




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

Case number: 47637/2011

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
	
SIGNATURE	DATE
	2022-06-17

In the matter between:

BRUCE MALANDELI MDLUTA

APPLICANT

And

**MINISTER OF POLICE
NATIONAL DIRECTOR OF PUBLIC PROSECUTION**

**FIRST RESPONDENT
SECOND RESPONDENT**

JUDGEMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

- [1] This is an application for condonation in terms of section 3(4) (a) of the Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act").
- [2] The Applicant's causes of action against the Respondents (the Minister of Police and the National Director of Public Prosecutions), are:
- 2.1. An unlawful arrest;
 - 2.2. An unlawful detention;
 - 2.3. A malicious prosecution.
- [3] It is common cause that the Applicant served a notice in terms of section 3(1) (a) of the Act ("the statutory notice"), on the Minister of Police on 28 February 2014, and that no statutory notice was served on the NDPP at all.
- [4] It is as a result of the objection to the late filing of the statutory notice on the Minister of Police and the failure to serve a statutory notice on the NDPP which necessitated the launch of this application.

BACKGROUND AND FACTS

- [5] The Applicant was arrested on a charge of robbery with aggravated circumstances on 13 December 2005.
- 5.1. The Applicant was released from custody on 9 November 2011 after being found not guilty on the abovementioned criminal charge.
 - 5.2. On 28 February 2014, a statutory notice was served on the Minister of Police.
 - 5.3. Summons was served on both Respondents on 30 April 2014.
 - 5.4. An Amended Plea was filed on 7 May 2015.
 - 5.5. A replication was filed on 7 September 2020.

- [6] This application was launched on 14 August 2016. The Notice of Motion is dated 5 March 2016; the founding affidavit was commissioned on 3 May 2016; according to the Applicants' attorneys, this application was launched and served on 14 August 2016.

THE LEGAL POSITION

- [7] Section 3(4) (a) and (b) of the Act reads as follows:
- (a) If an organ of state relies on a creditors 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 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
- [8] The letter of section 3(4) (a) is to the effect that the applicant has to satisfy all the three requirements, namely;
- (i) That the debt has not been extinguished by prescription;
 - (ii) That good cause exists for the failure by the creditor; and
 - (iii) The organ of the state was not unreasonably prejudiced by failure.
- [9] The Supreme Court of Appeal held in **Minister of Agriculture and Land Affairs v Rance**¹, that condonation must be applied for as soon as the party concerned realises that it is required.

¹ 2010 (4) SA 109 (SCA) AT 118 B

[10] The SCA has also held applications for condonation should, in general, be brought as soon after the default as possible. Thereby, possible prejudice to the other party and misconception as to the intentions and *bona fides* of the Applicant can be lessened. A delay in the making the application should be fully explained. A failure to do so may adversely affect condonation or it may merely be a reason to censure the Applicant or his or her legal advisers without lessening the force of the application.

[11] a debt may not be regarded being due until the debtor 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.

[12] Section 3(4) (a) and (b) of the Act² provides as follows:

- 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. *(b) The Court may grant an application referred to in par (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.*

² Institution of Legal Proceedings Against Certain Organs Of State Act 40 of 2002

[13] In the Special Plea and Respondents rely on the fact that the statutory notice has been served out of time and that the applicant's claim in respect of unlawful arrest and detention has become extinguished by prescription.

[14] The respondents contend that there is no explanation for the 14 (fourteen) month period in bringing this application. It is delays such as in the instance of this case which affect the administration of justice. Further that the failure to provide a full explanation for the delay in bringing this application, on its own, constitutes a reason for the application for condonation to be refused.

[15] In **Thembisile Stedman Reme v Minister of Safety and Security**³, the Court held:

“A delay in launching condonation proceedings after the notice has been dispatched is a consideration relevant to the Court's discretion to condone non-compliance in terms of section 3(4).

[16] The applicant contends that the respondents will not suffer any prejudice should the court grant condonation for the late service of the section 3 Notice. The respondents, however, articulate that they will suffer prejudice. The respondents contend that due to the inordinate lapse of time between the arrest of the Applicant in December 2005 and his release in May 2011 it can hardly be expected of any of the witnesses to recall with precision, the circumstances relating to this matter.

[17] Between December 2005 and November 2011 the applicant was in custody awaiting the finalisation of his criminal trial and one appreciates the fact that a considerable amount of time had elapsed not due to the fault on his part.,

³ Unreported Western Cape High Court decision; Case no. 22382/2014; Delivered on 24 August

[18] The applicant argues that I should grant the application because it is in the interest of justice to do so. The applicant referred me to **Brummer v Gorfil Brothers Investments (Pty) Ltd**⁴ wherein the Constitutional Court held as follows;

"It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if it is in the interest of justice and refused if it is not. The interest of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the Applicant's explanation for the defect."

CONCLUSION AND ORDER

[19] I am satisfied that the applicant has fully explained the reasons of the delay and that it will be in the interest of justice to grant condonation. In my view the application should therefore succeed. Ordinarily, costs should follow the result but in this case the opposition was not unreasonable.

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

- (a) Condonation is granted for the late filing of notification in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 Of 2002.
- (b) Costs to be costs in the cause.

KGANKI PHAHLAMOHLAKA

⁴ 2002(2) SA 837(CC), PARA 3

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

Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Case lines. The date for handing down is deemed to be 17 June 2022.

JUDGMENT RESERVED ON : 02 February 2022
FOR THE APPLICANT : ADV M MLISANA
ADV S MBALI
INSTRUCTED BY : MOKGOLA ATTORNEYS
FOR THE RESPONDENT : ADV R JAGA SC
INSTRUCTED BY : THE STATE ATTORNEY
DATE OF JUDGMENT : 17 June 2022