IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

2015.08.29 — DATE

SIGNATURE

CASE NUMBER: 79885/14

DATE: 28 August 2015

HANGWANI JOSEPH MUKWEVHO	First Applicant
OLEBILE MONICA MUKWEVHO	Second Applicant
BAAL-PERAZIM COLLEGE (PTY) LTD	Third Applicant

V

MEC FOR EDUCATION, LIMPOPO	First Respondent
THE MINISTER OF HIGHER EDUCATION AND TRAINING	Second Respondent

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JUDGMENT

MABUSE J:

[1] This is an application for condonation.

[2] The applicants in this matter seek the following order:

"1. That condonation be granted to the applicants to issue summons and institute legal proceedings against the respondents in terms of section 3(b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act").

2. Cost of suit only in event of opposition".

[3] The first applicant is the Chief Executive Officer of Baal-Perazim FET College, trading as Seshego FET College which is located at Seshego Plaza Campus, Zone 7, Seshego, Limpopo Province. Although there are two more applicants in this matter the aforementioned Chief Executive Officer or the first applicant has chosen not to describe them in these papers.

[4] The said application for condonation arises from the following circumstances. On or about 14 January 2013 the second applicant was arrested at Seshego in the Province of Limpopo. For the reasons referred to in annexure 'A' to the founding affidavit the second respondent intends instituting an action for damages.

[5] There was clearly a delay by the second applicant to institutes the said action. The second applicant explains the said delay as follows. Initially he had instructed a certain firm of attorneys in Polokwane to institute a claim for "*our wrongful arrest*". After numerous telephone calls and inquiries he received no reports from his then attorneys. Following the attorney's failure to attend to his matter or to furnish him

with reports he decided to terminate their mandate. During January 2014 he was approached by his current attorneys who requested him to assist them as a witness in the matter in which a friend of his was involved. It was during that month, January 2014, that the second respondent discussed the issue involving his aforementioned arrest with a certain Mr. Pistorius of his current attorneys of record.

[6] At first the said Mr. Pistorius informed him that he did not seem to be having prospects of success against the police for wrongful arrest due to the fact that his arrest was effected on the instructions of the Department and due furthermore to the fact that the police officer who arrested him did so on the Department's instructions. According to the advices to him by the said Mr. Pistorius his aforementioned arrest could not have been negligent or malicious. He advised him that there were good prospects, though, that the respondent was liable for a claim for malicious prosecution. For that reason he arranged a consultation with his counsel at his counsel's offices for a date in March 2014.

[7] After the said consultation, this application, the particulars of claim in the application now referred to as annexure 'Z' and the letter of demand in compliance with the Act were crafted. Only on 26 June 2014 was the said letter in terms of the Act sent. The third defendant responded in a letter dated 25 July 2014. In the said letter, according to the second applicant, the third defendant indicated that the second defendant was employed by the first defendant. After receiving the said letter from the first defendant, the applicants' attorneys proceeded to amend the letter that they

had sent to the third defendant and, having done so, proceeded to forward it to the first defendant. This letter, which was dated 6 August 2014, was sent to the Director General, Limpopo Provincial Department of Education. It is the Director General who is referred to as the first defendant. No response was received from the first defendant. As a result of the first defendant's failure to respond to his attorney's letter dated 6 August 2014, his attorneys sent a final demand to the first defendant. The said final demand, dated 12 September 2014, was served by the Sheriff of Court at the office of the first defendant on 16 September 2014 at 15h40.

[8] The applicant concedes that his cause of action arose on 14 July 2013. He makes a submission that his claim has not been extinguished by prescription. He undertakes to issue summons and have a copy thereof served on the respondents at the earliest possible time after the relief he seeks in this application is granted.

[9] It is contended by the second applicant that the respondent is aware of the claim against it; that the respondent will, upon being served with a copy of the summons, have an opportunity to file a plea to the merits. Finally it is contended by the second applicant that the respondent will be made fully aware of the intended claim and that they will have sufficient time to prepare a defence to the claim.

[10] On the merits, and referring to annexure 'Z', the second applicant contends that they have a *bona fide* claim in the main action against the respondent. He submits finally

that they have a reasonable chance of success should the action that they intend to launch proceed to trial.

[11] Before dealing with the evidence of the respondents in this matter, I wish to turn my attention to the material clauses of annexure 'Z'. Annexure 'Z' to the founding affidavit is the particulars of claim. I will cite the contents of paragraphs 5-10 thereof verbatim:

"5.

On 14 January 2013 at Polokwane, the 2nd defendant wrongfully and maliciously set the law in motion by laying a false charge of fraud against the 1st and 2nd plaintiff with the Polokwane Police Station.

6.

In laying the fraud charge, the 2nd defendant gave the Police the false information that the 1st and 2nd plaintiff was operating a FET College, being the 3rd plaintiff, without the necessary accreditation from the Department of Education, alternatively from the Department of Higher Education and Training.

7.

When laying this charge, and giving this disinformation, the 2nd defendant had no reasonable or probable cause for doing so, nor did he have any reasonable belief in the truth of the information given to the Police.

8.

8.1 As a result of the 2nd defendant's conduct as mentioned in paragraph 7 above, the 1st and 2nd plaintiffs were arrested on 14 January 2013, and detained until 1 February 2013.

8.2 As a result of the 2nd defendant's conduct as mentioned in paragraph 7 above, the number of student registrations at the 3rd defendant dropped significantly in reaction to the wrongful fraud allegations.

8.3 As a result of the 2nd defendant's conduct as mentioned in paragraph 7 above, and the subsequent detention of the 1st and 2nd plaintiffs, Nedbank revoked a home loan granted to the 1st and 2nd plaintiff as a result of the wrongful fraud allegations.

9.

At all relevant times, when the charge was laid, and the disinformation was given, the 2nd defendant was employed by-, and acting in the scope of his employment with the 1st defendant.

10.

After obtaining information that the 3rd plaintiff indeed was accredited by the relevant Department, the fraud charge against the 1st and 2nd Defendant was withdrawn by the Polokwane Magistrate's Court on 29 April 2013."

[12] I wish to point out that during argument of this matter counsel for the respondent informed the Court that the respondents have already been served with copies of the combined summons and that no notices of intention to defend have been delivered as the parties are awaiting the outcome of this application for condonation.

[13] As pointed out earlier, the respondents opposed the granting of the relief sought by the applicants. Their opposition is contained in an opposing affidavit deposed to by the second respondent.

[14] At the time of deposing to the opposing affidavit, the second defendant was the acting chief education specialist in the Limpopo Province. He sets out the defence against the application as follows: he was approached by a group of students who advised him that they had registered for further education training with Seshego Further Education Training College. The said group of students advised him that they needed to verify if the college was licensed to offer further education training. As the registration and licensing of further education colleges are done by the Department of Higher Education in Pretoria, he called the Department and was advised that neither Paal-Perazim College (Pty) Ltd nor Seshego FET College was registered with the Department to offer further education training. That indeed the aforementioned institutions were not registered for the purposes of offering further education training is confirmed by the affidavit of one Monica Motloi a Deputy Chief Education specialist employed by the Department of Higher Education and Training and stationed at its Pretoria Office. I will revert to this affidavit in due course.

[15] After he had received a report from the said Monica Motloi he advised the relevant students and told them what the Department had told him. The students then went to open criminal charges at the police station. He became aware that the students had laid charges when he was approached by the investigating officer who requested him to make a statement and he obliged. He denies that he laid any charges against Mr. or Mrs. Mukwevho. He denies furthermore that both Mr. and Mrs. Mukwevho have any prospects of success against the Department or the Limpopo Government in respect of the intended action of malicious prosecution.

[16] Mrs. Monica Motloi confirmed that the Department, that is the second respondent, is responsible for the registration of further education colleges in terms of the Continuing Education and Training Act 16 of 2006 ("the CET Act") read with the regulations for the registration of private further education and training colleges, Gazette No. 8796 dated 7 December 2007 ("the Gazette") as well as the guidelines provided to the applicants who apply for the registration with the Department. This is normally done in Pretoria. In her capacity as the Chief Education Specialist, among others, she deals with the registration of private colleges as envisaged in s. 28 of the CET Act. She keeps, and has access to, the records relating to the registration of further education training colleges. When this matter was brought to the attention of the Minister and the Department she was requested to check the registration of the third applicant and the third plaintiff to the claim for damages (the third applicant) Baal-Perazim College (Pty) Ltd and Seshego Further Education Training College with the Department. She confirms that both the third applicant and Seshego FET

College at the time were not registered with the second respondent to offer further education training associated with the second respondent.

[17] The records of the Department reflected that the third applicant submitted the application to be registered with the second respondent. She has stated in her affidavit that the application on behalf of the third applicant was submitted to the Department after the arrest of the first and second applicants on 14 January 2013.

[18] She was also requested to check the registration of Seshego Commercial and Computer College after consulting with the counsel and the State attorney. This was because there were allegations of some working relationship between this college and the third applicant and/or Seshego FET College. Seshego Commercial and Computer College is also currently not registered with the Department but the records reveals that it has been allocated and retains examination number 0799990718 issued on 22 April 2013. The affidavit continues and states that the examination number is provided by the unit within the Department for the purpose of accessing examination papers set by the Department and for writing examinations set by the Department. She contended that even if the examination centre had been awarded to an entity this action and proceedings are not related to the process or requirement set in the CET Act for an independent private institution to apply and receive registration with the State. Simply put as the time when the students laid the charges at the police station the Seshego Commercial and Computer College was not registered with the Department or the second respondent.

[19] It is common cause between the parties that the applicant's cause of action arose on 14 January 2013, the date on which the first and second applicants were arrested. In terms of s. 3(2)(a) of the Act, the applicants should have sent their notices of intention to launch a Court action against the respondents consequent upon their arrest on 14 January 2013 within 6 months of the said date, this date, being the date on which the debt arose. Where the applicants, in the said Act referred to as the creditors, failed to serve their notice to sue within the prescribed period, the said section allows them to approach the Court with an application for condonation for such failure.

[20] It is important to refer to the provisions of s. 3(4)(a) of the said Act. It states as follows:

"If an Organ of State relies on a creditor's failure to serve a notice in terms of (2)(a),

(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 exist for the failure by the creditor;

(iii) an Organ of State was not unreasonably prejudiced by the failure."

[21] It being common cause between the parties that, in order to succeed with their application for condonation, the applicants had to satisfy the Court, as enjoined by s. 3(4)(b) of the said Act that:

a. the debt has not become prescribed;

b. that good cause exist for the late service of a notice referred to in s. 3(2)(a) of the said Act; and

c. thirdly and lastly that the respondents have not and will not be unreasonably prejudiced by the late service of the said notice, by agreement between the parties, the scope of the consideration of the requirements by the Court was limited. According to the agreement, the issue that the Court was requested to decide was whether or not, if granted condonation, the applicants have any prospects of success on the merits with their planned action against the respondents.

[22] In dealing with prospects of success, Mr. De Kock, counsel for the applicants, argued that the Court should look at the applicants' particulars of claim. He developed his argument by saying that the particulars of claim will constitute the foundation of the claim. The particulars of claim, according to him, contain the information that the Court must use to determine the prospects of success of the applicants' case on the merits. He argued furthermore that the Court should look at the plaintiff's cause of action and determine whether there are any prospects of success. On the other hand, Mr. Ledwaba, counsel for the respondents, referred the Court to the opposing affidavit of the second respondent and argued that there are

no prospects of success. He referred the Court in particular to the second respondent's statement in his affidavit where he denied that he laid any charges against the applicants and stated furthermore that if such charges, if any, were laid, it was by some students.

[23] Counsel used different approaches as bases of their argument. Mr. De Kock argued, in other words, that a Court should look at the particulars of claim to determine prospects whereas counsel for the respondents referred the Court to the opposing papers.

[24] In Madinda v The Minister of Safety and Security 2008(3) ALLSA 143 SCA at page 147 G Heher JA, as he then was, had the following to say about good cause for the day:

"Good cause for the day is not simply a mechanical matter of cause and effect. The Court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless."

By this paragraph the Court was saying that the applicants must at least furnish an explanation of their default sufficiently full to enable the Court to understand how it really came about, and to assess their conduct and motives. See in this regard Silver v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345A; that a Court must at the same time look at the merits of the application. A litigant may fail to satisfy the Court about

his fault but still have strong merits. The Court also meant that even where the applicant has given a faultless explanation; it will be pointless to grant the condonation if the merits are weak. The Court deprecated the approach in which attention is paid to the reasons for the delay at the expense of the merits or vice versa. The proper approach therefore is to consider both the reason for the delay and the merits of the case at the same time. *"As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration."* See paragraph 148(b) of Madinda's case supra.

[25] In order to succeed with an application for condonation the Court must be satisfied that all three requirements have been met. Once it is satisfied the discretion to condone operates according to the established principles in such matters as to which C.G. United Plant Hire (Pty) Ltd v Hills and Others 1976(1) SA 717A at 720E-G.

[26] For the following reasons I am not satisfied that the applicants have any prospects of success on the merits if the condonation application is granted. The applicants have failed, in their replying affidavit, to deal specifically with the second respondent's allegation that it was some students who laid the charges against them and secondly, they have failed to deal with the second respondent's denial that he laid any charges against them. Where it is clear that facts, although not formally admitted, cannot be denied, they must be regarded as admitted. In the

circumstances I must find that the applicants have admitted that the charges were instead laid not by the second respondent but by some students.

[27] Furthermore the applicants did not deal anywhere in their replying affidavit with the evidence of Monica Motloi. The said Monica Motloi made it clear that the third applicant was not registered with the second respondent to offer further education training associated with the second respondent. The documents attached to the replying affidavit by the applicants are not certificates of registration in terms of the relevant CET Act but instead are certificates of accreditation only for examination purposes. The purpose of this certificate is to show that those centres have been recognised by the respondents as examination centres. They do not show that the applicants were registered in terms of the aforementioned CET Act. It follows therefore that it cannot be correct that the charges laid against the applicants are false.

[28] In my view, the application cannot succeed and is accordingly dismissed with costs.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv. DA de Kock*
Instructed by:	*Langenhoven Pistorius & Partners*
Counsel for the respondent:	*Adv. LGP Ledwaba*
Instructed by:	*The State Attorney*
Date Heard:	*26 August 2015*
Date of Judgment:	*28 August 2015*