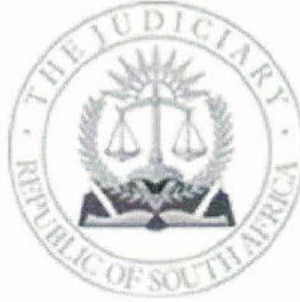


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/44369

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
	<u>26/11/2024</u>
	DATE
	
	SIGNATURE

In the matter between:

SELLO LAZARUS RAMONTJA

APPLICANT

And

LEGAL AID SOUTH AFRICA

RESPONDENT

J U D G M E N T

MABESELE J:

[1] This is an opposed condonation application for late filing of the Notice Contemplated in Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act¹. The applicant seeks, also, a relief to declare the cause of action to have arisen on 18 May 2020 in terms of Section 12(3) of the Prescription Act². The applicant has instituted an action against the respondent by way of summons which were issued under case no: 44369/21. He sues the respondent for professional negligence.

[2] On or about 29 February 2004 the applicant was arrested and charged with two counts of rape of two minor children. The case was held at the Regional Court, in Rustenburg. The applicant was represented by the employee of the respondent, namely; Mr M.E Makhadi, on the instruction of the respondent. The applicant was convicted on 18 November 2004. After conviction the matter was transferred to the North-West High Court, in Mmabatho, for sentence which was handed down on 29 August 2005. The applicant was represented by Advocate V. Zilanda during mitigation stage up until he was sentenced to two terms of life imprisonment.

[3] The applicant contends that on the same day that the sentence was handed down advocate Zilanda was obliged, and failed, to advise him of the following rights: (i) right to appeal, (ii) right to apply for leave to appeal before the appeal can be heard, (iii) right to a legal representation at the state's expenses for the purposes of appeal. The applicant argues that advocate Zilanda failed to bring

¹ 40 of 2002

² 68 of 1969

an application for leave to appeal on the same day on which sentence was handed down or ought to have given an explanation why it was impossible to bring the application for leave to appeal.

[5] The Institution of Legal Proceedings Against Certain Organs of State Act³ states the following:

“3. Notice of intended legal proceedings to be given to organ of state.

(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 legal proceedings in question;

(b) The organ of state in question has consented in writing to the institution of that legal proceedings

(i) without such notice;

(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 creditor

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

³ Supra

(a) a debt may not be regarded as being due until the creator has knowledge of the identity of the organ of state and of the facts given 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 willfully 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.

(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"

[6] Section 12(3) of the Prescription Act ⁴ allows a creditor to approach the court to declare a debt not to have prescribed and to be due on the time the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that the creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[7] Counsel for the respondent argues that the applicant became aware of his right to appeal since 2008. He also relies on the letter marked "Ph4", dated 31 October 2011, which the applicant addressed to the respondent, while in custody, asking for legal assistance. The applicant states in his letter that he did not lodge an appeal immediately after sentence. The reason being that, since he had pleaded guilty to two counts of rape he had hoped to apply, thereafter, for reduction of sentence. It is common cause that the applicant pleaded not guilty to two counts of rape and was convicted after evidence was presented by the state. In light of this, I am unable to find logic in the applicant's statement insofar as it relates to knowledge of appeal. Of extreme importance to consider in the letter is the statement by the applicant that: *'when they sentenced me to two life imprisonment, I was still young without knowledge'* This statement, in my view, explains the absence of the applicant's knowledge of the right to appeal. On the other hand, there is no denial that advocate Zilanda failed to carry out his obligations to inform applicant of his right to appeal immediately after sentence was passed. Therefore, the argument raised by counsel for the respondent has no merit.

⁴ Supra

[8] It is also argued that the applicant has not shown a good cause. I disagree. The applicant was released from prison on 14 February 2020 after his appeal against conviction and sentence was upheld, and conviction and sentence set aside. His appeal was argued by the respondent's employee. He had already spent 15 years behind bars. In my view, the debt became due soon after he was released from prison. Subsequent to his release from prison he went to stay with his aunt in the North-West Province. Due to the restrictions imposed on the movement of people as a result of COVID-19 pandemic, the applicant remained at his aunt's place of residence. He only managed to consult with his attorney on 18 May 2020 after the regulations on restrictions of people's movement were relaxed. It is for this reason that he served section 3 Notice on the respondents on the 6th October 2020.

[9] The applicant argues, rightly, that he has prospects of success in his action against the respondents, regard being had that: (1) the respondent's employee failed to inform the applicant of his right to appeal immediately after sentence was passed, thus caused unnecessary delays in obtaining court records, (ii) the applicant successfully appealed his conviction and sentence, having spent 15 years in prison.

[10] The respondent will not be unreasonable prejudiced by the applicant's failure to deliver Section 3 Notice timeously in that: (i) advocate Zilanda who represented the applicant during the trial is still in the employ of the respondent (according to the applicant), (ii) the transcribed record of the sentencing

proceedings is available as stated by the respondent in the answering affidavit.
For these reasons, I am inclined to grant condonation.

[11] With regard to the issue of costs, I do not deem it just to order the applicant to pay costs for the simple reason that the applicant seeks permission to enforce his right.

[12] In the result, the following order is made:

12.1 Condonation for late delivery of the Notice Contemplated in Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, is granted.

12.2 No order as to costs.



M.M MABESELE

(Judge of the High Court Gauteng Local Division)

Appearances

On behalf of the Applicant	:Adv Mudau
Instructed	: Leba Inc Attorneys
On behalf of the Respondent	: Adv A. Govender
Instructed by	: Webber Wentzel Attorneys
Date of Hearing	: 18 November 2024
Date of Judgment	: 26 November 2024