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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO.:EL 1262/2022

In the matter between:

NOTININA MATYHOLO

1st Plaintiff

MLUNGISI KILANA

2nd Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MHAMBI AJ

Introduction

[1] This is an interlocutory application emanating from the main action, instituted by the plaintiffs before this court. For the sake of brevity, *beveritus causa*, I shall refer to the parties as they are referred in the main action.

[2] In the main action, both plaintiffs instituted a civil suit against the defendant on 19 August 2022; their claim is that of unlawful arrest and detention, allegedly due to their arrest and the subsequent detention by members of the defendant stationed at Mdantsane.

[3] The plaintiffs had alleged in their particulars of claim that the alleged unlawful arrest and detention by members of the defendant, stationed at Mdantsane, occurred on 2 November 2019 and at N[...] 1[...], Mdantsane, that address, the plaintiffs regard as their home.

[4] The plaintiffs had further alleged in the particulars of claim that, during their arrest, the police had no warrant for their arrest, and had no probable cause for their arrest. Consequent to the alleged unlawful and wrongful arrest, the plaintiffs alleged that they were released on 4 November 2019, and at or about 16:30, without appearing in court, they were simply advised by the Police to go home and consider themselves as being lucky.

[5] In this interlocutory application, “**this application**”, the plaintiffs seek condonation for the late filing of their notice in terms of section 3 of the Institution

of Legal Proceedings Against Certain Organs of State Act (**Act 40 of 2002, the “Act”**), hereinafter referred to as “**the Statutory notice**”.

[6] This application is opposed by the defendant.

[7] It is apposite for me to state that the impugned statutory notice was issued by the plaintiffs on 9 February 2022, before the main action was instituted. The statutory notice was sent to the *domicilium* address of the National Commissioner of the South African Police, and the plaintiffs have attached proof of postage in this regard. There is no proposition or evidence that the defendant took heed to respond to the statutory notice.

[8] In support of its application for condonation, the first plaintiff has averred that:

“**10.** For the longest of time, I had been under stress which was caused by combination of issues, but rating above them was incarceration with no reason.

11. As a result of this trauma, I did not immediately focus on this issue/ case against the respondent until I was advised by the counsellor after completing my psychological sessions with her.

12. It is after her advice that I managed to discuss this matter with my sister who advised that we need to consult with a lawyer so as to get assurance

of an attorney. She then went ahead and organized me my attorneys of record who indeed confirmed that I have a case against the respondent”.

See paragraphs 9-12, page 32 of the bundle to this application.

[9] The 2nd plaintiff, in support of its condonation application, has averred that:

- “9. (T)he reasons for the delay in this matter were as a result of events that to a certain extent, it was beyond my control.
10. As it is reflected on the particulars of claim, I am working as a general worker with no extensive knowledge of issues; in fact, I am illiterate.
11. I depend mostly from guidance from my family on a lot of things. Soon after I was released from the cells, I left the township and stayed in my localities at Ngqushwa, I was avoiding anything which had to do with township.
12. After sometime, my family, in particular my niece who studies law at Fort Hare advised me that I may have a case against the respondent he further assisted me in getting the attorneys of record.
13. I immediately consulted with my lawyers and instructed him to initiate the proceedings which I am told occurred on 9 February 2022”.¹

¹ See paras 9 – 13, at page 9 of this application bundle.

[10] The defendant opposed this application; in its answering affidavit, the defendant accepts that the statutory notice was served on it; however, it avers that the statutory notice was served after a period in excess of two years, a point that appears to be common cause between the parties.

[11] The defendant's grounds of opposition may be summarised thus: it alleged that it will suffer prejudice if condonation is granted, as it will not be adequately equipped to deal with its defence due to the period of time that elapsed between the date of arrest and service of statutory notice. The defendant further alleges that adequate investigations, which would have happened had statutory notice been served timeously, were not made as a result of the lapse of time and that has caused its prejudice.

[12] The defendant, by the time it filed its answering affidavit, had already filed its plea in the main action, and the issue of prejudice raised in the answering affidavit was not raised in its plea, save to raise non-service of the statutory notice as a special plea. Most surprisingly, the defendant in the answering affidavit admits the arrest of the plaintiffs on the dates concerned. No comment has been made about the alleged detention of the plaintiffs in the answering affidavit. The prejudice complained of has not been explained in succinct and explicit terms, and this court has not been put into confidence about what type of investigations the

defendant ought to have made had statutory notice been served timeously. In the circumstances, I regard those facts as mere bare denials not sufficient to constitute a live issue for this court to determine.

[13] The issue to be determined by this court is whether condonation ought to be granted as prayed by the applicant. In order to answer that, I now turn to deal with the relevant legal framework in respect of this issue for determination.

[14] The legal requirements for the issue of statutory notice in respect of recovery of a debt against an organ of state are dealt with in section 3 of the Act. Section 3 of the Act states that :

3 Notice of intended Legal Proceedings to be given to Organ of State

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless ---

(a) the creditor has given an organ of state in question a notice in writing of his or her intention to institute legal proceedings in question, or

(b) the organ of state in question has consented in writing to the institution of the legal proceedings –

- (1) without such notice; or
- (11) upon receipt of a notice which does not comply which does not comply with all the requirements set out in subsection (2).
- (2) A notice must –
 - (a) Within six months from the date the debt became due, be served on the organ of state in accordance with section 4 (1); and
 - (b) Briefly set out –
 - (1) The facts giving rise to the debt
- (11) such particulars of such debt as are within the knowledge of the creditor.

[15] Subsection 4 of the Act says:

- (a) If an organ of the state relies on a creditors failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for cononation 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 of the creditor; and
- (iii) the organ of state was not unreasonable prejudiced by the failure.

[16] The question of what a debt is and when it is said to be due was answered by the SCA in *Truter and Another v Deysel*², it said:

“ ‘debt due’ means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim”

[17] In *Drennan Maud and Partners v Towing Board of the Township of Pennington*³, Harms JA says this about a debt :

“ In short, the word ‘debt’ does not refer to ‘ cause of action’; but more generally to the ‘claim’ In deciding whether ‘ debt’, or, put differently, what the ‘ claim’ was in the broad sense of the meaning of the word”

² 2006 (4) SA 168 (SCA) at para 15.

³ 1998 (3) SA 200 (SCA) at 212F-J

[18] The Constitutional Court in *Links v MEC for the Department of Health, Northern Cape*⁴, held that :

“ It is clear from section 3(4)(b) that condonation may not be granted where the creditor's claim has prescribed.”

[19] In this case, it is common cause between the parties that the claims of the plaintiff have not prescribed. This court has two issues to consider: first, whether good cause exists for the failure to serve statutory notice timeously; secondly, whether the defendant has been or is unduly prejudiced by the late service of statutory notice. It is a matter of fact that the plaintiffs have a claim against the defendant.

[20] In dealing with the requirements in terms of s 3(4) (b), the court in *Madinda v Minister of Safety and Security*⁵ , the court affirms that the standard of proof to establish section 3(4) (b) requirements is not on a balance of probabilities but rather, the ‘ overall’ impression made on a court which brings a fair mind to the facts set up by the parties. Furthermore, these factors need to be considered in light of the well-established principles for the grant of condonation.

⁴ 2016 (4) SA 414 (CC) para 16

⁵ 2008 (4) SA 312 (SCA) at para 8.

[21] In *Mlaudzi v Old Mutual Life Assurance Company South Africa Ltd*⁶, the court had the following factors to be considered when considering an application for condonation:

“A full, detailed and accurate account of the causes of the delay and their effects must be furnished as to enable the court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court, and the avoidance of the unnecessary delay in the administration of justice”.

[22] I now turn to apply the *Madinda*⁷ and *Mlaudzi*⁸ principles to the facts of this case. I am satisfied that the explanation proffered by both plaintiffs as the reason for the late filing of their statutory notice (s), respectively, creates, in overall a reasonable and fair impression to the satisfaction of this court, which, viewed, cumulatively, amounts to good cause for the timeous failure to serve the statutory notice as quired by section 3 of the Act.

[23] On the basis of certainty and finality, which are key components to the administration of justice, it is convenient for all the parties in this matter that the

⁶ 2017 (6) SA 90 (SCA) at para 26

⁷ Above n 5

⁸ Above n 6

main action be dealt with to finality and without any unreasonably delay. I am not persuaded that the defendant has and or is prejudiced by the late service of the aforesaid statutory notice(s). The defendant has already filed its plea; the main action has reached a stage of *litis contestio*.

[24] In compliance with rules and the practice directives of this court, the parties have already held a conference and recorded a minute in terms of Rule 37 of the Uniform Rules. Rule 37 minute has been filed as part of the record of this application, which clearly indicates that the main action is trial-ready. Notably, in the Rule 37 minute, the parties, among other things, recorded that there is no party prejudiced by non-compliance with the court's rules. In the circumstances, even if the issue of late filing of the statutory notice remains an issue for determination, there seems not to be a substantial prejudice to the defendant as far as trial readiness and preparation are concerned. Even though, in the answering affidavit, the defendant has admitted the alleged arrest of the plaintiffs, but in the Rule 37 minute, the arrest and detention are denied, which is an issue to be resolved by the trial court.

[25] The claims of the plaintiffs are crucial and important to be resolved by the trial court, as they affect their constitutional right to freedom and liberty, and further to not being subjected to an inhuman and degrading manner. In which

case, the arrest and the subsequent detention of any individual are inconsistent with the aforesaid constitutional rights, in the event it is found to be wrongful and unlawful, as the plaintiffs seek determination in that regard. The plaintiffs need to be afforded an opportunity to be heard as far as the main action is concerned and not to be precluded by procedural issues in having their matter finalised.

[26] Consequently, this application should succeed. I am not persuaded to follow the general principle that costs should follow the results, due to the circumstances of this case. The plaintiffs are the ones seeking the indulgence and therefore, despite opposition to their application, the defendant need not be penalised with a costs order.

Order

[27] In the result, the following order is issued:

1. The defendant's special plea to the plaintiff's claim is dismissed.
2. The late filing of the plaintiff's statutory notice (s) in terms of section 3 of Act 40 of 2002 is condoned.
3. Each party is ordered to pay its own costs.

M MHAMBI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff s	:	Adv S. Sintwa
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Heard on	:	25 September 2025

Judgment Delivered on : 06 November 2025