IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 26246/2013

21/9/2015

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

21-09-2015 .....

DATE SIGNATURE

In the matter between:

CHARLOTTE CONNIE MHLONGO	Applicant
and	
COMMISSIONER FOR SARS	1st Respondent
ANDREW SESHOKA	2nd Respondent
FHULUFHELO MUTAVHATSINDI	3rd Respondent

DATE OF HEARING	:	**18 AUGUST 2015**
DATE OF JUDGMENT	:	**21 SEPTEMBER 2015**

JUDGMENT

MANAMELA AJ

Introduction

[1] The applicant seeks condonation, as contemplated in section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act), for failure to serve notice of intention to institute legal proceedings against the respondents. The respondents filed a special plea and thus indicated their reliance on the applicant's failure to serve a notice as contemplated in section (2) (*a*) of the Act.[1]

[2] She issued summons against the respondents on claims for malicious prosecution (Claim A) and defamation (Claim B).[2] The respondents opposed the application mainly on the grounds that, the applicant has failed to prove existence of good cause for her failure to serve the notice with regard to Claim A and that Claim B has prescribed by the time summons was served. A brief factual background is therefore necessary for an exposition of the submissions regarding condonation and location of the origin of the claims.

Applicant's case

[3] The applicant was an employee of the South African Revenue Service (SARS), an entity for which the first respondent is the head, as the Commissioner. In March 2009 the applicant was arrested on a charge of corruption and held in custody until she was released on bail. She was subsequently acquitted of the charges on 21 October 2011.[3] She submits that the prosecution was malicious and instigated by the

[1] See section 3 (4) (*a*) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act).
[2] See para 9-18 of the founding affidavit on indexed pp 6-8.
[3] See para 13 of the founding affidavit on indexed p 7.

second and third respondents, as employees or furthering the interests, of the first respondent.

[4] During 2009 the first respondent appears to have published a message or statement, referred to as a circular by the applicant, to all employees of SARS. I could not read some part of the message or statement on the document attached to the papers,[4] which appeared to have been blotted out. Mr Raphahlelo appearing for the applicant assisted me in this regard. From my contemporaneous notes, taken from Mr Raphahlelo's dictation, the material part of the message reads:

"Charlotte Mhlongo was convicted for selling jobs."[5]

[5] The applicant considers the above publication to be defamatory, hence a damages claim (Claim B) against the respondents. It is common cause that the applicant was not convicted of a charge of corruption or for selling jobs, especially at the time (in 2009) when the publication was allegedly made by the first respondent.[6] In fact, as stated above, the applicant was acquitted of this charge on 21 October 2011.

[6] The applicant correctly submits that she was required to serve the notice in terms of section 3 of the Act on the respondents within six months from 21 October

[4] See annexure "A" to the founding affidavit on indexed pp 16-18.
[5] See annexure "A" to the founding affidavit on indexed p 17
[6] See para 14 of the founding affidavit on indexed p 7.

2011 on 20 April 2012. She served the notice on 18 June 2012[7] and the respondents raised a special plea in this regard,[8] hence this application for condonation.

[7] The applicant explains her delay in serving the notice to have been caused by the following. After her acquittal she received an invoice or statement of account from her legal representatives in March 2012. The invoice was in excess of R700 000. She had no means to settle this invoice and was advised by her legal representatives to sue the respondents. However, she only instructed them to commence legal proceedings against the respondents on 18 June 2013. She pleads ignorance of her rights to sue for the delay.

Respondents' case

[8] The respondents' opposition to the condonation is based on an argument that the requirements in the Act regarding condonation haven't been met. It is submitted that the applicant's explanation for the delaying in serving the notice ought to cover the entire period when the notice remained outstanding. The following is the respondent's analogy in this regard:

"...if the notice was required to be delivered on a Monday but it was only delivered on a Friday, the explanation given must cover the whole period of Tuesday, Wednesday and Thursday. This means that the applicant must explain why the notice was not delivered on any of the days before Friday."[9]

---

[7] See para 23 of the founding affidavit on indexed p 9; annexure "B" to the founding affidavit on indexed p 19.
[8] See para 27 of the founding affidavit on indexed p 10.
[9] See para 12 of the respondents' heads of argument on indexed p 60.

[9] With respect, I find the above analogy or submission to be amusing, but that is not really the point. The following will locate the origin of my amusement in this regard. The applicant applies for condonation because she was late by two months for serving the notice. This will then mean that she goes into a narration of her daily or weekly or monthly activities when explaining her delay, if the respondents' approach was to be followed. In my view, this approach does not accord with the modern rules of our legislative interpretation.[10] The approach taken by the respondents when interpreting the impugned provision does not take cognisance of the purpose of the provision.[11] In my view, all the applicant has to do is to sufficiently explain her delay. I am not as yet saying there is such sufficiency in her explanation, but I merely marvel at the implication of the submission. I will return to this later on.

Applicable legal principles

General

[10] The only legal principles material for the contentions in this matter are those relating to the impugned provisions of the Act and those relating to the subject matter of the applicant's claims, being malicious proceedings and defamation.

[11] Therefore, other than the provisions of the Act, the law or principles of the law of defamation and malicious prosecution or malicious proceedings are to be considered. I look at these under separate subheadings below.

---

[10] See ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012(4) SA 593 (SCA) and [2012] 2 All SA 262 (SCA) at para [18] cited with approval by the Constitutional Court in ***Kwazulu-Natal Joint Liaison Committee v Member of the Executive Committee, Department of Education, Kwazulu-Natal and Others*** 2013 (6) BCLR 615 (CC) on p 651 at para 129.

[11] See ***Harksen v Lane NO and Others*** 1998 (1) SA 300 (CC).

Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act

[12] Section 3 of the Act reads as follows in the material part:

"(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) ...

(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."

[underlining added for emphasis]

[13] From the above, it is clear that this court has to be satisfied that three requirements have been met by the applicant. Firstly, that the debt claimed by the applicant has not been extinguished by prescription. Secondly, that good cause exists for the failure by the applicant to serve the notice. Finally, that the respondents were not unreasonably prejudiced by the failure.

[14] As stated above, the legal principles applicable to the actual claims by the applicant based on defamation and malicious proceedings are also to be considered in order to determine whether in the circumstances there are prospects of success for the claims, as part of determining existence of good cause. I deal with these next and start with malicious proceedings.

Malicious Proceedings

[15] The applicant's Claim A is for malicious prosecution. This is one of the forms of malicious proceedings.[12] The essentials or conditions of liability for malicious proceedings are as follows:

[12] "Malicious criminal proceedings may take the form of malicious prosecution, malicious procurement of a search warrant or malicious arrest or imprisonment. Malicious civil proceedings may consist of malicious arrest of a person under civil process, malicious execution, malicious insolvency or liquidation proceedings and any

a) The defendant instituted or instigated the proceedings

b) The defendant acted intentionally or with *animus iniuriandi*

c) The defendant acted without reasonable and probable cause

d) The defendant was actuated by an improper motive or malice

e) The proceedings terminated in the plaintiff's favour.

f) The plaintiff suffered damages.[13]

[16] In ***Amlers Precedents of Pleadings***[14] the abovementioned elements are almost the same as in *LAWSA*.[15] However, the elements in b) and d) above are combined as one element. In my view, this makes perfect sense, as a person acting with *animus iniuriandi* is actuated by malice or improper motive. I do not deem it warranted to be detained by these any further and will move on only to return to this later.

Defamation

[17] The applicant claims that she was defamed by the publication made by the first respondent allegedly that she was convicted of corruption or for selling jobs, when this wasn't the case. A claim grounded on defamation is an *actio iniuriarum* and is for protection of the right to a good name, unimpaired reputation and esteem

---

other abuse of the legal process. Unlike English law, South African law does not distinguish between the institution of civil and criminal proceedings when dealing with abuse of legal procedures." See McQuid-Mason DJ ***Malicious Proceedings*** **Law of South Africa**, Volume (15) 2nd edition (*LAWSA*) at 311 with footnotes omitted.

[13] See *LAWSA* at 315.

[14] Harms LTC ***Amlers Precedents of Pleadings*** 8th edition (LexisNexis Cape Town 2015) (*Amlers*).

[15] See footnote 11 above.

by others.[16] Our Constitution[17] enshrines fundamental constitutional value of human dignity.[18] Therefore, there is an intersection of two fundamental values, protected by the Constitution, being the right to freedom of expression and the protection of reputation or good name.[19]

[18] The plaintiff in an action based on defamation must set out and prove the words alleged to have been used by the defendant. Publication of the defamatory statement is *prima facie* wrongful, if it has the 'tendency' or is calculated to undermine the status, good name or reputation of the plaintiff.[20] The defendant can dispel the *prima facie* case or wrongfulness by proving that the statement is the truth and in the public interest.[21]

[19] I deal next with these requirements or legal principles against the submissions made on behalf of the parties. I conveniently use the requirements as subheadings under the next main heading.

---

[16] See Brand FDJ ***Defamation*** **The Law of South Africa**, Volume (7) 2nd edition (*LAWSA-Vol 7*) at 232 and the authorities cited there..

[17] Constitution of the Republic of South Africa, 1996.

[18] See *LAWSA-Vol 7* at 232 and its authorities..

[19] *Ibid.*

[20] See *Amlers* at p 157.

[21] See *Amlers* at p 162.

Legal principles and facts of this matter

The debt has not been extinguished by prescription

[20] It is common cause that Claim A in respect of malicious prosecution has not been extinguished by prescription.[22] Therefore, the subject of discussion under this requirement is Claim B, the defamation claim. The applicant submits that the malicious prosecution interrupted prescription in respect of the defamation claim.[23] In the applicant's view it matters whether the allegations were true or not and the acquittal made the cause of action complete. Therefore, prescription could not start earlier. Prescription is in terms of ***the Prescription Act 68 of 1969*** (the Prescription Act). Section 11 provides that the period of prescription of debts in this regard is three years. In ***Claasen v Bester*** [2012] JOL 28281 (SCA) the Honourable Lewis JA wrote for a unanimous court that:

"And in *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) para 17 Cameron and Brand JJA said: 'This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortably.'[24]

[underlining added for emphasis]

[22] See para 2.1.1 of the applicant's supplementary heads of argument; paras 17-19 of the respondents' heads of argument.
[23] See para 3.2.1 of the applicant's supplementary heads of argument.
[24] See ***Claasen v Bester*** [2012] JOL 28281 (SCA) at paras [14] and [15].

[21] Therefore, it is clear that the applicant was only required to sue when she had the "minimum facts" and not when in her opinion the cause of action for her claim has completed. As stated above, in a claim for defamation the plaintiff must set out and prove the words alleged to have been used by the defendant and publication of the defamatory words are *prima facie* wrongful, if they are calculated to undermine the status, good name or reputation of the plaintiff. This is clearly at the time when the words are used. This is the reason why a defendant in such a lawsuit can defend himself or herself by pleading that the words are true and in the public interest.[25] In my view, the defence does not lie in the future, when the plaintiff is perhaps vindicated, but when the utterances are made. This should not be construed to mean that the plaintiff or victim of the defamatory publication may not sue on the basis that a publication made previously has now ended up been defamatory. I am not required to go into this direction and I shouldn't be construed to be saying that such a claim would have been meritorious had it been applicable to the applicant. In this matter the applicant finds the publication that she was convicted of corruption to be defamatory when she was never convicted of such a crime or charge. It follows that Claim B has been extinguished by prescription and therefore the applicant has failed to satisfy this requirement for condonation. And because the requirements for condonation are conjunctive in nature, Claim B immediately falls off due to failure to clear this hurdle.

[25] See para [18] above.

Good cause exists for the failure by the applicant

[22] The other requirement for condonation is that this court ought to be satisfied that there is good cause for the failure by the applicant in serving the notice required by the Act.

[23] In ***Madinda v Minister of Safety and Security*** 2008 (4) SA 312 (SCA) the existence of good cause was explained as entailing:

"prospects of success in the proposed action; the reasons for the delay; the sufficiency of the explanation offered; the *bona fides* of the Applicant; and any contribution by other persons to the delay and the Applicant's responsibility therefor."

[24] The applicant submits that there is a strong merit in her favour which militates for condonation. On the other hand the respondents submit that the applicant has not proven existence of good cause. With regard to the issued of sufficiency of the explanation they submit that the requirements or elements in the Act have not been met.

[25] The applicant does not appear to have been very time sensitive about the pursuit of her claim from the moment she was allegedly advised of her right to sue the respondents. She still took another two months to send the impugned notice. However, I now know this because she has made those submissions. She did not pretend there was another reason for the delay. In my view this is a demonstration of her *bona fides.* She was arrested on the basis that she is corrupt and the publication by the first respondent confirms that she was viewed as corrupt by at least the first respondent or within her employer SARS. In my view these are indicative of

prospects of success in her claim based on malicious prosecution. I am satisfied that this requirement is met in respect of Claim A.

The respondents were not unreasonably prejudiced by the failure

[26] The applicant submits that there is no unreasonable prejudice to the respondents considering the circumstances of this matter. It is submitted that the applicant used the first available opportunity to assert her rights, albeit two months later. I agree with this contention. There may be some prejudice to the respondents, although in the papers this is only alleged in general terms by the respondents, but such prejudice – should it exists - would not be unreasonable. In my view, the applicant acted in good faith throughout.

Conclusion

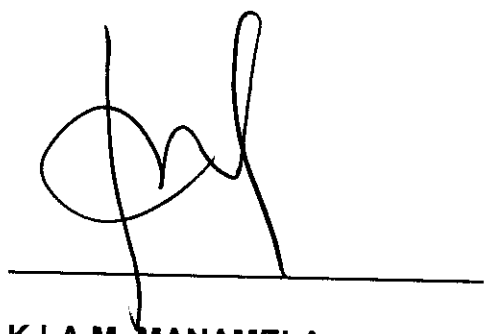
[27] Therefore, in my judgment, the applicant has met the requirements for condonation regarding the late serving of the notice in terms of the Act. Obviously, this is only in respect of Claim A, for malicious prosecution. I have already found that Claim B for defamation is extinguished by prescription.[26] In the end there is partial success by both parties and this affects the issue of costs. Therefore, in my judgement, costs in this application should be awarded to the party who ultimately succeed in the action.

[26] See paras [20] and [21] above.

Order

[28] In the result the following order is made:

1. Condonation is granted in terms of section 3(4)(b) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act) for the applicant's late compliance with sections 3(1) and (2) of the Act based on a claim for malicious prosecution or malicious proceedings;
2. Condonation in terms of section 3(4)(b) of the Act for the applicant's late compliance with sections 3(1) and (2) of the Act based on a claim for defamation is denied due to the claim for defamation being extinguished by prescription;
3. The costs of the application are costs in the action.



K.LA.M. MANAMELA

Acting Judge of the High Court

APPEARANCES :

For the Applicant	:	Adv. MP Raphahlelo
Instructed by	:	Mpoyana Ledwaba Inc.
		Pretoria
For the Respondent	:	Adv. K Tsatsawane
Instructed by	:	Gildenhuys Malatji Inc.
		Pretoria