

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023/106026

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

25/08/2025

DATE

SIGNATURE

In the matter between:

ZACHARIA SIPHO MATHABA

Applicant

and

MEC FOR HEALTH GAUTENG

Respondent

COURT ORDER

- A. The application is dismissed with costs, counsel's costs to be at Scale A.

JUDGEMENT

INTRODUCTION

- (1) This is an application by a former employee, as applicant, against his former employer, the respondent, for a declaratory order that the applicant's five-year period fixed-term contract was unlawfully terminated on 12 November 2020.
- (2) The applicant further claims the aggregate salary he would have earned over the remaining period of his contract in the amount of R 6383 471-52 as well as an amount of R 420 397-68 as compensation for the leave forfeited as a result of the premature termination of the applicant's contract of employment.
- (3) A personal costs order was initially sought against the Acting Head of Department of the respondent, but the applicant did not persist with his relief at the hearing as the said person was not joined in the proceedings.

MATRIX AND CHRONOLOGY OF RELEVANT FACTS

- (4) The applicant was appointed as the Chief Executive Officer (CEO) of the Far East Rand Hospital on 18 November 2019 on a 5-year fixed-term contract.
- (5) On 20 September 2020 the applicant was charged with allegations which included fraud, and, alternatively, gross dishonesty for applying for and being paid for commuted overtime.
- (6) On 15 October 2020 the applicant was notified to attend a disciplinary hearing to answer these allegations, which hearing was scheduled for 25 November 2020.
- (7) On 12 November 2020 the applicant was served with a notice of withdrawal of the charges brought on 20 September 2020. On the same day the respondent was summarily dismissed without affording him a pre-dismissal hearing.
- (8) Between 18 November 2020 and 31 August 2023 the applicant launched various proceedings in terms of labour legislation, without success.
- (9) On 17 October 2023 the applicant launched this application presently under consideration. The application was forwarded by the applicant by

email to Mr Thamaga and other persons at the State Attorney's office in Johannesburg.¹

- (10) The applicant states that, as the respondent failed to deliver a notice of intention to defend in the prescribed time period, he set the matter down on the unopposed motion roll on 5 February 2024. On that date Bokabo AJ removed the matter from the roll to enable the applicant to obtain legal representation.
- (11) The application was set down on 23 April 2024 at which time the applicant had legal representation. Mia J removed the matter from the roll again in order for the application to be served by the sheriff. On 29 April 2024 the application was served by the sheriff on the respondent. On 7 May 2024 the sheriff also served the application upon the State Attorney in compliance with section 2 of the State Liability Act 20 of 1957.
- (12) The applicant, in argument, was very critical about the conduct, or rather lack of action, on the part of the respondent and the State Attorney's office after having been served with the application by the sheriff. The respondent delivered an answering affidavit on 28 August 2024. The applicant submitted that this affidavit was delivered some nine months out of time.

¹ Caselines 01-73 to 76.

- (13) Among the many points-*in-limine* raised by the respondent in the answering affidavit,² is that the applicant failed to comply with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organ of State Act 40 of 2002 (the Act). The provisions of section 3 of the Act loom large in these proceedings and will be dealt with hereunder.
- (14) On 4 September 2024 the applicant delivered a replying affidavit.³ The applicant dealt with the issues raised in the answering affidavit comprehensively. The respondent's application for condonation for the late filing of the answering affidavit was also strongly opposed.⁴
- (15) The applicant then proceeded to apply for condonation for his failure to serve a notice in terms of section 3(1)(a) of the Act in his replying affidavit.⁵ A notice in terms of section 3(1)(a) was annexed to the replying affidavit,⁶ which means that such notice was served on 4 September 2024. This was after this application was served on the respondent and the State Attorney. The significance of this fact will be dealt with hereunder.
- (16) The applicant prepared and filed a Chronology as required by the Practice Manual of this court, but he does not mention that he has filed two supplementary affidavits and that the notice ("**RDC4**") was only filed

² Caselines, Answering Affidavit (AA), para 8, 01-109 to 110.

³ Caselines, 01-131 to 01-153 (RA).

⁴ Caselines, RA, paras 27-48, 01-138 to 143.

⁵ Caselines, RA, paras 63-80, 01-147 to 151.

⁶ Caselines, Annexure "**RDC4**", 01-165 to 166.

with the replying affidavit on 4 September 2024. The applicant filed heads of argument on the same date.

- (17) The respondent delivered heads of argument on 19 September 2024. In these heads of argument the respondent raised the issue of whether the applicant's claim has prescribed.⁷ As the applicant was summarily dismissed on 12 November 2020, it was submitted that he had until 13 November 2023 to legally serve his application by the sheriff on the respondent to interrupt the running of prescription.⁸ Reference was also made to section 15(1) and (6) of the Prescription Act 68 of 1969 (the Prescription Act). It was further emphasised that Rule 4(1)(a) and Rule 4(aA) of the Uniform Rules of Court require that service of any document initiating application proceedings shall be affected by the sheriff. It follows, submitted the respondent, that the applicant did not legally serve its notice of motion and affidavit on the respondent until 29 April 2024 to be able to interrupt prescription. This had the effect that the applicant's contractual claim against the respondent became prescribed so it was submitted.
- (18) The further issue that was raised in the respondent's heads of argument is that the notice required by section 3(1)(a) of the Act was not served prior to the instituting of legal proceedings.⁹

⁷ Caselines, Respondent's Heads of Argument, para 3, 07-3.

⁸ Caselines, Heads of Argument, para 3.2, 07-3. The applicant confirmed this fact in his replying affidavit.

⁹ Caselines, Heads of Argument, para 4.3, 07-6.

- (19) The parties held a pre-hearing conference on 11 December 2024 and filed a joint practice note.¹⁰ From this practice note it is clear that the parties placed a long list of issues in dispute. Among these disputed issues are whether this court has jurisdiction to hear the matter, whether it was competent for the respondent to raise a defence of prescription for the first time in its heads of argument and whether the applicant had complied with section 3 of the Act.
- (20) On 6 January 2025 the respondent delivered a supplementary affidavit in which the initial email transmission of the application on 17 October 2023 was raised, as well as condonation was sought for the late delivery of the answering affidavit by a period of three (3) months and not 9 (nine) months as stated in the answering affidavit. Prescription of the applicant's claim was pertinently raised.¹¹ The respondent filed a short form of the notice of motion to obtain leave to file a supplementary affidavit.
- (21) On 20 January 2025 the applicant filed a notice of intention to oppose leave (to the respondent) to file a supplementary affidavit.¹²

THE HEARING

- (22) At the commencement of the hearing, the applicant, who appeared in person, commenced by raising three points-*in-limine*, viz:

¹⁰ Caselines 04-51 to 58.

¹¹ Caselines, Supplementary Affidavit, paras 19-20, 08-7.

¹² Caselines, 08-66 to 67.

- (22.1) That the notice of motion filed by the respondent in January 2025 to obtain leave from the court to file a supplementary affidavit, was fatally defective.
- (22.2) The respondent did not comply with Rule 6(1) in respect of the said application for leave, as the respondent should have filed a substantive application.
- (22.3) It was stated at the pre-hearing conference on 11 December 2024 by the applicant and his legal representatives that prescription cannot be raised in argument, but must be pleaded.
- (23) The applicant cited a number of judgements in support of the first two points referred to above. Mr Moodliyar who appeared for the respondent, complained that he did not get any prior notice of the points-*in-limine*, but nevertheless continued to deal with the submissions of the applicant. He submitted that condonation for the late filing of the answering affidavit can nevertheless be granted. He further argued that the applicant filed two supplementary affidavits without seeking leave from the court and he further submitted that the applicant sought condonation for non-compliance with section 3 of the Act only in his replying affidavit and without bringing a formal application for condonation.

- (24) The applicant strongly opposed the granting of any condonation to the respondent for the late filing of the answering affidavit and the supplementary affidavit. The reason for his opposition seems to be that the respondent only raised the issue that the applicant's claim has prescribed, in the supplementary affidavit.
- (25) The respondent submitted that, in exercising its discretion whether to permit the filing of further affidavits, the court should keep in mind that a matter should be adjudicated on all the facts relevant to the issue in dispute.¹³ It was also pointed out that the applicant did not file a replying affidavit to the respondent's supplementary affidavit for which there was sufficient time before the hearing.
- (26) In respect of minor technicalities and less than perfect procedural steps, Mr Moodliyar submitted that the court could follow **Pangbourne Properties Ltd v Pulse Moving CC and Another**¹⁴ where the court stated:

"[16] There are a large number of matters that come before us in this division in which parties, for a variety of reasons, agree to file affidavits at times suitable to them. Each case must be decided on its own facts and it cannot be said that when affidavits are filed out of time that these are not, without more, before the court.

¹³ **Garnett-Adams Properties (Pty) Ltd v Thomas** (029983/2023) [2024] ZAGPJHC 534 (4 June 2024) at [14].

¹⁴ 2013 (3) SA 140 (GSJ) para 16.

Without attempting to tabulate all instances where affidavits which are filed out of time may indeed be validly before a court, I refer to two examples only. Affidavits can validly be before the court pursuant to an agreement between the parties – see rule 27(1) which provides for such an agreement. They can also be validly before the court if the interests of justice require it. See the unreported judgement of In re Application for the Issuing of a letter of Request (GNP case No 3771/07, 14 September 2007) where Van der Merwe J (as he then was) said: 'Though the replying affidavit was well out of time it had to be taken into account in the interests of justice.' Shongwe J (as he then was) said in the unreported judgement of Venter v Van Wyk (GNP case No 30323/04, 27 June 2005):

'The first point in limine is, in my view, highly technical. It is correct that the replying affidavit was filed out of time and that no formal application for to and from between the parties which situation I do not prefer to entertain. It is a waste of valuable time. I therefore rule that I will admit all affidavits before me and deal with the important issues presented by the application.' “

- (27) Despite the applicant's highly technical objections against the court granting leave to allow the supplementary affidavit of the respondent, the court regards it to be in the interests of justice that the

supplementary affidavits and condonation applications of both parties be allowed to be part of the record. The exercise of the court's discretion in this manner is further fortified by the conclusion that a plea of prescription is not the *ratio* for the judgement in this matter, but rather the facts set out in the applicant's own papers in respect of the non-compliance with section 3 of the Act in respect of the giving of notice of the claim of the applicant to the respondent.

NOTICE OF INSTITUTION OF LEGAL PROCEEDINGS

- (28) It is a common cause fact in this matter that this application was served by the sheriff on the respondent on 29 April 2024.¹⁵
- (29) It is further common cause that the application was initially transmitted by email by the applicant to the State Attorney's office on 17 October 2023. The respondent argued that this was not service in accordance with Rule 4(1)(a). This form of service was clearly not acceptable to Mia J when she exercised the court's discretion in terms of Rule 4(10) on 28 March 2024 to require service by the sheriff.
- (30) It is common cause that service of the application by sheriff on the respondent and the State Attorney¹⁶ occurred prior to the belated notice given by the applicant (Annexure "NDC4") on 4 September 2024, which is an annexure to the replying affidavit.

¹⁵ Caselines , return of service.

¹⁶ In terms of the State Liability Act referred to above.

(31) In his condonation application, which is part of the replying affidavit, the applicant applied for condonation of his failure to serve notice of his intention to institute legal proceedings for the recovery of the money owing to him as set out in his notice of motion. The applicant sought condonation in terms of section 4(b) of the Act and referred to the three factors listed in this section which the court must consider in granting condonation. They are:

(31.1) The debt must not have been extinguished by prescription;

(31.2) Good cause exists for the failure by the creditor;

(31.3) The organ of state was not unreasonably prejudiced by the failure.

(32) Whilst the applicant made submissions in respect of all three factors which must be considered, his condonation application was made in this replying affidavit after the respondent objected in the answering affidavit that the notice in terms of section 3 of the Act was not served prior to the institution of the legal proceedings.¹⁷

(33) The Supreme Court of Appeal in **Minister of Safety and Security v De Witt**¹⁸ has considered the interpretation of sections 3 and 4 of the Act, which is a matter where the creditor (De Witt) served his summons prior to the prescription of his claim and only thereafter applied for

¹⁷ Caselines, AA, paras 8.1-8.4, 01-109 to 110.

¹⁸ 2009 (1) SA 458 (SCA).

condonation for failure to give notice in terms of section 3(1)(a). In interpreting the provisions of section 3(4)(b) of the Act the court stated:

"[5] The section has been the subject of interpretation in several cases already. In particular, the requirements of good cause and absence of prejudice to the organ of State for condonation to be granted, set out in s 3(4)(b), were discussed by this court in Madinda v Minister of Safety and Security. At issue in this case is a different question: where no notice is given by the creditor, or where the notice is defective in some respect, but the legal proceedings are instituted before the expiry of the prescription period, may a court condone the failure to give notice, or the giving of defective notice, after the summons or application has been served? The question takes on added significance where proceedings are served before the prescriptive period has ended, but notice is served only after that date, or where notice has been served before the prescriptive period has ended but does not comply with s 3(2)."

(34) The Supreme Court of Appeal answered the said questions as follows:¹⁹

"[13] The discretion may only be exercised, however, if the three criteria in s 3(4)(b) are met: that the debt has not

¹⁹ At para [13].

been extinguished by prescription (at issue in this case); that good cause exists for the creditor's failure; and that the organ of State has not been unduly prejudiced. The Minister does not rely on either of the latter two criteria in this appeal."

- (35) The court concluded that, because De Witts' summons was issued and served before the end of the prescriptive period, the court had a discretion to condone De Witt's late service of notice on the Minister after the proceedings were instituted.²⁰
- (36) In this matter the applicant has applied for payment of money, which constitutes a "debt" both for purposes of the Prescription Act as well as for purposes of section 3 of the Act. There seems to be no dispute that the debt claimed by the applicant would prescribe three years after his unlawful dismissal on 12 November 2020. This means his claim would prescribe on 13 November 2023. That being the case, by 29 April 2024, when the application was served by the sheriff on the respondent, the applicant's claim had already prescribed.
- (37) It follows that his condonation application to condone late service of the notice in terms of section 3(1)(b), cannot succeed on a consideration by the court of the factors set out in section 3(4)(b), as his claim had already prescribed when the applicant applied for condonation.

²⁰ *Supra*, para [21].

CONCLUSION

- (38) The application therefore stands to be dismissed. I consequently make the order set out above.



LM du Plessis
Acting Judge of the High Court
Gauteng Division
Johannesburg

REPRESENTATION For the applicant

Dr ZS Mathaba (in person)
(Heads of Argument: **Adv K Maponya**)

Respondent
Counsel:
Attorneys:
Reference:

Adv D Moodliyar
State Attorney
Mr C Thamaga

Date of Hearing:
Date of Judgement:

26 and 28 February 2025
25 August 2025