



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, BHISHO]**

CASE NO.: 404/2022

In the matter between: -

NOMBONISO LILIAN DIKE

PLAINTIFF

and

MINISTER OF POLICE

1ST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2ND DEFENDANT

JUDGMENT

NORMAN J:

[1] This application has been brought with the sole purpose of seeking condonation for the applicant's non-compliance with the provisions of section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Institution Act). The application is opposed by the first respondent on the basis that the claim has prescribed in terms of section 11(d) of the Prescription Act. Although there is focus on the first respondent in the judgment, because of his active participation in the application, this judgment applies to the second

respondent as well although she failed to file an answering affidavit. This judgment also deals with her objection to the condonation based on the prescription point.

[2] Ms Magadlela appeared for the applicant and Ms Sangoni for the respondents.

Relevant facts

[3] The applicant is a female adult residing at Khangelekile Community settlement, Buck Kraal Farm, Peddie, in the Eastern Cape. She is a widow doing odd jobs and a primary care giver to three minor children and one grandchild.

[4] On or about 15 July 2022, the applicant instituted a claim for damages against the Minister of Police and the National Director of Public Prosecutions for, *inter alia*, unlawful detention, discomfort, malicious prosecution and legal fees in the amount of R1 140 000.00.

[5] In giving details relating to the claim, the applicant stated the following:

5.1. During the afternoon on 16 May 2019, masked members of the South African Police Services entered her home without a search warrant and searched it. They planted drugs in her bedroom. They assaulted her in an attempt to obtain a confession from her. They arrested her without probable cause. They did not inform her of her constitutional rights. It was later established that the officers who were involved in the search were Sergeant Z. Ndyoko and Sergeant Maru who were attached to the TRT Fort Jackson police station.

5.2. She was kept in custody. The arresting officer recommended that she be released on bail, however, the prosecutor opposed bail. She alleged

that the opposition by the prosecutor was irrational and malicious. She was kept at the East London prison. She appeared in court on 17 May 2019 and the case was postponed to 20 May 2019. On 20 May 2019 the case was further postponed to 27 May 2019. She was granted bail on 27 May 2019.

- 5.3. After several postponements she was found not guilty and discharged on 27 November 2020. On 11 March 2021, she advised her attorneys of record about her arrest. On that day, she alleged, she had accompanied her now deceased husband who had attended to the attorney's offices for a consultation. It was during that consultation that she mentioned what had happened to her. She was advised by the attorneys that they first needed to request the docket from the police station to assess her rights.
- 5.4. The request for the docket was made to the police on 24 March 2021. When the information officer from the police station failed to furnish the requested information, an appeal was lodged against the deemed refusal on 11 May 2021, without success. On 14 September 2021, the applicant approached court, seeking an order to compel the first respondent to furnish the docket. She was granted the relief sought. The first respondent was given fourteen days within which to furnish the docket. The application was not opposed by the first respondent.
- 5.5. The sheriff served the order on the first respondent on 22 February 2022. The first respondent complied with the order on 27 May 2022, some

three months later. The applicant submitted that there was compliance one year and two months after the initial request.

5.6. The applicant complained that she was frustrated by the first respondent and as such her claim had been compromised. She regarded the delay to furnish the information as an intervening incident which suspended the running of prescription. On 26 April 2022 her attorneys of record issued a notice in terms of the Institution Act. Again, on 26 May 2022 they issued another notice. On 27 May 2022, she consulted with her attorneys of record. She stated that she could not have instituted her action without the information received from the police.

5.7. The application for condonation was launched on 24 February 2023. On 02 March 2023, the respondents delivered their notice to oppose. It was only on 12 April 2023 that the first respondent delivered his answering affidavit deposed to by his legal officer, Ms J.A van Rooyen.

[6] All the facts set out by the applicant detailing her arrest, detention and acquittal were denied by the first respondent. He stated that he had no knowledge of those allegations and put the applicant to the proof thereof. The first respondent further stated that the claim had prescribed. He further relied on the decision of the Constitutional Court in ***Mtokonya v Minister of Police***¹ and ***Abongile Zamani v Minister of Police***², for the contention that the prescription point was upheld by those courts. He further submitted that no proper case has been made out in the application and therefore it should be dismissed with costs.

¹ (CCT 200/ 16) [2017] ZACC 33, PARAS 37,44,45 and 46.

² (12/2019) [2021] ZAECBHC (12 February 2021).

[7] In reply, the applicant's attorneys of record submitted that the claim has not prescribed because the applicant was acquitted on 27 November 2020 and her claim would only prescribe on 27 November 2023. Summons was served on 15 July 2022.

[8] The first respondent submitted that this court may grant the application sought in terms of section 3(4)(b) of the Institution Act if satisfied that the provisions thereof have been met.

Second respondent

[9] The second respondent, although she filed a notice to oppose, did not file an answering affidavit. This court is not in a position to apply the averments made in the answering affidavit to her because, the deponent made it clear that the answering affidavit was filed on behalf of the first respondent. It is for that reason that the focus will be on the first respondent. To the extent that the second respondent persisted in the objection without an affidavit the outcome herein will apply to her as well, except where there is specific intention to exclude her.

Applicant's legal arguments

[10] In argument, Ms Magadlela submitted that: The action has not been extinguished by prescription. There is good cause that exists to justify the delay in delivering the prescribed statutory notice upon the respondents timeously. The respondents have not been unreasonably prejudiced by the failure to deliver the said notice. It is well within this court's discretion to consider the fact that it will be in the interests of justice to grant the relief sought even if some of the jurisdictional factors may not be satisfied.

[11] She argued that prescription started to run when the applicant was notified that she was discharged from the criminal case. In this regard, she relied on the case of **Holden v Asmang Limited**³. She submitted that in **Sello v Minister of Police N.O & Another**⁴ the Court stated that:

*“[15] In applying the principle held in **Miracle Mile** that a debt is due when it is immediately claimable by the creditor and immediately payable by the debtor, the debt became claimable by the plaintiff on the date of his release from incarceration on 15 October 2015. However, the complete cause of action was only established after consultation with his attorneys on 6 June 2017. This principle was also confirmed in **Truter v Deysel**⁵ where the SCA held that, for the purpose of prescription, a debt is due when the creditor acquires a complete cause of action to approach a court to recover the debt. Although the right to reclaim the amounts arose the day after his release from incarceration, in absence of any knowledge of the identity of the respondents, the applicant’s rights in law only became enforceable on 6 June 2017.”*

[12] She further submitted that strong merits may mitigate fault on the part of the applicant in failing to serve the required notice. Relying on **Madinda v Minister of Safety & Security, Republic of South Africa**⁶ the court dealt with the provisions of section 4(b) as follows:

“[12] There are two main elements at play in s 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 delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant’s explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration. The learned judge a quo misdirected himself in ignoring them.”

³ Case No.: 1277/19 [2020] ZASCA 145 (5 November 2020) para 18.

⁴ (89077/16) [2022] ZAGPPHC 233 (13 April 2022) para 15.

⁵ [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

⁶ (153/07) [2007] ZAZASCA 34; [2008] 3 ALLSA 143 SCA; 2008 (4) SA 312 (SCA) (28 March 2008) para 12 & 13.

[13] Ms Magadlela submitted that it is in the interests of justice that the non-compliance with the provisions of the Institution Act be condoned as there are good prospects of success in the claim. She further submitted that the respondents stand to suffer no prejudice if the relief sought is granted. On the other hand, it is the applicant who will suffer great prejudice, should condonation be refused because her claim has not yet prescribed. She submitted that a dismissal of this application would amount to refusal of an opportunity to ventilate all the issues before court. She further submitted that there is no prejudice to be suffered by the respondents because they are the custodians of the case docket, relevant registers, files and statements relating to the applicant's arrest, detention, assault and prosecution and that would enable them to defend the claim against them.

[14] She submitted that the explanation tendered for the delay in filing the statutory notice has been explained sufficiently. She further relied on the provisions of section 34 of the Constitution for the contention that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, where appropriate another independent and/or impartial tribunal or forum. She submitted that the opposition advanced by the first respondent lacks details in that he simply raised an issue of prescription but failed to provide any evidence that supports the prescription claim. She submitted that the respondents' opposition should be rejected. She prayed that the applicant should succeed with costs.

First respondent's legal submissions

[15] Ms Sangoni, on the other hand, submitted that the applicant pleads ignorance of the law and that she only got to know about the respondents' indebtedness to her when she consulted a legal representatives. She submitted that the applicant's explanation for the length of the delay does not show good cause and that ignorance of the law is no excuse. She referred the court to the decision in ***Nair v Telkom Soc & Others***⁷ for the submission that:

"[11] In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach."

[16] Ms Sangoni also relied on ***Mtokonya v Minister of Police***⁸ where the Chief Justice Zondo referred to a judgment by Moseneke J in *Eskom v Bhonjanala Platinum District Municipality* where he stated:

"The submission that a claim or debt does not become due when facts from which it arose unknown to the applicant, but only when such claimant has acquired certainty regarding the law and attendant rights and obligations that might be applicable to such a debt. If such a construction was to be placed on the provision of section 12(3) grave absurdity would arise. . . . A claimant cannot blissfully await authoritative, final, and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises."

[17] She submitted that the applicant had knowledge of the facts of the claim from the date of her arrest and that was the date when the cause of action arose. She submitted that there is no adequate explanation for the period of delay and on this basis alone, based on, inter alia, the *Mtokonya* decision, this court

⁷ (JR 59/2020) [2021] ZALCJHB 449 (7 December 2021) at para 11.

⁸ (CCT 200/16) [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) (19 September 2017).

should refuse the application for condonation. She submitted that the application should be dismissed with costs.

Discussion

[18] Section 3(2) of the Institution Act provides:

“Part 2

Notice of intended legal proceedings to be given to organ of state

3. (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 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*

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor

(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) For purposes of subsection (2)(a)-

(a) *a debt may not be regarded as being due until the creditor 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; and*

(b) *a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.”*

[19] Section 4(b) of the Institution Act provides that a court may grant an application for condonation 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.”

[20] As a starting point it is necessary to have regard to the facts and questions of law pleaded by the parties. At paragraphs 54 to 57 and 59 to 61, the applicant dealt with “good cause” and alleged, *inter alia*, that she had no knowledge of the law, she became aware of the civil laws after consulting with her attorneys, the request for the case docket was peremptory, had the first respondent furnished the docket timeously and not after one year and two months, she would have issued the statutory notice on time. She further alleged that she had good prospects of success in the claim.

[21] The first respondent dealt with those allegations at paragraph 14 as follows:

“14. AD PARAGRAPHS 54, 55, 56, 57, 59, 60 & 61 THEREOF:

I deny the allegations contained in these paragraphs, have no knowledge of same and put the plaintiff to the proof thereof. I submit further that the first respondent has good prospects of success in the application and in the action proceedings in respect of the merits of the case.”

[22] At paragraph 58 the applicant alleged:

“I was advised that before one may litigate against the state a Statutory notice must be sent to the state. However, before delivering such notice, my attorneys advised me that, they first needed to request and obtain the case docket so that they may investigate my prospects of success and further advise me of any legal recourse I may be able to seek.”

[23] The allegations made in this paragraph were not denied by the first respondent. They must therefore be deemed to be admitted. The applicant further alleged at paragraph 36 that the first respondent provided the information that was requested from him a year and two months later. A response to that allegation by the first respondent is *“This is denied. The legal representatives will argue that the allegations in these paragraphs are not relevant for the above proceedings.”*

[24] There are no facts pleaded by the first respondent at all except a legal conclusion that the applicant's claim has prescribed based on section 11(d) of the Prescription Act. He further contended that a prescribed claim cannot be resuscitated by condonation.

[25] In ***Modipane v M M Dada BK h/a Dada Motors Lichtenburg***⁹, Landman J, at para 12 when dealing with the role of pleadings stated:

“[12] At the outset is necessary to restate, briefly, the role and function of pleadings in dispute resolution. Pleadings define the ambit of the dispute. They indicate what the nature of the dispute is and what facts must be proven by the plaintiff to sustain the claim. And conversely the facts which must be resisted and facts which must be proven to sustain the defence. The pleaded facts also indicate the legal principles applicable to the claim and defence even though it is not customary to label the nature of the claim or defence.”

[26] Each case must be treated on its own merits. I have to consider the reasons advanced for the delay by the applicant and an explanation given by the first respondent in relation to the allegations made against him of, *inter alia*, having delayed in furnishing the information requested, on time. The applicant had detailed the steps she took in obtaining such information, including, amongst others, approaching court for an order directing the information officer of the first respondent to furnish to the applicant's attorneys with copies of the docket. The applicant demonstrated that she relied on the first respondent for the information she sought. This is apparent from the fact that there are no facts from the first respondent demonstrating why the applicant was furnished with the information that was requested after a year and two months. There are no facts presented by the first respondent to demonstrate prejudice that he suffered as a result of the delayed notice. The applicant, on the other hand,

⁹ (1559/2010) [2011] ZANWHC 43 (30 June 2011).

demonstrated the prejudice she will suffer should she be non- suited at this stage and her condonation application be refused.

[27] It must have been in contemplation of situations like these that the Legislature deemed it appropriate to provide for instances such as those mentioned in section 3(3)(a) of the Institution Act, namely: “*unless the organ of state wilfully prevented him or her or it from acquiring such knowledge*”. In my view, it would be a travesty of justice if the first respondent’s contribution to the delay can simply be overlooked, whilst in the same breath, compliance with the statutory notice time period is insisted upon. A delay of a year and two months is long and it does not get ameliorated by the prescription point. The respondent did not furnish the information timeously. He did not state what difficulties he encountered, what steps he took in order to ensure that he or his employees complied with their constitutional mandate of ensuring that they make information, upon request, available, on time, to the party that requests it.

[28] The first respondent contends that the applicant knew about the cause of action upon her arrest. If one were to follow this reasoning it would mean that there is absolutely no basis upon which people would seek legal advice. Upon each and every arrest then a cause of action would arise and an applicant would be expected to rush to court and institute an action. I see no legal impediment to seeking legal advice. In fact, it is a prudent thing to do because not every arrest that is perceived to be unlawful, is actionable. The applicant demonstrated that she was not aware of her rights. Not every individual is *au fait* with the concept of arrest. In this instance the applicant demonstrated that she was not even aware that she could have a claim against the Minister as a result of the conduct meted out to her and the unlawful search, according to her, of her home.

[29] After the institution of the action, the first respondent pleaded to the combined summons and raised prescription as a special plea. The fact that prescription is being raised as a special plea does not on its own mean that the claim has in fact prescribed. Prescription is a legal defence which may warrant leading of evidence at the trial and the trial court will decide whether the matter has indeed prescribed. The respondent has not advanced any facts whatsoever upon which he based his contention that the applicant had knowledge of the identity of him as the debtor more than three years before the action was instituted. The Constitutional Court in the ***Mtokonya matter*** at para 181 relied on *Gericke* where *Diemont JA* held:

“The onus was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of the completion of the period of prescription. He accordingly alleged in his special plea that the debt was prescribed because the debt had become due on 13 February 1971 and summons was issued only on 14 February 1974.

However, the Act specifically provides that prescription begins to run only when the debt becomes due and that it is not deemed to become due until the creditor has knowledge both of the identity of the debtor and of the facts from which the debt arises. It follows that if the debtor is to succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date.¹⁰

[30] I find that reliance on the *Mtokonya* case, is with respect, misplaced. In *Mtokonya* the parties had submitted a special case on prescription for adjudication. The parties further agreed on certain facts giving rise to the claim and disputes. The High Court was requested to determine whether or not the applicant’s claim had prescribed. The Constitutional Court defined the issue as:

“[10] The issue for determination involves the interpretation of section 12 (3) of the Prescription Act. It is whether section 12 (3) requires that a creditor should have knowledge that the conduct of the debtor giving rise to the debt is wrongful and

¹⁰ *Gericke v Sack* 1978 (1) SA 821 (A) at 827-8.

actionable in law before prescription may start running or before it can be said that the debt is due...”

[31] Similarly, in the ***Minister of Police v Abongile Zamani*** case, the Full Court, on appeal, was dealing with the dismissal of a special plea based on prescription.

[32] That is not what this court is faced with. This court is faced with whether or not it should condone the applicant’s failure to deliver the statutory notice on time. I am satisfied that the applicant has proffered adequate explanation for the delay and thus taking into account all the facts, she demonstrated good cause to warrant condonation for the late delivery of the statutory notice. On the other hand, lack of facts and detail on the part of the first respondent makes it difficult for this court to find that its objection to the condonation is justified. The information that was requested has since been provided to the applicant. Therefore, the prejudice that was contemplated by the Legislature on the part of the respondents does not arise because, the information requested has been provided. The first respondent will be able to pursue his defence in the matter. In any event, the first respondent has not alleged that it has suffered any prejudice whatsoever because of the failure on the part of the applicant to issue the notice timeously. There are prospects of success at the trial because there are no facts advanced at this stage to explain why the applicant’s home was searched without a warrant. A person’s home is her sanctuary and no law enforcement agent has a right to invade that space without justification. No facts justifying such invasion have been advanced by the first respondent.

[33] In its preamble the Institution Act provides:

“AND RECOGNISING THAT-

- * *the Prescription Act, 1969 (Act No. 68 of 1969), being the cornerstone of the laws regulating the extinction of debts by prescription, consolidated and amended the laws relating to prescription;*
- * *some of the provisions of existing laws which provide for different periods of prescription in respect of certain debts are inconsistent with the periods of prescription prescribed by the Prescription Act, 1969;*

AND BEARING IN MIND THAT-

- * *South Africa has moved from a parliamentary sovereign state to a democratic constitutional sovereign state;*
- * *the Bill of Rights is the cornerstone of democracy in South Africa and that the State must respect, protect, promote and fulfil the rights in the Bill of Rights;”*

[34] In light of these considerations, and when one balances the explanation given by the applicant, on the one hand, and the resistance put up by the respondent, on the other, one realises that there is no merit in the resistance because of the first respondent’ s conduct which contributed to the delay. In essence, by not furnishing the information, the first respondent or its employees, prevented the applicant from acquiring the knowledge she sought. The fact that the information was requested and when it was not provided she approached court for relief, demonstrated the exercise of reasonable care on the part of the applicant, to obtain the information.

[35] In the circumstances, I accordingly find that the applicant’s condonation application is not hit by prescription because she sought advice after her discharge from the criminal proceedings on 27 November 2020. There is no evidence put up by the respondent to refute her allegations on lack of knowledge. The reliance on the *Holden* decision by the applicant is apposite where the court at paragraph 9 stated:

“[9] *The importance of the fourth requirement, which is the only one with which we are concerned in this appeal, lies in the fact that the claim can only arise if the*

proceedings were terminated in the plaintiff's favour. That is because a claim for malicious proceedings cannot anticipate the outcome of proceedings yet to be finalised. To hold otherwise would permit recognition of a claim when the proceedings may yet be decided against the plaintiff."

[36] I accordingly find that there is merit in the application. It is in the interests of justice that the court accepts the explanation proffered by the applicant as adequate and thus condone non-compliance with the time periods for the issuing of the notice and in particular the provisions of sections 3(2)(a) and (b) of the Institution Act.

Costs

[37] On the issue of costs, Ms Sangoni correctly submitted that the issue of costs is a matter that resides within the discretion of the court. Ms Magadlela submitted that costs should be awarded to the applicant.

[38] It is trite that when a party seeks condonation it is asking for an indulgence. It is for that reason that such party is usually ordered to bear costs of the condonation application. However, in this case, the delays caused by the first respondent in furnishing the docket to the applicant even after he had been served with the court order, call for an order of costs against him. I am mindful of the fact that the notice to oppose and the plea of prescription in the action were delivered on behalf of both respondents. The second respondent did not actively participate in the application because the deponent to the answering affidavit clearly stated that "*as such depose this answering affidavit on behalf of the first respondent*". It is for that reason that the order of costs will relate only to the first respondent.

[39] In the circumstances, I make the following Order:

1. That the applicant's failure to comply timeously with the provisions of section 3(1) read with sections 3(2)(a) and (b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is hereby condoned and the applicant is granted leave to pursue its claim against the first and second respondents.
2. That the first respondent is directed to pay costs of this application.

T.V NORMAN

JUDGE OF THE HIGH COURT

Matter heard on : 15 June 2023

Judgment Delivered on : 18 July 2023

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