REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 23309/2008

DATE: 12/10/2010

IN THE MATTER BETWEEN:

N Z M B	PLAINTIFF
AND	
MINISTER OF SAFETY AND SECURITY	1ST DEFENDANT
COMMISSIONER OF THE SOUTH AFRICAN	
POLICE SERVICE	2ND DEFENDANT
CONSTABLE TSHILO	3RD DEFENDANT

JUDGMENT

RANCHOD, J

INTRODUCTION

[1] The plaintiff, a 32 year old female, who at the time of her arrest was 28 years old instituted a delictual action against the defendants wherein the plaintiff claims for unlawful arrest, unlawful detention, *contumelia* and medical costs.

FACTUAL BACKGROUND

[2] The allegations are that on the late night of the 29th to the morning of the 30th of December 2006 at about 00:40 the plaintiff was at the police station in Khutsong. There is a dispute as will be apparent later, as to what she went to complain about. The plaintiff alleges that she went there to lay a charge of rape whereas the defendant states that the plaintiff had come there to complain about someone who had stolen her shoes near the taxi rank in Khutsong. While she was at the police station in the charge office or client service centre as it is called, she was arrested and detained from 00:47 on 30th of December 2006 until 14:10 on Sunday 31st of December 2006, that is, for approximately 37 hours.

ISSUES NOT IN DISPUTE

[3] The common cause issues are:

(1) That on 30th of December 2006, the plaintiff was at Khutsong Police Station at the charge office;

(2) That the plaintiff spoke to a member of the South African Police Services;

(3) That the plaintiff was arrested, detained and thereafter released on the following Sunday.

ISSUES IN DISPUTE

[4] The issues in dispute are whether:

(1) The plaintiff was arrested on the 29th or 30th of December 2006;

(2) The plaintiff was arrested by one constable Thiso;

(3) At the time of the arrest, the plaintiff was drunk and acting disorderly, which is in contravention of section 127(b) of the Gauteng Liquor Act 2 of 2003;

(4) The plaintiff obstructed the police from executing their official duties; and

(5) On the day of the arrest, the plaintiff lodged a complaint of rape or a theft of shoes.

CONDONATION

[5] In the particulars of claim the plaintiff states that she will seek condonation for filing the required notice in terms of section 3(2)(a) of the Legal Proceedings Against Certain Organs of State Act 40 of 2002 which was filed outside the prescribed time limit of six months. Plaintiff states further in the particulars of claim that the defendants would suffer no prejudice and that good grounds exist for the granting of condonation and she would be able to provide evidence in this regard.

[6] The defendants raised a special plea to the effect that the prescribed notice was not served on the defendants within six months from the date on which the debt became due.

[7] The first thing to be noted is that the plaintiff did not formally make an application for condonation. In the particulars of claim she merely mentions that condonation will be sought, as I have stated earlier. Although a substantive application for condonation was not brought, during the trial the plaintiff led the evidence of Attorney PM Verster ostensibly in support of the condonation requirements.

[8] Before the commencement of trial a copy of the pre-trial minute was handed up. One of the questions put to the plaintiff's legal representatives by the defendants' legal representatives was:

> "Kindly state the grounds for the request for condonation for the late notice in terms of Act 40 of 2002?"

The answer was:

"The evidence will be *inter alia*: there was a notice to the station commander of Khutsong dated 21 February 2007, within six months after the cause of action arose. Only thereafter counsel was briefed and a better notice was send (*sic*) to the commissioner to make provisions for all the elements to comply with the Act. The defendants were able to find their witnesses and the plaintiff is not aware of any prejudice caused by the latter (proper) notice. The court will be addressed on the "good cause" needed to succeed for the request for condonation and the case law applicable. The plaintiff do (sic) not intend to set out all evidence necessary for her to succeed herein, but states these facts to facilitate a possible limitation of disputes, with specific reference to the special plea by Defendants."

[9] It is trite that an application for condonation should be in writing. (See *Mahomed v Mahomed* 1999 (1) SA 1150 (E) at 1152 and *Tolo v Mngomezulu* 2001 (3) SA 669 (T) at 671). However, it may be granted even in the absence of a substantive application. (See *McGill v Vlakplaats Brickworks (Pty) Ltd* 1981 (1) SA 637 (W) at 643C-F; *Hessel's Cash & Carry v SA Commercial Catering and Allied Workers Union* 1992

(4) SA 593 (E) at 599F-600B). A discretion is therefore vested in the Court to nevertheless consider the request for condonation even though a substantive application has not been made. I deem it appropriate therefore to consider the request for condonation in the interest of justice. I accordingly turn to consider the condonation application.

[10] Section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 permits a court to condone a litigant's failure to give a valid notice required by section 3(1)prior to instituting legal proceedings if three requirements are met, namely –

(1) If the debt has not been extinguished by prescription;

(2) Good cause is shown; and

(3) The debtor is not prejudiced.

Furthermore, application for condonation may be made by the creditor even <u>after</u> proceedings have been instituted if the debt has not

prescribed. (See the *Minister of Safety and Security v Augustus John de Witt* (unreported) (722/2007) 103 [2008] ZASCA (19 September 2008).

[11] I turn then to consider the three criteria in turn.

[12] That the debt has not been extinguished by prescription is not in dispute.

[13] I deal next with the third criteria that is, whether the debtor had been prejudiced, before dealing with whether "good cause" has been shown.

[14] In the defendants' counsel's written heads of argument the special plea is not dealt with. However, in oral submissions defendants' counsel emphasised that the plaintiff had not shown good cause and did not deal with the question of prejudice at all. Indeed, no evidence as to prejudice suffered by the defendants was led during the trial. In any event defendants were prepared to proceed with the trial and in fact did so. Defendants were therefore not prejudiced, in my view.

[15] The question then arises whether good cause exists for the plaintiff's failure to serve the requisite notice on the defendants within the prescribed six months period. In this regard, during the course of the trial the plaintiff led the evidence of her attorney's Pretoria correspondents, a Ms. PM Verster. Ms Verster testified that she received instructions from the plaintiff's attorneys in May 2007 to brief counsel for the purpose of drawing up the required notice. The instructions were accompanied by only certain letters that were exchanged between the plaintiff's attorneys and the South African Police Services (SAPS). The first letter is dated 21 February 2007 (marked exhibit "K") from plaintiff's attorneys to the SAPS at Khutsong. The letter states:

> "Dit is ons instruksie, dat:
>
> 1. Kliënt op 29 Desember 2006 by die SAPD aangedoen het om 'n klag van verkragting te lê;
> 2. Sy toegesluit is met mededeling dat sy dronk is;
> 3. Op 31 Desember 2006 is sy eers toegelaat om 'n geneesheer te sien of haar klag te lê;
> 4. MAS 357/12/2006 is toegeken.

5. Hoewel die verdagte aan Klaagster bekend is, is geen arrestasies hierin gemaak nie.

Ons verneem graag u kommentaar in bovermelde aangeleentheid."

[16] In a letter dated 19 March 2007, which is marked exhibit "L" in the record, the SAPS responded to the said letter of the plaintiff's attorneys. It is stated that plaintiff was arrested at 11:47 on 30 December 2006 for drunkenness. The letter goes on the state that she was released at 14:10 on 31 December 2006 and that she reported that she was raped by her boyfriend (kêrel) only on 31 December 2006 when a docket was opened. The docket reference number is then provided and it is further stated that the case was transferred to the Carletonville Detective Branch. The names of the investigating officer and his commander are also furnished as well as their contact telephone numbers. Some three months later in a letter dated 20 March 2007 plaintiff's attorneys acknowledged receipt of the aforementioned letter and proceed to inquire where the plaintiff was arrested for drunkenness and by whom. The police responded to the letter by way of a letter dated 4 April 2007, which is exhibit "N" of the record, that plaintiff was arrested by

Constable Tshilo and that the prosecutor had refused to prosecute the charge of drunkenness.

[17] At this point it should be noted that according to the plaintiff she was arrested on the night of 29th of December 2006. The period within which the prescribed notice had to be served was six months from that date. The prescribed notice is dated 7 April 2008, and was delivered to the defendants on 11 April 2008, that is, almost a year after the last letter from the police dated 4 April 2007. By this latter date, that is, 4 April 2007, plaintiff's already had sufficient information on hand to prepare the prescribed notice, as will be apparent in what follows.

[18] Ms. Verster emphasised that the main reason for the late delivery of the prescribed notice which, incidentally, was on her firm's letterhead, was because the police docket was not available from the SAPS. She testified or explained that the facts and evidence in the notice was only obtained in April 2008, hence the delay. She insisted that the police docket was necessary to assess the possibility of success of the claim. Surprisingly, even though the notice was served well beyond the prescribed time limit she testified that she ultimately served the notice without the

contents of the docket being available because she was pressed for time. However, a perusal of the notice indicates that the submissions made by the plaintiff's Pretoria correspondent, Ms Verster are not tenable. In this regard it is worth setting out the contents of the notice in some detail:

> "Geliewe kennis te neem dat ons hiermee instruksies ontvang het vanaf ons kliënt N M B om 'n aksie te loods teen die Minister van Veiligheid & Sekuriteit, die Kommissaris van Polisie, onbekende polisiebeamptes en konstabel THISO weens haar onregmatige, kwaadwillige en opsetlike arrestasie te Khutsong Polisiestasie op 29 Desember 2006, sowel as verskeie aantastings van haar regte, onregmatige aanhouding en ernstige kompromie van 'n behoorlike klag van aanranding wat deur die kliënt gelê sou word.
>
> Die besonderhede van die voorval was dat op Vrydag, 29 Desember ons kliënt en haar kêrel by sy woning sekere drankies gedrink het, wat nie daartoe gelei het dat sy onder die invloed van drank was nie. Sy het ongeveer 20:00 teruggestap huis toe wat ongeveer 300 meter van sy huis was. Dit was donker

en die straatligte het gebrand, waarna ’n man, slegs aan haar bekend as TELO haar van agter aangeval het, in die bosse ingesleep het en verkrag het.

Dieselfde aand ongeveer 24:00 is sy na die Polisiestasie te Khutsong om die voorval aan te meld, was baie ontsteld en het ontroosbaar gehuil. Konstabel THISO was aan diens en het geweier om enige verklarings van haar te neem en het gesê dat sy dronk is en moet terugkom. Sy het daarop aangedring om gehelp te word, waarna Konstabel THISO haar gearresteer het vir dronkenskap en na die aanhoudingselle geneem het. Alhoewel sy herhaaldelik vermeld het dat sy verkrag is en onmiddellik ondersoek moet word, is sy enige behandeling, oproepe of verdere hulp of ondersteuning geweier.

Op Sondag 31 Desember 2006 het Superintendent THOMPSON by die selle aangedoen waarna sy vermeld het dat sy verkrag is en dat sy toegesluit is sonder enige hulp. Omtrent 16:00 is daar aan haar gesê dat sy kan huis toe gaan as sy R150-00 betaal. Teruggekom by die huis het haar ouers toegesien dat sy teruggaan

na die Polisiestasie en weer eens is sy geweier om ’n klag te lê. Uiteindelik is daar na vele gesukkel ’n klag van verkragting gelê en het ’n ondersoek beampte ons kliënt na Carltonville Hospitaal geneem, waar sy deur Dr F Rosado gesien is. Daar is aan haar vermeld dat meer as 72 uur verloop het en dat daar geen bewyse is of opgespoor kan word dat sy wel verkrag is nie. Sekere tablette is aan haar gegee om te drink en sy is huis toe. Haar vader het haar weer teruggeneem na die Carltonville Hospitaal en aan hom is ook vermeld dat meer as 72 uur verloop het.

Ten spyte van verskeie navrae en beloftes dat daar na hulle teruggekom sal word, het 2 weke verloop waarna daar wel ’n verklaring deur die kliënt afgelê is te Carletonville Polisiestasie.”

[19] The information provided in the notice was within the knowledge of the plaintiff and in all probability emanated from the plaintiff herself and was not dependant upon any information from the police or the docket after the letter from the police dated 4 April, 2007. Hence Ms Venter’s evidence is woefully inadequate in explaining why the notice was not served timeously.

[20] The question that arises is whether this fault should be attributed to the plaintiff i.e. the failure to show good cause. I say this in the particular circumstances and facts of this case before me.

[21] Plaintiff's attorneys were clearly aware that they needed to show good cause and in this regard I refer to the pre-trial minutes from which I quoted earlier.

[22] In plaintiff's counsel's written heads of argument reliance is primarily or almost exclusively I should say, placed on the evidence of Ms. Verster to show good cause. Ms Verster's evidence does not, in my view establish good cause.

[23] I am therefore of the view that the special plea should be upheld. However, having said that, plaintiff may be well advised to seek legal advice as to whether her remedy now lies elsewhere. Having heard the evidence on the merits I am of the view that but for the special plea having succeeded, the plaintiff would in all probability have succeeded in her claim based on the facts and the evidence led during the trial.

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

1. The special plea is upheld.

2. The plaintiff's claim is dismissed with costs.

N RANCHOD
JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF: ADV. LD SCHOLTZ
INSTRUCTED BY: VERSTER SWART INC, PRETORIA
FOR THE DEFENDANTS: ADV. MS PHASWANE
INSTRUCTED BY: STATE ATTORNEY, PRETORIA