



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION-MAKHANDA)**

CASE NO: 2798/2021

In the matter between:

LUVUYO PHUMELELE MKHOSANA

APPLICANT

And

THE MINISTER OF POLICE

RESPONDENT

JUDGMENT

Nkele AJ:

INTRODUCTION.

- [1] This is an application that has been brought for purposes of seeking condonation for the applicant's failure to serve the National Commissioner of Police with a Statutory Notice within a period of six Months from the date the cause of action arose, and failure to serve the Provincial Commissioner of Police with any notice whatsoever. The application is being opposed by the respondent on the basis that the claim has prescribed.

RELEVANT FACTUAL BACKGROUND

- [2] The applicant is an adult male who resides at Cala Administrative Area, in the District of Cala, Eastern Cape Province.

- [3] On or about the 1st of June 2019 at or near Paradise in the Magisterial District of Lady Frere, within the jurisdiction of the above Honourable Court, applicant was wrongfully and unlawfully arrested by members of the South African Police Services, whose full and further particulars were unknown to him.
- [4] In the particulars of claim the applicant further alleges that he was clapped in the face with an open hand by a police official, was further shot at by other police officials and also hit with the back of the rifle on the face as result of which he became unconscious.
- [5] As direct result of the wrongful and unlawful assault aforesaid by the members of the South African Police Service the applicant had to undergo medical treatment after he sustained the following injuries:
- 1.1 *Nasal Septum Fracture.*
 - 1.2 *2 cm left supra orbital lacerations.*
 - 1.3 *1 cm nasal ridge lacerations; and*
 - 1.4 *Severe bodily injuries.*
- [6] The applicant caused a Statutory Notice to be served at the respondent's head office on the 12th of March 2021, which was approximately one year and eight Months from the date the cause of action arose. No service of the aforesaid statutory notice was effected upon the Provincial Commissioner but was served with the Summons on the 27th of October 2021. The summons was also served upon the Minister and the State Attorney on 17 September and 25 November 2021, respectively.
- [7] After service, it is common cause, that they entered an appearance to defend and also filed a plea and a special plea on behalf of all the defendants. In the special plea the defendant raised non-compliance with the provisions of section 3(1)(a); (2)(a) and (4)(1) of the Institution of Legal Proceedings Against Certain Organs of the State Act¹, (**"the Act"**). This application was therefore launched consequent upon receipt of the special plea aforesaid.

¹40 of 2002.

THE APPLICANT'S CASE

- [8] In support of the order sought, the applicant strongly contends that although there has been failure to serve the statutory notice timeously upon the National Commissioner, summons was served within the three-year period of prescription. The applicant further admits failure to serve the Statutory Notice upon the Provincial Commissioner, but argues that the summons was served on the 27th of October 2021 and that was well within the three-year period of prescription.
- [9] The applicant further argues vehemently that the non-service of a Statutory Notice or the late issue thereof does not result in the prescription of a claim. It is for that reason that condonation for the late issue of the statutory notice against the National Commissioner and the non-service thereof upon the Provincial Commissioner is sought in this application. In support of the argument for condonation, the applicant relies on the judgments of *Sello Thabang v Minister of Police*² and *Minister of Agriculture v C.J. Rance (Pty) Ltd*³.
- [10] The applicant's reasons for the failure to timeously serve a statutory notice, in respect of the National Commissioner, and for the total failure to serve same in respect of the Provincial Commissioner, appear to be that he did not immediately approach legal representatives for advice in his hometown of Cala. Firstly, because he had to attend to the treatment of his injuries and that took him some Months before he felt relieved. Secondly, after recuperating from his injuries, he further delayed looking for an attorney in his local town because they were mainly concentrating on doing work in the Magistrate Court. His reason for the reluctance to approach those attorneys practising in Cala was that he felt that his matter should be adjudicated in the High Court.

² case no. 8907/2016

³ Case No. 293/09/2010) ZASCA 27 March 2010.

Thirdly, he was unaware that a statutory notice had to be issued before action proceedings could be instituted against the respondent, and as a result of that he took time to look for an Attorney. It was only when he consulted with an attorney towards the end of March 2021 that he got to know that a statutory notice should have been issued before action proceedings could be instituted.

- [11] Other reasons advanced in the papers and during argument were that the applicant has great prospects of success on the merits, and in this regard, reference was made to the plea filed on behalf the defendant, which is a bare denial. The applicant also contended that no prejudice will be suffered by the defendant if the condonation sought is granted.

THE RESPONDENT'S CASE

- [12] On the other hand, the respondent contends with much vigour and determination that applicant's cause of action arose on the 1st of June 2019 and would have become prescribed on the 1st of March 2022. The applicant was well aware of that. The respondent further contends that, as far back as the 10th of March 2022 when the special plea was filed, that there has been non-compliance with the provisions of the Act but chose to wait for four Months before he could launch a condonation application. He only lodged the application on the 4th of July 2022 and no explanation has been proffered for that delay. The effect of the respondent's argument in this regard, as I understand it, is that applicant's claim has prescribed due to failure to timeously issue a statutory notice to the National Commissioner and to issue same at all to the Provincial Commissioner
- [13] It is also the respondent's contention that in terms of the State Liability Act a party who intends to institute legal proceedings against an organ of the state is required to give notice of the intended proceedings to the National Commissioner, Provincial Commissioner and to the State Attorney. The trust of the respondent's argument in this regard is that failure to issue the statutory notice to any of the listed parties is fatally defective, as it leads to the prescription of a claim that a party may have against an Organ of the State.

The respondent strongly persuaded me to dismiss the application on that basis.

[14] The respondent further argues that, there has not been a proper explanation for the delay and the reasons upon which the applicant relies are not enough. In effect they amount to no reasons at all as, in particular, ignorance of law is no excuse.

[15] Lastly, the respondent contends that if condonation is granted it will suffer immense and irreparable prejudice. To substantiate that argument, the respondent argues that there has been an unreasonable delay from the time the statutory notice was sent to the respondent, the time when the applicant got to know that it had to file a condonation application and the time the application was actually launched. The applicant therefore failed to satisfy the requirements envisaged in terms of section 4 of the Act, so the argument went.

THE REGULATORY LEGAL FRAMEWORK

[16] It is a trite that Chapter III of the Prescription Act ⁴ applies to debts of organs of state. That means that there is no distinction between these and other debts about when prescription begins to run, the period of prescription, delay in the completion of prescription or the interruption thereof.⁵ That trite principle is confirmed by the provisions of section 2 of the Act which are to the effect that subject to section 3 and subsections (3) and (4), a debt which became due before the fixed date, which has not been extinguished by prescription and in respect of which legal proceedings were not instituted before that date; or after the fixed date, will be extinguished by prescription as contemplated in **Chapter III of the Prescription Act.**⁶

⁴ 68 of 1969.

⁵ Amler's Pleadings LexisNexis 10th Ed page 352.

⁶ also, Minister of Finance v Gore [2007] 1All SA 309 (SCA), 2007 (1) SA 111 SCA para 12.

[17] Of particular relevance is the preamble to the Act no. 40 of 2002 which provides that:

“AND RECOGNISING THAT:

. the Prescription Act, 1969, (Act no,68 of 1969) being the cornerstone of the laws regulating the extinction of debts by prescription, consolidated and amended the laws relating to prescription;

. some of the provisions of existing laws which provide for different periods of prescription in respect of certain debts are inconsistent with the periods of prescription prescribed by the Prescription Act, 1969.

AND BEARING IN MIND THAT:

. South Africa has moved from a parliamentary sovereign state to a democratic constitutional sovereign state;

. the Bill of Rights is the cornerstone of democracy in South Africa and that the State must respect, protect, promote and fulfil the rights in the Bill of Rights”.

[18] In an instance where an organ of State relies on a creditor's failure to serve the required notice, the Creditor may apply for condonation, even after the issue of summons. The court may grant the application if it is satisfied that:

- (a) The debt has not been extinguished by prescription;
- (b) Good cause exists for the creditor's failure to serve the notice; and
- (c) The organ of state is not unreasonably prejudiced by the failure.⁷

[19] In terms of section 5(1) of the Act any process by which legal proceedings contemplated in section 3(1) are instituted must be served in accordance with the provisions of section 2 of the State Liability Act ⁸, where the defendant or respondent is the Minister of Police, service of the process must be effected upon the National Commissioner as defined in the in the South African Police Services Act No. 68 of 1995.

[20] Section 2(2) (a) provides that the plaintiff or applicant, as the case may be, or his or her legal representatives must, after any Court process instituting proceedings and in which the executive authority of a department is cited as a nominal defendant or respondent has been issued, serve a copy of that

⁷ Almer's Precedent ibid page 353, section 3(4) of Act no. 40 of 2002, Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA).

⁸ no. 20 of 1952.

process on the Head of Department concerned at the Head Office of that Department. Interpreting the provisions of section 2(2) of the State Liability Act the Supreme Court of Appeal in *Minister of Police v Miya* made the following remarks:

“As already stated above, it is common cause that the main issue in this appeal concerns the interpretation of section 2(2) of the State Liability Act. It is by now trite that when a legislative provision is to be interpreted, consideration should be given to the language used in the light of the ordinary rules of grammar and syntax; the process of interpretation is objective, not subjective; and a sensible meaning should be preferred rather than an insensible one. Furthermore, the Constitutional Court has made it clear that when interpreting legislation, the purpose of the impugned provision must be fulfilled, and if it is fulfilled, a mechanical approach is to be deprecated”.⁹

[21] At paragraph 14 of the *Miya* judgment the Supreme Court of Appeal held that

“There is also the injunction that in section 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Thus, where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted. The right implicated in this case is that of access to court, enshrined in section 34 of the Constitution. Consistent with this injunction, the interpretation of section 2(2) of the State Liability Act must be one which promotes this right, by considering the underlying purpose of the section, rather merely its text. This purposive approach is far more consistent with our constitutional values, than reading the section narrowly and strictly, as preferred by the appellants”.

[22] In the *Miya* case the central issue for determination before the Supreme Court of Appeal was whether non-compliance with the provisions of section 2(2) of the State Liability Act renders a Summons a nullity. That issue arose as a result of failure to serve summons on the Minister of Police in terms of section 2(2)(a), although the summons was served upon the state attorney representing Minister. As a result of that the Minister raise a special plea of prescription due to non-service of summons on him. The High Court dismissed the special plea on the basis that the Minister was made aware of the summons and even filed an appearance. For that reason, the High Court concluded that, non-compliance with section 2(2)(a) did not render the

⁹ 1250/2022) ZASCA 71 (16 May 2024) para 12.

summons void, as the purpose of section 2(2)(a) has been achieved. In that matter the Supreme Court of Appeal considered the fact that the Minister fully participated in all stages of the proceedings and it therefore endorsed the purposive interpretation of section 2(2) as adopted in *Minister of Police v Molokwane*.¹⁰

EVALUATION AND APPLICATION OF LAW TO THE FACTS

- [23] At this juncture it is appropriate to have regard to the facts and the questions of law pleaded by the parties. This is so because each case is decided upon its facts and, similarly the relevant legal principles are applied to given facts. With that being said, I now turn to first consider the given facts.
- [24] At paragraphs 9,10,11, 12, 13 and 14 of the Founding Affidavit, effectively the applicant at those paragraphs deals with good cause where, inter alia, he alleges that he was unaware of the legal requirement relating to the issue of a Statutory Notice and only became of it when he consulted his present attorneys of record. By that he was advised that it was already late to file the requisite statutory notice. In the Answering Affidavit there is no pertinent averment dealing with the applicant's paragraphs in the Founding Affidavit relating to good cause.
- [25] There are therefore no facts pleaded by the respondent counter to those that deal with good cause in the Founding Affidavit. All that the respondent has done in the Answering Affidavit is to dwell much on the conclusions of law relating to prescription, non-service of a Statutory Notice and reasons for the delay. Regarding delay, all that the respondent says is that it was impossible and illogical for the applicant to have only approached attorneys in May 2021 and yet claim to have sent the Statutory Notice a year earlier, in 2020. I have not located this averment the respondent is referring to, either in the founding affidavit or the replying affidavit. What is also of profound importance is that the applicant has argued very strongly that it has a strong case, meaning he has strong prospects of success in the main action. That has not been

¹⁰730/2021) [2022] ZASCA 111 (15 July 2022).

gainsaid by the respondent. I am therefore bound to take that into account when I decide on an appropriate order.

[26] In **Modipane v M M Dada BK h/a Dada Motors Lichtenburg Landman J**, para 12 explained the role of pleadings when he held that:

“[12] At the outset it is necessary to restate, briefly, the role and function of pleadings in dispute resolution. Pleadings define the ambit of the dispute. They indicate what the nature of the dispute is and what facts must be proven by the plaintiff to sustain the claim. And conversely the facts which must be resisted and the facts which must be proven to sustain the defence. The pleaded facts also indicate the legal principles applicable to the claim and the defence even though it is no customary to label the nature of the claim or defence”.¹¹

[27] In the present matter what is common cause is that after the institution of the action, the respondent did not only file an appearance to defend but also filed a special plea and a plea-over. It is trite that the fact that the respondent has raised prescription, in opposition to the application for condonation, as a defence does not on its own mean that the claim has in fact prescribed. In this regard Norman J in *Dike v Minister of Police* lucidly explained the position as follows:

“Prescription is a legal defence which may warrant leading of evidence at the trial, and the trial court will decide whether the matter has indeed prescribed. The respondent has not advanced any facts whatsoever upon which he based his contention that the applicant had knowledge of the identity of him as the debtor more than three years before the action was instituted”.¹²

[28] The respondent strongly contends that the applicant knew the applicant's cause of action arose upon his arrest on the 1st of June 2019. To quote the wise reasoning of Norman J in the *Dike* judgment *“if one were to follow this reasoning it would mean that there is absolutely no basis upon which people would seek legal advice. Upon each and every arrest then a cause of action would arise, and an applicant would be expected to rush to Court and institute an action. I see no legal impediment to seeking legal advice. In fact, it is a*

¹¹ (1559/2010) [2011] ZANWHC 43 (30 June 2011)

¹² (1559/2010) [2011] ZANWHC 43 (30 June 2011).

*prudent thing to do because not every arrest that is perceived to be unlawful, is actionable. The applicant demonstrated that he was not aware of her rights*¹³

[29] I am in full agreement with reasoning in the *Dike* Judgment and I am of the view that it applies in this matter with equal force. This is so because the applicant has fully explained the reasons for the delay, in particular that he was not aware of the statutory requirement relating to the issue of a statutory notice and that has not been gainsaid in any meaningful way. Moreover, the applicant has strong prospects of success to such an extent that the respondent has only filed a bare denial to the crucial averments made in the particulars of claim.

[30] Even if I am wrong in this regard, I am fortified in my view that the application for condonation should succeed on the basis that no prejudice will be suffered by respondent. In fact, none has been demonstrated and even in argument the Respondent's Counsel, Ms Teko, conceded that it has not been demonstrated that prejudice will be suffered if the condonation sought is granted. In any event the respondent has fully defended the matter to the extent of filing a plea and a special plea. So, in my view his rights are fully protect in the sense that no judgment can be obtained or granted clandestinely. The respondent will be fully notified of every step taken in the matter and therefore afforded an opportunity to respond there to appropriately.

[31] Moreover, as was stated in the Supreme Court of Appeal Judgment of *Minister of Police v Miya* the right involved is that of access to Courts as enshrined in section 34 of the Constitution. As was stated in that judgment, the interpretation of any legislation that restricts the right of access to Courts must be purposive in nature, which is consistent with our constitutional values. I am bound to follow that judgment, especially in the present factual matrix where no prejudice will be suffered and the respondent is defending the

¹³ para 28 of the judgment.

matter to the extent that it has filed a plea and a special plea. I am fortified in my conclusion also by the preamble to Act no,40 of 2002, which clearly states that the Bill of rights is the cornerstone of democratic South Africa, and the State must respect, protect, promote and fulfil the rights in the Bill of Rights. In the circumstances I am bound not only by the Supreme Court of Appeal Judgment but also by the very same legislative enactment upon which the respondent relies to oppose the condonation application. Not all is lost to the respondent as the applicant still has to prove its case in the ordinary way and the respondent has all the opportunity in the world to vigorously defend its rights and protect its interests.

[32] The issue of costs, no doubt, is in the discretion of the court and since a condonation application is, by its very nature, an indulgence the applicant is not entitled to costs although it has become successful in the application. As the saying goes, it cannot eat its cake and still have it.

[33] In the result I make the following order:

(a) The applicant's failure to timeously comply with the provisions of section 3(1), read with sections 3(2)(a) and (b) of the Institution of Legal Proceedings against Certain Organs of the State Act no. 40 of 2002 against the National Commissioner is hereby condoned and the applicant is granted leave to pursue his claim against the respondent.

(b) The applicant's failure to comply with the provisions of section 3(1), read with sections 3(2)(a) and (b) of Act no. 40 of 2002 against the Provincial Commissioner is hereby condoned and the applicant is granted leave to pursue his claim against the respondent; and

(c) That there shall be no order as to costs.

T.A. NKELE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : Advocate Nyobole

Attorney for the Applicant : Ngoro Attorneys

Mthatha

Instructed by : Mgangatho Attorneys

Grahamstown

Counsel for the Respondent : Advocate AE Teko

Advocates' Chambers

Attorney for the Respondent : State Attorney

Makhanda

Instructed by : Yokwana Attorneys

Makhanda

Matter heard on : **4th September 2025**

Judgment delivered on : **23 October 2025**