IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 2530/2018

In the matter between:

JACOBUS ERASMUS JOHANNES VAN DER MERWE — Applicant

and

THE MINISTER OF POLICE — 1st Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — 2nd Respondent

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HEARD ON: 20 JUNE 2019

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 11 JULY 2019

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[1] This is an application for condonation for the late filing of a notice of the Applicant's intention to institute legal proceedings against the Respondents within a period of six months from the date on

which the debt became due[1]. It appears to be common cause that the Applicant was arrested on a charge of rape on 3rd July 2015 without a warrant for his arrest. He was held in custody until he was eventually released on bail on 14 July 2015. On 27th October 2015 the charge against him was withdrawn by the State, according to the Applicant. The Respondents dispute this allegation and maintain that the case was merely removed from the court roll on that day.

[2] Be it as it may, on 27th July 2017 the Applicant caused the abovementioned statutory notices to be delivered to the Respondents, and at the end of May 2018 the Applicant served summons on the Respondents, claiming a total amount of R800 000 for unlawful arrest and detention, and for malicious prosecution. The Respondents filed their plea in the action on 13th August 2018, pleading specially that the required notices were not filed within six months after the cause of action arose, and that the action therefore had to be dismissed with costs. The cause of action arose on 3rd July 2015, but allowing for the six month period, the notices were filed some 18 months late. Section 3 of the Act provides that a plaintiff can only institute action after he had served the notice within six months.

[3] Having been alerted by the Plea filed by the Respondents that they were raising the failure to give notice timeously as a defence to the Applicant's claims, he knew that he had to make application for condonation in terms of the Act. In this respect Section (4)(a) provides as follows:

[1] Section 3 (2)(a) of the Institution of Legal Proceedings against certain Organs of State Act no 40 of 2002 (the Act).

"(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."

[4] Since the summons was served on the Respondents within 3 years after the cause of action arose, the question of prescription does not arise in the application for condonation. Only the questions of good cause shown and prejudice to the Respondents need to be considered. There is also another issue that calls for closer scrutiny in the present matter, and that is the fact that the application for condonation was only filed on 20 February 2019 by the Applicant, that is some 6 months after he became informed that such an application was necessary. To make matters even more cumbersome for the Applicant, he also filed his replying affidavit in the application about one month late. He therefore filed an application for condonation for the late filing of his replying affidavit together with the condonation application for the late filing of the notices.

[5] The principles relating to condonation have become settled in our law. The degree of non-compliance, the explanation thereof, the importance of the case and the avoidance of unnecessary delay in the administration of justice are among the factors that usually weigh with a court when it considers an application for

condonation[2] As for the requirement of an explanation for the delay, it has been stated by the Supreme Court of Appeal [3] that:

"Condonation is not to be had merely for the asking. A full, detailed and accurate account of the causes of the delay and their affects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed, must be spelled out."

[6] Specifically in relation to condonation applications in terms of Section 4(a) of the Act, the following observations by our courts are relevant to the present application:

In MEC for Education KZN vs Shange[4] it was stated that the court is to exercise a wide discretion, that "good cause" may include a number of factors that are entirely dependent on the facts of each case, and that the prospects of success in the main action play a significant role. In Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd[5] it was found by Madjiedt AJA at par. 33 that in terms of Section 3(4)(b) a court may grant condonation if it " is satisfied" that the three requirements have been met. In practical terms this means the "overall impression" made on a court by the facts set by the parties[6]. At paragraph 35 the learned Judge stated that, in general terms, the interests of justice play an important role in condonation applications. In the unreported case of M.D. Marais v Minister of Safety and Security and the MEC for Roads and Transport (case no. 1521/2010) it was held by

[2] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited (2013) 2 All SA 251 (SCA) at paragraph 11.
[3] Per Heher, JA in Uitenhage Transitional Loacl Council v SA Revenue Service 2004 (1) SA 292 (SCA) at 297 H-J.
[4] 2012 (5) SA 313 (SCA).
[5] 2010 (4) SA 109 (SCA).
[6] See also Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at paragraph 8.

Jordaan, J of this Division that the explanation for the delay should be full and at least sufficient and acceptable.

> "Any explanation is not ordinarily just regarded as acceptable only because it is a full explanation. That full explanation must be acceptable as well."

[7] It is against the backdrop of these principles that the present application has to be adjudicated. In his founding affidavit the Applicant sets out the reasons for the late delivery of the notices as follows:

> "I, as a lay person, never knew that I might be entitled to claim damages from the 1st and 2nd Respondents and I am even less aware that I had to give the Respondents notice within 6 months after the causes of action arose. I only became aware that I might be able to institute a claim as aforesaid during June 2017 and arranged a consultation with my attorneys of record to discuss same on the 7th July 2017 during which consultation I instructed them to proceed with the necessary."

[8] Mr. Mene, appearing for the Respondents, submitted at the hearing that the provisions of the Act would only apply to people who have knowledge, and not to people without knowledge or legal training, should the court find in the Applicant's favour on this point. Mr. Els, for the Applicant, submitted that this explanation of the Applicant represents a full, reasonable and acceptable explanation. However, the period of delay before the notices were delivered, is not the only aspect that has to be considered, because the delay of 6 months in filing the condonation application is of equal importance. If, for instance, it is found that there is no reasonable and acceptable explanation

for the delay in filing the application, then it would follow that the application for condonation as a whole cannot succeed.[7]

[9] This is so because in the Rance-case, *supra*, the Supreme Court of Appeal held that "condonation must be applied for as soon as the party concerned realizes that it is required".[8] In the case of Van Wyk v Unitas Hospital[9] the Constitutional Court confirmed the requirement that an applicant must give a full explanation for the delay, "In addition, the explanation must cover the entire period of delay", the court stated. In the present application, the Applicant in his founding affidavit does not even refer to this delay of six months, nor does he offer any explanation at all for the delay in that affidavit.

[10] The position in our law is that an applicant must stand or fall by the facts alleged in his founding affidavit. Almost a century ago, in Pountas Trustee v Lahanas[10] it was already stated that the facts contained therein form the main foundation of the application, because those are the facts which the respondent ids called upon either to affirm or to deny. Since this is so, it is not permissible to make out new grounds for the application in the replying affidavit. These principles have been repeated in numerous judgments over the years. When the present Applicant realized his omission in this respect when it was raised by the Respondents, he proceeded to file a replying affidavit containing a belated attempt to explain his delay. This affidavit, incidentally,

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[7] See e.g. OC Potgieter v MEC for Police, Roads and Transport, unreported judgment of this Division, case no 3859/2015, paragraph 17.
[8] Paragraph 39 of the judgment.
[9] 2008 (2) SA 240 (CC) at paragraph 20.
[10] 1924 WLD 67.

was also filed one month late, as mentioned earlier. The explanation offered by the Applicant in his replaying affidavit, boils down to the following: he was waiting for documents to be discovered by the Respondents, which included copies of the police docket. These documents were collected by his attorneys from the offices of the state attorney on 10 December 2018. He mentions further that his attorneys proceeded to draft the application for condonation as soon as possible after the end of the Christmas holidays. While this may be so, it still remains a mystery why the application was then only filed on 20th February 2019. The delay is therefore not explained fully and in such a manner that the explanation covers the entire period of the delay, as is required in our law.

[11] This court is mindful of the fact that not only the explanation for the delay, but also the prospects of success in the main action, are important factors in determining whether condonation should be granted in a case. If strong merits or prospects of success are shown, it may mitigate the fault of the applicant in applications for condonation[11]. A court may then exercise its discretion in favour of the applicant, despite a poor explanation for the delay.

[12] In this case, the Applicant avers that there were no reasonable grounds for his arrest without a warrant, that he was deprived of his freedom without good cause, that there was no prima facie case against him and that the case against him was not investigated properly. As for the malicious proceedings, he alleges that the prosecution should have realized that the

[11] Madinda-case, supra, at 317.

evidence against him did not constitute a prima facie case, and that there were no or insufficient evidence against him. The evidence were therefore not properly considered, he alleges. These allegations made by the Applicant are all denied by the Respondents.

[13] It is evident that the Applicant mainly relies on his contention that there were insufficient or no evidence against him in an attempt to show good prospects of success in the main action. He does not say, however, why he considers the evidence as such. If there were solid grounds for his contention, he should have attached to his founding affidavit copies of the witness statements so that the court could assess his allegation of no or insufficient evidence properly. As we have seen, he was in possession of those statements more than two months before his application for condonation was filed. Without those statements, the court is left with only the bold allegations of the Applicant, while it is unable to determine whether there is in fact good merits in the action instituted by the Applicant. The result is that the merits of his action cannot tip the scales of the application in his favour.

[14] Concerning the application for condonation for the late filing of the replying affidavit, it appears that the Applicant is blaming his attorneys for the delay which occurred. This is not deemed as a reasonable and acceptable explanation, for an applicant cannot always escape liability for the default of the legal representative chosen by him[12].

[12] Colyn v Tiger Food Industries 2003 (6) SA 1 (SCA), Saloojee NNO vs Minister of Community Development 1965 (2) 135 (AD).

[15] In the premises, it is my overall impression that, based on all the facts and circumstances of both the applications, I should not exercise my discretion in favour of the Applicant. I am not persuaded that good cause exists for the granting of condonation in any of the two applications.

[16] I can find no reason to deviate from the general practice with regard to costs. There were no arguments presented relating to the costs of postponement on 28 March 2019 and 30 May 2019, and there will be no orders relating thereto.

[17] The following order is therefore made:

1. The application for condonation for the late filing of the replying affidavit is dismissed with costs.
2. The application for condonation in terms of Act 40 of 2002 is dismissed with costs.

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P.J. LOUBSER, J

On behalf of the applicant:	Adv. J. Els Instructed by: Loubser van der Walt Inc c/o Jacobs Fourie Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv. B. S. Mene Instructed by: The State Attorney BLOEMFONTEIN