

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
PRETORIA

CASE NUMBER: 56860/2017

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

08/02/2019...

DATE

SIGNATURE

In the matter between:

William Brian Mkhabela

Applicant

v

Minister of Police

Respondent

JUDGMENT

SKIBI AJ

INTRODUCTION

- [1] This is an application for condonation for the late delivery of the notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act¹ (the Act). The respondent is opposing the application.

FACTUAL BACKGROUND

- [2] On 14 June 2017, the applicant's attorneys caused a notice in terms of section 3 of the Act to be served at the office of the National Police Commissioner demanding payment of a total amount of R2 520,000.00 for damages in respect of the alleged unlawful arrest and detention. The summons commencing the action and now claiming an amount of R820,000 was served upon the respondent on 21 August 2017.
- [3] The applicant alleges that on or about 7 February 2015 and at Mamelodi, Gauteng Province, he was arrested without a warrant by Isaac Samuel Mabena, a warrant officer in the South African Police Service (SAPS). He was detained from approximately 16h05 on 7 February to 13h00 on 9 February 2015 at Mamelodi East police station. He was charged with unlawful possession of a firearm and ammunition suspected to have been stolen. He alleges that the arrest and subsequent incarceration was an abuse of power which amounted to a violation of his constitutional right to dignity on the basis that he never committed the said crimes. He alleges that he was licenced to possess the state-issued firearm and ammunition.

¹ Act 40 of 2002

- [4] The applicant explains the delay as follows:

"I was not aware of the required time limits that had to be given to an organ of State within 6 months of my arrest. I only became aware on the applicable Act of Parliament as well as time periods when I first consulted my attorney of record on 14 June 2017."

On 30 November 2017² this application was launched with the Registrar of this court.

ISSUES

- [5] The main issue for determination is whether the applicant has made a proper case for this court to grant him condonation for the late filing of the notice in terms of section 3 of the Act.

LAW

- [6] Section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 provides:

(a) that 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 court having a jurisdiction for condonation of such failure.

the court may grant an application referred to in paragraph (a) if it is satisfied that-

² Date stamp of the registrar is reflected and the date of service of the application to the respondent

(i) *the debt has not been extinguished by prescription;*

(ii) *good cause exists for the failure by the creditor;*

(iii) *the organ of state was not unreasonably prejudiced by the failure.*

- [7] The interpretation of the three requirements came before the higher courts for consideration and have been dealt with extensively. In the case of the *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*³ it was held that section 3(4)(b) circumscribes the court's power by requiring that it be satisfied that all the requirements are met and the said requirements must be established by the Applicant. See also *Oletsitse v Minister of Police*⁴; Unreported judgment by the full court of the *Eastern Cape Division, Grahamstown case of Wanga Maguga v Minister of Police*⁵

(i) *Prescription*

- [8] On the facts of this case the first requirement is not applicable because the action was instituted before the prescription of the claim. Both parties correctly so in my view conceded that the action has not prescribed.

(ii) *Good cause:*

³ 2010 (4) SA 109 (SCA) at para [11]

⁴ Unreported judgment Case No: 29788/2011 ZAPPHC 333 (6 May 2015)

⁵ EC Division, Grahamstown (Unreported case CA 342/2017 (delivered 27/08/2017))

- [9] Good cause refers to the reasons for the delay and the prospects of success in the intended action. In the case of *Malinda v Minister of Safety and Security*⁶ the Supreme Court of Appeal said the following:

"[10] The second requirement is a variant of one well-known in cases of procedural non-compliance. Torwood Properties (Pty) Ltd v South African Reserve Bank 1996(1) SA 215 (W) at 227-228F and the cases there cited. 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex, it may be that only some of many possible factors become relevant. These may include 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 or parties to the delay and the applicant's responsibility thereof."

[12] ..."Good cause for the delay" 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 part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault, no merits may render mitigation pointless. There are two elements at play in section 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by the delay beyond the statutory prescribed limit for the giving of notice".

⁶ 2008 (3) ALL SA 143 (SCA) and also reported at 2008 (4) SA 312

- [10] In general terms the interest of justice plays an important role in condonation application. An application for condonation is required to set out fully the explanation for the delay and must be reasonable. In the instant case the applicant's reason for delay is that he was not aware about the notice which had to be served to the respondent until he consulted his attorneys on 14 June 2017. The respondent argues that the applicant has failed to provide this court with sufficient reasons as to why section 3 notice was not served within the prescribed period.
- [11] The respondent in essence contends that the applicant does not give account of what steps he took from 9 February 2015 when he was released until June 2017 and as a police reservist, he ought to have known that if the arrest was unlawful, a reasonable law enforcement officer in the position of the applicant could have instituted an action soon after his release. His failure to explain the steps he took demonstrates a lack of good cause for the delay.
- [12] During the argument, Mr Mngomezulu, counsel for the applicant, was invited to point out where on record the applicant deals with what steps were taken upon his released. Counsel was constrained to concede that there is no explanation save to say that the notice was issued shortly after he became aware about it in June 2017. His counsel's contention is that soon after the applicant became aware of the legislation, a notice was sent to the offices of

the respondent which was followed by issuing of summons and the launching of this application.

- [13] Mr Mngomezulu referred to a decision of this court where a condonation was granted even though there was a delay in serving the notice. Counsel for the respondent's contention was that she has not been given a copy or citation of the said case and it was not in the heads of argument filed by applicant's counsel and was objecting a reliance to the said case because it was not referred to in the applicant's heads of argument.
- [14] I offered her the opportunity to have the matter stand down so that she could read the judgment. She opted not to take the opportunity. She submitted that that case would not change the fact the applicant failed to give reasons for the delay and that therefore the application should be dismissed.
- [15] Mr Mngomezulu referred the court to the unreported case of *Oletsitse v Minister of Police*⁷ (hereinafter referred as *Oletsitse case*). In that case there was also a delay in serving the notice in terms of section 3 of the Act. In the *Oletsitse* case the applicant was arrested without a warrant by the South African Police Services. He was in detention for a period of ten days. The charges were later withdrawn. Shortly thereafter he consulted attorneys and summons was issued suing the Minister of Police for vicarious liability. The respondent in that case raised a special plea amongst other things that there

⁷ (29788/2011 [2015] ZAGPHC 333 (6 May 2016))

was no condonation application for the late institution of the legal proceedings. The application for condonation was launched approximately after twenty-six months from the date when the cause of action arose. The court after considering the arguments and evidence presented granted condonation for the late filing of the notice in terms of section 3 of the Act.

- [16] The *Oletsitse* judgment does not help the applicant in his case. In *Oletsitse* the applicant gave reasons for the delay as follows:

"Para [19] The Applicant's explanation for delay reads as follows:

I at all relevant times honestly believed that I could act against the defendant once the case against me had been disposed of. I respectfully submit that the delay in the delivery of the said notice on 15 September 2015 (sic) was due to my initial incorrect belief that the prosecution against me had to be completed. I respectfully submit that the delay was not caused as a result of a deliberate action or intention to prejudice that defendant. I did not have any knowledge of the legal process and I was not aware that a notice had to be submitted within six months after the claim has arisen."

- [17] In *Maguga* case⁸ the applicant clearly explained the steps he took and he took those steps timeously. In para [31] the following appears:

"[31] It is evident from Maguga's affidavit that he took action with some expedition: soon after he had been treated in hospital, he reported what had happened to him at the Duncan Village police station. It is clear too that from an early stage he was intent on pursuing a civil remedy against his assailants. As a lay person, he was reliant on the advice of the attorney who he consulted. Through no fault on his part he was misinformed and given erroneous legal advice that prevented a notice from being given timeously."

- [18] In *Maguga* the court draws a distinction in the application for condonation in terms of the rules and in terms of section 3(4) of the Act⁹.

⁸ Supra at para [31] and [32]

[19] In the instant case the applicant says that he was acquitted on 20 May 2016. He does not give account of what steps he took to have his matter brought to court. He only consulted the attorneys on 14 June 2017, which is a period of about thirteen months after his acquittal but he neglects to provide any reason, whatsoever, as to why he did not seek legal advice sooner. The applicant in the *Oletsietse* case explains clearly his mistaken belief and that he took steps immediately after the withdrawal of the charges.

[20] The applicant makes a bold statement that he was unaware of the time period but does not take the court to his confidence explaining the delay from 9 February 2015 to 14 June 2016 or the at least from the date when his criminal matter was finalised in court.

[21] I agree with counsel for the respondent that the applicant has failed to provide sufficient reasons for the delay in serving the notice in term of section 3 of the Act. In my view a bad precedent may be set if the court were to condone the laxity of the litigant where no explanation is provided for the delay. The court is not persuaded that the explanation provided by the applicant is reasonably, in fact he gave no explanation at all the for delay to consult his attorney after he was acquitted on 20 May 2016.

Prospects of success

⁹ Para [28] of Maguga judgment

[22] The applicant's contention is that he has good prospects of success on the merits of his pending action against the respondent. He says he was never afforded an opportunity to provide an explanation by the arresting police officer, Constable Mabena. He says that a firearm and ammunition was issued to him as he was a police reservist¹⁰. During argument both counsel were asked to provide the court with information as to whether the applicant was given a service firearm and ammunition by the officials of the respondent.

[23] Counsel for the applicant's submission was that there is no clear indication from the respondent whether it concedes that the applicant was arrested and charged for unlawful possession of firearm and ammunition which was issued to him by the officials of the respondent. The respondent on the other hand argues that the applicant was arrested in terms of section 40(1), (b) and (e) of the Criminal Procedure Act¹¹ (CPA). Section 40(1) of the CPA provides that a peace officer may without a warrant arrest any person:

(a) who commits or attempts to commit an offence in his presence;

(b) whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody;

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly

¹⁰ Page 7 of the paginated record para 7

¹¹ 51 of 1977

obtained and whom the peace officer reasonably suspects of having an offence with respect of such thing.

[24] The Appeal Court in the case of *Melani v Santam Insurance Co Ltd*¹² sets out the requirements for condonation : amongst the facts usually relevant are “the degree of lateness, the explanation given therefor, the prospects of success and the important of the case. The court held that *what is needed is the conspectus of all the facts. Thus a slight delay and good explanation may help to compensate for prospects of success which are not be strong. Or the importance of the issue and strong prospects of success may tend to compensate the long delay*”.(underlined my own emphases). The court held all those the listed factors should be considered together not in a piecemeal.

[25] In the instant case, the degree of lateness is so huge and no explanation given by the applicant. It is indeed so that this matter is of important to the applicant but sight should not be lost on the side of the respondent as well the matter should reach finality hence there are time periods set out by the provisions of section 3 of the Act for the instituting of the proceedings.

[26] I am not satisfied that the applicant has good prospects of success. He was

¹² 1962(4) SA 531 (A) at 532 C-E

detained after he was charged for unlawful possession of firearm and ammunition and from the evidence presented the police had reasonably suspicion that the firearm was stolen as stated in the respondent's papers.

(iii) *Prejudice*

- [27] The applicant's contention is that the respondent will suffer no prejudice if this applicant is granted. The respondent on the other hand submits that the applicant's delay to serve notice prejudices it as the incident occurred in 2015 which is now almost four years since the cause of action arose and the memory of witnesses might diminish with the lapse of time. Counsel for the respondent refers the court to the case of *Mohlomi v Minister of Defence*¹³ in paragraph

[11]... *Inordinate delays are common in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken*".

¹³ 1997 (1) SA 124 (CC) para [11]

[28] The respondent also referred the court to the case of the *Commissioner for Inland Revenue v Pick n Pay Wholesalers (Pty) Ltd*¹⁴ where the following remark was made:

"... Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in common experience that, during the stage of retention or storage in their accounts after a long interval than after a short one. It is a matter of memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent information. One is aware too that there can occur a process of unconscious reconstruction".

[29] The respondent contends that the unexplained delay will be prejudicial to it if the application is granted. The applicant has a right to vindicate the infringement of his constitutional rights. However, there are time lines set for instituting the action and failing which an application for condonation is necessary where he/she is required to provide reasons for delay and to show the existence of reasonable prospects of success.

[30] The Act requires that the applicant serve a notice to the organ of state to institute civil proceedings in terms of section 3 of the Act within six months from the date the debt became due. The applicant became aware of such legislation on 14 June 2016 that he is required to serve a notice to institute civil proceedings against an organ of state.

¹⁴ 1987 (3) SA 435 (A) at page 469 F-G

- [31] The applicant says he endured trial in the regional court for months and after his acquittal he waited for a year before he sought legal advice from an attorney and gives no explanation for such delay. As the applicant is a police reservist, one can reasonable expect that he ought to have known what action to take if he was unlawfully arrested and detained.

RESULT

- [32] In the result, for the reasons set out above, the applicant's application for condoning for the late filing of the notice in terms of Section 3 of the Act fails.

COSTS

- [33] Counsel for the applicant's contention with regards to costs is that if the applicant's application succeeds the court should grant an order with costs. On the other hand, counsel for the respondent's argument was that if the application is granted the court should make an order that each party to pay its own costs but if the court decide to dismiss the application costs should follow the result, the respondent should also be awarded cost order. Her reason is that the respondent had to come to court and oppose the application and the applicant should be sanctioned by a cost order. The court disagrees with the approach suggested by counsel for the respondent regarding a cost order. In any event the issue of cost is an issue within the discretion of the court.

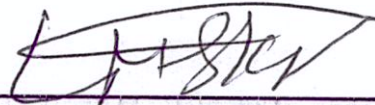
- [34] The court is of the view that an order that each party pay its own costs will be just and fair. The applicant is not a vexatious litigant, he wanted to get access to court to vindicate his claim for damages for the alleged unlawful arrest.

ORDER

- [35] The following order is made:

[35.1] The applicant's condonation application for late delivery of the notice as contemplated in section 3 of the Institution of Legal Proceedings against Certain Organs of State, 40 of 2002 is dismissed.

[35.2] Each party to pay its own cost



N SKIBI

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

Heard on : 4 February 2019

Judgment delivered : 8 February 2019

APPEARANCES

For the Applicant : Adv. S Mngomezulu
Instructed by Jafta (Lerato) Attorneys
PRETORIA
Tell: (012) 771-7109

For the Respondent : Adv. V Mashele
Instructed by State Attorney, Pretoria