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

CASE NO: EL 840/2020
NOT REPORTABLE

In the matter between:

SIZEKA IRIS DANISO	**First Applicant**
PELISWA VAKELE	**Second Applicant**
MAKHI SAM	**Third Applicant**

and

MINISTER OF POLICE	**Respondent**

JUDGMENT IN RESPECT OF
APPLICATION FOR CONDONATION (ILPACOSA)

HARTLE J

[1] The applicants are the plaintiffs in an action for damages against the defendant founded on claims for malicious arrest and detention (Claim A) and malicious prosecution (Claim B) respectively. In the particulars of claim it is alleged that the criminal proceedings against them which are the subject matter of Claim B were terminated on 9 September 2019. They were however arrested on different dates (30 August, 7 September and 8 September 2017 respectively) on the charges underlying the said prosecution.

[2] Summons was issued on 21 August 2020. Service was timeously effected on the respondent on 28 August 2020 and on the office of the State Attorney on 4 September 2020.[1]

[3] On the pleadings the respondent raised a special plea in which it was contended that it was incumbent upon the applicants to have served statutory notices in terms of section 3 (2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 ("*ILPACOSA*") within "*a period of six months from the date on which each of their claims became due*" and that they had failed to give the requisite notice. Additionally, so the respondent pleaded, he had not been requested to and neither had he consented in writing to the institution of the proceedings without compliance with the said section and that the applicants are thus barred from pursuing the action.

[4] The respondent pleaded that the applicants' claims arose on the dates when they became aware of the consequences of the alleged wrongful and unlawful conduct giving rise to their claims which, from his perspective, would have been on the respective dates referred to in paragraph 1 above relative to Claim A.[2]

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[1]Service was effected as it ought to be in terms of section 2 (2) (b) of the State Liability Act, No. 20 of 1957 five days after the respondent, who is the main debtor, was served via the offices of the National and Provincial Commissioners. The service of the process on the State Attorney serves a different purpose than interrupting prescription. That purpose is for the State's legal advisers to furnish the relevant head of department with legal advice on the merits of the matter concerning the process which was served on the both of them. By the time the matter was argued before the court there was no suggestion that the claim had prescribed in the traditional sense of the word.

[2] This should have left the applicants with no doubt that the fuss about the service of the notices concerned Claim A.

[5] The provision of section 3 of the ILPACOSA provide as follows in respect of the obligation on a litigant to give statutory notice:

> **"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 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 proceedings—
>
> (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) For purposes of subsection (2) (a)—

(*a*) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(*b*) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(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."

[6] On 2 March 2021, shortly after its delivery, the applicants' attorneys wrote to the State Attorney (in my view in very unspecific terms) to suggest that the special plea be abandoned:

> "We refer to the above matter and more particularly your Plea received on 27 January 2021.
> We have read your plea and we are of the view that the points in limine raised in your special plea do not show any prejudice or harm suffered and/or to be suffered by your client as a result of noncompliance.
> We confirm that filing of the condonation application will have financial implication to either of the parties and as such we do not see a need to bring such an application to which we do not see reason why it should not be granted in Court.
> In view of the above, we request that by agreement between the parties, you abandon your special plea and we proceed with the matter to its finality.
> We request that should you have a contrary view to the above, you advise us in writing so that we instruct our Counsel to prepare condonation papers timeously.
> Your response is sought herein."

[7] As an aside the letter gives nothing away even concerning what "*noncompliance*" was at stake.

[8] No "*agreement*" was reached on the issue of the special plea and it became apparent to them in the course of preparing for trial, so the applicants aver, that a formal application would be necessary obtain a declarator or to condone their failure to have given statutory notice timeously since their claims are also based on unlawful arrest and detention.[3]

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[3] The distinction between Claims A and B takes account of the fact that the claim for malicious prosecution would only have arisen on the date when the prosecution was terminated, that is on 9 September 2019. The six month period contemplated in section 3 (2)(a) would have required notice to be given in respect of this claim by 9 March 2020. The earlier claim poses an entirely different kettle of fish because the applicant's causes of action in respect of claim A would certainly have arisen six months prior to when the statutory demand was sent.

[9] This was the impetus for the application before this court then for condonation in terms of section 3 (4)(a) of the ILPACOSA in which the applicants pray for an order in the following terms:

> "1. declaring that the applicant has complied with the Notice contemplated in terms of section 3 (1) of the Act;
> 2. alternatively, condoning the applicant's non-compliance with the timeframes referred to in section 3 (2) of the Act;
> 3. granting the applicants leave to continue with the legal proceedings under case no. 840/2020;
> 4. directing the respondents to pay costs of this application on an attorney and client scale; and
> 5. granting such further and/or alternative relief as may seem to this Honourable Court meet."

[10] In the application the applicants pleaded that statutory notices were sent to the Provincial Commissioner and National Commissioner on "*3 March 2020*" (*Sic*) by registered mail. Proof of posting of the registered letter(s) was put up in support of this averment marked Annexure "*SD 3*" but this shows to the contrary that the letters were dispatched on 2 March 2020. The date indicated on the notices themselves, in respect of the first and second applicants ("*SD 1*" and "*SD 2*" respectively), however, is 3 March 2020. (I should point out that it was only recognized in reply that the applicants had omitted to attach the separate notice in respect of the third applicant which is properly dated 2 March 2020 (Annexure "*SD 4*"), as well as the separate proof of posting thereof to the National and Provincial Commissioners respectively on even date (Annexure "*SD 5*")).

[11] In advancing reasons for the bringing the application and in explaining why they had not done so earlier, the applicants averred that it had dawned on their legal representatives during trial preparation that it would be necessary, worst case scenario, to seek condonation for the fact that the debts giving rise to their claims for unlawful

arrest and detention had arisen more than six months prior to the date of the dispatch of their statutory notices. In any event, so they explicated further, they only became aware after seeking legal advice in February 2020 (days before the statutory notices were sent) that they had any claim at all in law to pursue.[4]

[12] Apart from making the usual averments to bring them within the requirements stated in section 3 (4)(b) (i) – (iii) of the ILPACOSA and stating their view that their claims bear reasonable prospects of success, the applicants relied, as stated above, on their nescience (as lay persons) that they could claim at all, let alone that there were procedural requirements that needed to be fulfilled to pursue such claims. This late discovery and their attorney's interaction with the State Attorney on the issue of the notices also provided a context to their delay in bringing the present application.

[13] As can be discerned from the costs order prayed for in the applicants' notice of motion, they averred in this respect that they were entitled to costs on the punitive scale because the respondent had been unreasonable by invoking "*a mere technicality*." What they meant thereby is that the notice had straddled the facts of the arrests leading up to the prosecution that had been terminated. The notices served were given within six months of the prosecutions failing against them and had contained sufficient facts of all the salient events giving rise to their claims. There could thus be no prejudice as the notices would have served the essential purpose for which they had been given. Moreover, their attorney's attempts to have engaged on their behalf with the State Attorney to withdraw the special plea had come to naught, rendering the application necessary for this reason.

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[4] See in this respect *Dike v Minister of Police and Another* (404/2022) [2023] ZAECBHC 15 (18 July 2023) on which the applicants relied to sustain their contention, albeit a bit tentatively made, that since they only came to a realisation a few days before giving notice that they had a claim at all, this meant that the debt could not have been regarded as being due until the creditor had knowledge of the identity of the organ of state and of the facts giving rise to the debt in the manner contemplated by the provisions of section 3 (3)(a) of the ILPACOSA. The latter sub-section serves as a deeming construct for purposes of section 3 (2)(a) of the ILPACOSA as to the date on which the debt became due. In other words, when the advice of their attorney was solicited that they had a claim, which they were unaware of before, the ILPACOSA clock started to run.

[14] In making a case in the founding papers for the respondent's unreasonable attitude they alluded to a further letter addressed to the State Attorney dated 25 November 2021 (Annexure "*SD 8*"), written pre-application, in which the respondent had been placed on terms to withdraw his special plea or face the consequences of a costs order. The contents of this communication too, which bear repeating to prove a point, do not in real terms describe the crux of the applicants' problem or their peculiar perception of the matters causing the concern, neither do they indicate why they felt themselves constrained to have to invoke the provisions of section 3 (4) (a) of the ILPACOSA at the respondent's expense:

> "We refer to the above matter and more particularly our conversation on 21 October 2021 wherein your requested that we afford you time to communicate with your client regarding the possibility of abandoning your special plea.
> We confirm that since then, 21 October 2021, we have been waiting from you about the way forward so that we proceeding to draw our clients papers for condonation.
> We request you to advise us whether we proceed with application for condonation or your clients have instructed you to withdraw your special plea.
> We advise that should we not hear from you on or before the close of business on Friday the 26 day of November 2021, we shall proceed to instruct our Counsel to draw application for condonation and we shall seek costs order against your client.
> We trust that the above is in order.
> We await to hear from you urgently."

[15] Since no concession came, the present application was issued and was due to proceed on an unopposed basis but this event was upstaged by the State Attorney filing a notice to oppose on behalf of the respondent after the fact.

[16] In the answering affidavit deposed to by Mr. Ngcama of the State Attorney's office, he took issue firstly with the purported puzzle that costs should be claimed by the

applicants against the respondent at all, let alone on a punitive scale "*for an irrational reason*" whereas they were the ones "*seeking the indulgence of the court for their admitted non-compliance with the Act*".

[17] Further, in an interesting twist which had not been foreshadowed in the respondent's special plea, he alluded to the "*illogical and inexplicable dichotomy*" of the first and second applicant's reliance on notices dated 3 March 2020 whereas the proof of posting by registered mail purportedly confirms their posting to the National and Provincial Commissioners respectively on 2 March 2020, a day before. He pointed out further that the notices contended for related only to the first applicant and that there was none ostensibly given concerning the third applicant. This for obvious reasons raised a concern that the applicants could claim in their founding that they had sent notices or that those concerning the first and second applicants could be "*validly utilized*" in support of the application as prayed for in the notice of motion.

[18] Other bald denials were raised in opposition to the application none of which need repeating for present purposes given that Mr. Sishuba who appeared for the respondent only addressed the court concerning the issue of costs. He intimated that his client would otherwise not stand in the way of condonation being granted to the applicants if it was satisfied that they had established the requirements for such relief.

[19] He was however constrained, from a "*compliance point of view*", to direct the court's attention to the worry that had been raised by Mr. Ngcama in the answering affidavit concerning the discord between the date of the supposed notices of the first and second applicants and the date of their dispatch by registered mail.

[20] Whilst this "*dichotomy*" had indeed been raised as a concern in the respondent's answering affidavit, the applicants in reply promptly gave a plausible reason for the discrepancy between the dates in the notices and registered slips. According to Mr. Holmes, the attorney who had appeared for the applicants at the time, the date "*3 March 2020*" on the notices concerning the first and second applicants was a

typographical error. He confirmed by way of a confirmatory affidavit filed together with the applicants' replying affidavit that the required notices had all been drafted, and sent, on 2 March 2020.

[21] I should add that the respondent has never denied receipt of any of the notices or raised any objection or prejudice in relation thereto other than to comment on the said discord.

[22] I am satisfied that the applicants have made out a proper case for the substantive relief sought in prayer in 1 on the basis that they only became aware of their entitlement to claim and of the requirement to give statutory notice on 20 February 2020 when they consulted with their erstwhile legal practitioner, Mr. Holmes.[5] The debt in respect of Claim A would therefore only have arisen on this date and notice followed swiftly on that event.[6]

[23] Even though it might technically have been unnecessary for the applicants to have invoked the provisions of section 3 (4) (a) of the ILPACOSA from their perspective on the basis that the debt only became due on 20 February 2020, the declaratory order still appears to me to be an essential one that needs making for the sake of certainty predicated on this court's finding, pursuant to the provisions of section 3 (3) (a), read with section 3 (2) (a) of the ILPACOSA, that the debt "*became due*" on this later date as opposed to the dates on which the applicants were arrested. The certainty is probably also necessary, in respect of both claims, given the discrepancy in the dates between the first and second applicants' notices and proof of posting which I accept was a mistake on the basis indicated above.

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[5] It was not suggested by the respondent to the contrary (on the basis contemplated by section 3 (3) (a) of the ILPACOSA, that they should be regarded as having acquired such knowledge any earlier than this date "*by exercising reasonable care".*

[6] See *Ntombikhona Maleshiyo v MEC for the Dept of Health, Eastern Cape* (451/2018) [2020] ZAECBHC 28 (23 October 2020) in which a similar approach was adopted. I would however have been equally satisfied to condone the late notice served in relation to Claim A on the basis that the applicants have met the requirements for condonation set forth in section 3 (4) (b) (i) – (iii) of the ILPACOSA.

[24] It follows that the applicants should then also be granted the concomitant relief sought in prayer 3 so that they can proceed to prosecute their action unencumbered by obscurity.

[25] That brings me to the question of costs.

[26] I point out in this respect that the applicants asked for costs on the punitive scale regardless of whether the respondent opposed the application or not on the two bases outlined above.

[27] The allegation that the State Attorney spurned the attempt on the applicants' behalf to settle the matter by withdrawing the special plea does not impress me. The letters written say nothing at all really to justify an inference that he unreasonably failed to furnish his consent on the basis envisaged by section 3 (1) (b) of the ILPACOSA. By the applicants' own admission the notice was given out of time in relation to the applicant's causes of action under Claim A. The applicants could have replicated to the special plea but chose not to and in my view appeared to be under the mistaken impression at first that no condonation was necessary at all.[7] Their attorneys certainly gave no hint to the State Attorney that they would make out a case ultimately that the debt (in respect of claim A) could not be regarded as being due until they obtained legal advice on 20 February 2020. The respondent could not be expected to divine as much. I am therefore inclined to agree with Mr Ngcama's submission made in the answering affidavit on behalf of the respondent that the latter cannot be faulted for the applicants' election to have brought the present application.

[28] I point out further that although the respondent never complained of the discrepancy in the dates between two of the notices and the certificate of posting, or that no notice had ostensibly been given by the third applicant, a dispute in these two respects was bound to arise when the applicants purported to make out their case in the

[7] In their imagination they had given notice timeously after the date of termination of the prosecution which sufficed as far as they were concerned for purposes of the ILPACOSA.

founding affidavit to the effect that they had, in fact, complied with the notice contemplated in terms of section 3 (1) of the ILPACOSA.

[29] In the latter respect it was not in my view unreasonable thereanent for the respondent to have raised a red flag about the validity of the claimed notices, at least up until this aspect was cleared up by the applicants in reply.

[30] As for the rest, it appears that unless the applicants relented on the punitive costs order prayed for, the respondent was in my view justified in continuing to oppose the application on this basis alone. Even in reply the applicants maintained their position that this court should be "*encouraged*" to grant costs on a punitive scale.

[31] The reason for their insistence is motivated in the following paragraphs in the replying affidavit:

> "41.1 Whilst it is admitted that I and my co-plaintiffs are seeking an indulgence, to the extent that the court may find that our notices were late, we have requested costs on a punitive scale as the defendant had unreasonably decided to take issue with the late delivery of the statutory notice without taking cognizance of the claim being founded on both lawful and malicious arrest and detention. The debt for malicious arrest and detention and prosecution only arose when the prosecution failed. Thus timeous notice was given in that regard. This notwithstanding the defendant did not withdraw the special plea but in fact persisted with same. This opposition is a clear indication of such stance.
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> 41.2 Further as aforesaid, the debt in respect of the unlawful arrest and detention only arose in February 2022 after consultation with our attorney.
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> 42. Having regard to the aforesaid, the defendant, being aware of the various causes of action and having received the notice, was not prejudiced. It is therefore apparent that the defendant's special plea is a mere technicality which this court should not take lightly to avoid an influx of similar cases.

43. It is on this basis that the court is encouraged to grant costs on a punitive scale."

[32] Ms. Booysen who appeared for the applicants cited *Dauth and others v Minister of Safety and Security and Others*[8] as authority for her submission that a costs order was warranted because the respondent's opposition had been unreasonable. I do not agree that it was.

[33] She also referred the court to *Premier of the Western Cape Provincial Government NO v Lakay*[9] ("*Lakay*") in support of her submission that the applicants should not be likened to a litigant seeking condonation for their non observance of court procedure (which might justify an order according to the ordinary rule that such a litigant should absorb his/her own costs unless it can be suggested that the resistance to such an application is entirely unreasonable warranting the objector being mulct with the costs), but that it is an entirely different situation.

[34] In an instance such as this where an organ of state under the auspices of the ILPACOSA relies on a creditor's failure to serve a notice in terms of section 3 (2) (a) of the Act that party must of necessity approach the court to enforce his or her right to litigate. In such event, as the SCA found in *Lakay,* the more correct approach would be for the costs to follow the result. Although the SCA was ultimately not required to determine the issue of costs in that instance, the court observed as follows:

"*The court a quo ordered the Premier to pay the applicant's costs occasioned by the former's opposition to the application. Counsel on behalf of the Premier initially argued that the applicant should have been ordered to pay the Premier's costs as, it was submitted, the applicant was seeking condonation and the Premier's opposition was not unreasonable. Ordinarily, in applications for condonation for non-observance of court procedure, a litigant is obliged to seek*

[8] 2009 (1) SA 189 (NC) at [10].
[9] 2012 (2) SA 1 (SCA).

the indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter's costs if it does oppose, unless the opposition was unreasonable. I doubt that this is the correct approach in matters such as the present, as an application for condonation under the 2002 Act has nothing to do with non-observance of court procedure, but is for permission to enforce a right, which permission may be granted within prescribed statutory parameters; and such an application is (in terms of s 3(4)) only necessary if the organ of state relies on a creditor's failure to serve a notice. In the circumstances there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result."[10]

[35] Whilst I agree that the applicant's pursuit of an application such as the present one is for a significant reason and purpose so that they can remove the hindrance standing in the way of proceeding with the prosecution of their claims, it is not authority for the proposition that costs follow the result in an unopposed scenario. The applicants prayed for costs on a punitive scale, for a different reason as indicated above. It was therefore imperative on the State Attorney to object to such a costs order being taken against the respondent in circumstances where the applicants had admitted that notice given in relation to claim A had been significantly out of time. If costs had been prayed for on the ordinary scale in the event of the respondent opposing who then for the mere sake of it opposed the application on the merits and came up short, I would have had no qualms in awarding the applicants their costs on whatever scale was befitting the situation. In this instance however the main challenge was poised against the prayer for a punitive costs order and then it just so happened that the respondent was also obliged to point out that the notices filed in support of the applicant appeared to be invalid (or non-existent in the case of the third applicant). As stated elsewhere I find nothing amiss in the respondent raising a concern about these ostensible deficiencies. Indeed I would be concerned if the State Attorney did not perform due diligence in this respect. The applicants were obliged to make out their case that they had complied with the provisions of section 3 (1) of the ILPACOSA if they wished to succeed in asking this

[10] Paragraph [25].

court to declare that they had so complied, which provisions read contextually with the section 3 of the ILPACOSA as a whole go to both form and substance.

[36] Having said that the respondent's opposition to the application was justified to defend the costs prayer, and that the State Attorney was obliged to question the validity of the notices relied upon, the notices ultimately accepted as being compliant would indeed have served the purpose for which they were intended and no prejudice can be contended for and on behalf of the respondent by their lateness in respect of claim A. I accept too that the applicants are seriously minded to be placed in a position, with the leave of this court necessarily sought, to pursue their constitutional right of access to court and should not be mulct with a costs order. I point out too that the State Attorney did not file heads of argument, neither the requisite practice note ahead of the matter being argued on the opposed roll. Mr Sishuba was briefed by the respondent at the last minute to appear and make submissions only concerning the issue of costs. Again I accept that such oversight accords with the State Attorney's legal obligation to look out for the interests of its clients which purpose was duly achieved.

[37] In recognition of the fact that the applications were in pursuit of enforcing a fundamental right, I do not consider it fair to order them to pay the respondent's costs. Once the issue of the validity of the notices had been resolved and the dust had settled this should have put it beyond a doubt that they had given effective notice. This the applicants earnestly believed they had done.

[38] In the result I issue the following order:

1. It is declared that the applicants have complied with the notice contemplated in terms of section 3 (1) (a) of the Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 ("*ILPACOSA*") in respect of both Claims A and B.
2. The applicants are granted leave to continue with the legal proceedings commenced under case no. 840/2020.

3. Each party shall be liable for their own costs of the application.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 19 September 2024

***DATE OF JUDGMENT : 27 September 2024**

Appearances:

For the applicants : Ms. R A Booysen instructed by M S Ginya Inc., East London (ref. Mr. Ginya)

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For the respondent : Mr. M H Sishuba instructed by the State Attorney, East London (ref. Mr. Isaacs).

*This judgment will be delivered electronically by email on this date.