the court *a quo* to the delivery of the notice to the Provincial Commissioner as occurred in the present circumstances.

[23] Even though there was a less than satisfactory explanation in explaining the delay in applying for condonation, given that the claim had not prescribed and that the respondents have suffered no prejudice in consequence of the failure by the appellant to deliver a notice specifically to the Provincial Commissioner, it is in my view, in the interests of justice, that this appeal should succeed.

[24] The costs will follow the result.

[25] In the result the following order is made:

[25.1] The appeal is upheld with costs.

[25.2] The decision of the court a quo is set aside and substituted by the following:

'Condonation is granted to the applicant for failure to serve a notice in terms of section 4 (1) (a) of the Institution of Legal Proceedings Against Certain organs of State Act 40 of 2002'.

I AGREE



NP MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE



C COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA



A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	16 OCTOBER 2024
JUDGMENT DELIVERED ON:	14 FEBRUARY 2025
COUNSEL FOR THE APPELLANT:	ADV. NM DUBE
INSTRUCTED BY:	HC MADIKE INC
REFERENCE:	MR. MADIKE

NO APPEARANCE FOR THE RESPONDENTS