Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case number: **729/2007**

Date heard: **09/05/2008**
Date delivered: **23/05/2008**

In the matter between:

CATHARINA DAUTH First Applicant
HELENA DOGANISA HENDRIKA DAUTH

Second Applicant

MACDOLENE OLYNE

Third Applicant

PAMELA ELVONIA NERO

Fourth Applicant

CHARLOTTE RENTIOA OLYNE

Fifth Applicant

EDWIN BRENDAN OLYNE

Second Applicant

and

THE MINISTER OF SAFETY AND SECURITY **1st Respondent**

COLLIN LOCK 2nd Respondent

CHRISTO BRIAN FORTUNE 3rd Respondent

Coram: ***Lacock J***

JUDGMENT

LACOCK J:

[1] This is an application by the applicants for condonation of their failure to comply with the provisions of **s 3 (1) (a)** of the **Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 (**the **Act)** in that legal proceedings were instituted against the first respondent for damages allegedly suffered by the applicants by reason of the averred negligent conduct of the second respondent, a police officer, who acted in the course and scope of his official duties as such.

[1.1] It is alleged by the applicants that the second respondent negligently failed to prevent the third respondent from robbing firearms from the Postmasburg police station, and that this neglect of official duties was causaly connected to a shooting incident during which the third respondent shot and killed the husband of the first applicant as well as the husband of the third applicant and the first applicant was wounded. The applicants claim damages for inter alia loss of support allegedly suffered as a consequence of the deaths of the deceased.

[2] The following facts, and which are common cause between the parties, are of importance for purposes of the present

application:

[2.1] The pleadings in this matter are closed, and the matter was enrolled on the roll of this Court for hearing on 16 October 2006. Immediately prior to the hearing of the matter, the applicants notified the respondents of their intention to amend its particulars of claim to provide for an application for condonation in terms of **s 3 (4)** of the **Act**. This application for an amendment was opposed on the basis that such an application for condonation requires a formal application on notice of motion, and that such an application should be adjudicated upon before the trial can commence. The latter argument was upheld by the said Court, and the trial was postponed to afford the applicants the opportunity to bring a formal application for condonation.

[2.2] The relevant conduct on which the applicants' claims are founded, occurred on 1 July 2002 at Postmasburg.

[2.3] The summons was issued on 22 July 2004 and served shortly thereafter.

[2.4] The claims, in the normal cause, would have been extinguished by prescription on 30 June 2005.

[2.6] The application for condonation was filed on 2 July 2007.

[2.7] For purposes of this application it is to be accepted that no timeous **s 3 (1) (a)** notice was given by or on behalf of any of the applicants to the first respondent.

[3] Mr Potgieter SC, on behalf of the first respondent, relied primarily on the provisions of **s 3 (4) (b) (I)** of the **Act,** contending that the claims of the applicants had been extinguished by prescription. His argument can be summarised as follows: The provisions of **s 3 (1) (a)** of the **Act** are peremptory. A failure to comply with these provisions renders a subsequent summons of no legal force and effect unless condonation is granted in terms **of s 3 (4)** of the **Act**. The summons in casu is to be regarded as of no force and effect until condonation is granted. Since condonation was only sought on 2 July 2007, the claims of the applicants were then already extinguished by prescription (on 30 June 2005). The three year prescription period was not interrupted by the issue of summons on 22 July 2004 in terms of **s 15** of the **Prescription Act, 68** of **1969**, since the said prescription period cannot legally be interrupted by a summons that is of no legal consequence. The court is, in terms of **s 3 (4) (b) (I)** of the **Act** not competent to grant condonation in respect of a claim or claims that had been extinguished by prescription.

[4.] **S 3** of the **Act** reads as follows:

"***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; 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

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 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.

(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 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 legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

[5] Counsel were unable to refer me to any authority in point, and I was unable to find any either. Mr Potgieter however relied on the following extract from **Laubscher**, **"EXTINCTIVE PRESCRIPTION" (Juta & Co., 1996)** at **p 127**: *"The service of process on the debtor must furthermore commence proceedings against the debtor in a legally effective*

manner. A defective provisional sentence summons will not interrupt prescription and upon dismissal of such a summons the plaintiff will not be entitled to continue with the principal case. Where service of the process is premature in terms of a statutory provision, legal proceedings are not effectively commence and prescription is therefore not interrupted in such an instance."

The learned author relies on the following judgments in support of this: **Santam Insurance Co. Limited v Vilakasi 1967 (1) S.A. 246 (A)** at **253**, and **Evins v Shield Insurance Co. Limited 1980 (2) S.A 814 (A)** at **833 -834**. Mr Potgieter also referred me to the publication, "PRESCRIPTION IN SOUTH AFRICAN LAW" by John Saner and more particularly to the following passage on pg **3-67** to **68**: *"Essentially, therefore, what section 15(1) contemplates is the service of a process by which legal proceedings are effectively commenced for the payment of the debt in question. Similar principles will apply to actions against local authorities and the like in terms of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, particularly section 3(1) and (2). Consequently, if notice has not been given within six months of the debt becoming due (and condonation has not been granted or the organ of state has not consented to the institution of legal proceedings without notice) or, even if these conditions are fulfilled and 30 days have not elapsed after the notice date, the service of a process will be premature and ineffective for interrupting prescription. Clearly, therefore, since legal proceedings cannot effectively be commenced by the service of a premature summons or other process, prescription cannot thereby be interrupted."*

The author too relies on the same cases referred to by Laubscher.

[5.1] Not anyone of these authors however discusses the effect of the granting of condonation under **s 3 (4)** of the **Act** on a summons issued before condonation had been granted. Saner however qualifies his aforesaid statement by *".....and condonation has not been granted or the organ of state has not consented to the institution of legal proceedings without notice....."*

[5.2] The issue in the Vilakasi matter was whether a summons served on the insurance company prior to the delivery of a notice in terms of **s 11 (bis) (1)** of the **Motor Vehicle Insurance Act, 29** of **1942**, which section required that, *"no such claim shall be enforceable by legal proceedings commenced by a summons served on the registered company before the expiration of a period of 60 days as from the date on which the claim was sent....."*, interrupted the running of prescription. It was held, *"In my opinion it is clear that the service referred to in sec. 6 (1) (b) must be a service whereby action is instituted as a step in the enforcement of the claim or right. The underlying reason why such a service interrupts prescription is that the creditor has thereby formally involved his debtor in court proceedings for the enforcement of his claim. That effect is absent where, as here, the claim is statutorily unenforceable by proceedings commenced by a summons served prematurely."* **(**at **253 H)**.

[5.3] In Evins (supra) the Appellate Division confirmed the aforesaid dictum, where the court dealt with similar provisions in **s 25** of the **Compulsory Motor Vehicle Insurance Act, 56 of 1972**, and **s 15** of the **Prescription Act, 68 of 1969.** The court held, *"Although there are substantial differences in the wording of the present Prescription Act 68 of 1969 (as a comparison of the relevant portions of ss 3 (1) and 6 (1) (b) of Act 18 of 1943 on the one hand and ss 10 (1) and 15 of Act 68 of 1969 on the other hand will readily demonstrate), I am nevertheless of the view that the ratio decidendi of Vilakasi's case supra is applicable to the case of a premature service of summons which falls to be considered under s 25 of the Act and s 15 of Act 68 of 1969. in my opinion s 15 (1), read together with s 15 (6), contemplates the service of a process (in this instance a summons) whereby legal proceedings are effectively commenced for payment of the debt in question; and consequently the service of a summons, which in terms of s 25 of the Act is premature and, as stated above, could not effectively commence legal proceedings for enforcement of the claim for compensation, would not interrupt the running of prescription."* (at **833 F – H**)

[6] The ratio in the aforesaid decisions was that the delivery of a notice to the insurance company in terms of the applicable legislation prior to the issue of a summons, was a peremptory statutory requirement. Non compliance with these statutory requirements would render a summons issued prior to such compliance premature and of no legal

consequence. The question of condonation of the said failure to timeously deliver the notices did not arise, and no provision was made for such an eventuality in the relevant legislation.

[6.1] This, to my mind, is the important distinction to be drawn between the aforesaid and similar statutory requirements and the provisions contained in **s 3** of the **Act**.

[6.2] Although the wording of s 3 is couched in peremptory terms, it cannot be construed as peremptory in the strict sense of the word if the section is read as a whole and more particularly with **ss (4)** thereof. *"Such a construction would be in accordance with the rule that the language of every part of a Statute should be construed as to be consistent, so far as possible, with every other part of that Statute……."* **(Chotabhai v Union Government and Another 1911 AD 13 at 24)**.

The mere fact that provision is made in **s 3 (4)** of the **Act** for condonation for the failure to comply with the provisions of **s 3 (1)**, is indicative thereof that the provisions of **s 3 (1)** of the **Act** are not peremptory in the sense that non compliance therewith renders a "*premature*" summons void or legally

ineffective. See in this regard the unreported judgment of **Van Der Merwe J** in **Marais v Minister van Veiligheid en Sekuriteit en 'n Ander (Vrystaat Provinsiale Afdeling) Case Nr. 2727/2005.**

[6.3] That the legislature did not intend a "premature" summons to be ineffective or void, is to be inferred from the wording of **s 3 (4) (a)** of the **Act,** viz. "*If an organ of State relies on a creditor's failure to serve a notice in terms of* ***s 2 (2) (a)****, the creditor may apply to a court having jurisdiction for condonation……"* These words are indicative thereof that, unless reliance is placed on a creditor's failure to comply with the provisions of **s 3 (1)** of the **Act**, the proceedings thus instituted (for instance by the issuing of a summons) are regarded as valid and effective.

[6.4] What a court is entitled to condone is the failure of a creditor to give the required notice <u>before legal proceedings for the recovery of a debt had been instituted.</u> This, to my mind, presupposes that legally effective proceedings had to be instituted. It therefore follows that, once condonation is granted the legal proceeding thus instituted remain effective as from the date

of its inception (date of issue), and no further order for the resurrection of those proceedings is required. This reasoning is amplified by the very wording of **s 3 (4) (a)** of the **Act** quoted in paragraph 6.3. above.

[7] If I am correct in my finding that a "premature" summons is for purposes of **s 4** of the **Act** to be regarded as valid and effective (unless the relevant organ of State relies on the creditor's failure to serve a **s 3 (1) (a)** notice, or no consent was given in terms of **s (3) (1) (b)**, and an application for condonation fails), the dicta in **Vilakasi** – and **Evins (supra)** are not applicable to a summons contemplated in **s 3 (4)** of the **Act**. The three year prescription period under the **Prescription Act of 1969** had therefore not been interrupted by a legally ineffective summons, but had in casu been interrupted by the issuing of a summons whereby legal proceedings for the enforcement of the claims by the applicants were effectively commenced. This court is therefore not incompetent to grant condonation as requested by reason of the provisions of **s 3 (4) (b) (I)** of the **Act**.

[8] Although Mr Potgieter in his heads of argument submitted that the applicants failed to provide "good cause" for their failure as required in **s 3 (4) (b) (II)** of the **Act**, he, correctly so in my view, conceded in argument that, since no blame can be attributed to the applicants for the

ineptitude of their lawyers and since it was at all times the bona fide intention of the applicants to pursue their claims against the respondents, and that the respondents were not unreasonably prejudiced by the relevant failure to give notice, and since the pleadings in this matter are closed, it can be accepted for purposes of this application that good cause had been shown to exist. See in this regard the unreported judgment of the **Supreme Court of Appeal** in the matter of **Thembela Madinda v Minister of Safety and Security of the Republic of South Africa, 153/07.**

[8.1] It was furthermore conceded by Mr Potgieter that the first respondent was not unreasonably prejudiced by the failure of the applicants.

[8.1] By reason hereof no more needs to be said in this regard.

[9] The parties are ad idem that, should condonation be granted the further relief sought in the Notice of Motion ought to be granted as well.

[10] In regard to costs Mr Van Niekerk SC for the applicants submitted that the first respondent's opposition to the application for condonation was unreasonable, and that I should, by reason thereof, order the first respondent to pay the costs of the application.

I however, agree with Mr Potgieter that the opposition was not unreasonable. The laxity of applicants' legal representatives is almost inexcusable, and it is this conduct that necessitated the application for condonation. The first respondent was fully justified to oppose the application on this ground as well as on the novel ground of prescription which was all but a frivolous defence.

To my mind justice and fairness demand that no order in regard to costs should be made.

[12] The following order is made:

A. Condonation is granted for the applicants' failure to comply with the provisions of s 3 (1) (a) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002.

B. Leave is granted to the applicants to pursue their claims against the respondents on the pleadings already served and filed under case number 788/2004.

C. No order is made in respect of costs.

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HJ Lacock
JUDGE

For the applicant:	**Adv J.G Van Niekerk SC**
For the respondents:	**Adv Potgieter SC**