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 High Court, Kimberley)

CASE NO:	**CA&R 42/2017**
DATE HEARD:	**18 JUNE 2018**
DATE DELIVERED:	**29 JUNE 2018**

In the matter between:

DAVIDS, DANIEL Appellant

and

COETZEE, HENCO 1st Respondent

SWARTZ, GERHARD 2nd Respondent

MAPOGO SECURITY SERVICES 3rd Respondent

MINISTER OF SAFETY AND SECURITY

(Now **THE MINISTER OF POLICE**) 4th Respondent

Coram: Williams ADJP *et* Olivier J

JUDGMENT

Olivier J:

[1.] The appellant, Mr Daniel Davids, is suing Mr H Coetzee (first defendant/respondent), Mr G Swartz (second defendant/respondent), Mapogo Security Services (third defendant/respondent) and the Minister of Police (fourth defendant/respondent[1]) for damages. The four claims set out in the particulars

[1] The fourth respondent is the only defendant involved in this appeal and in what follows reference will therefore be made to the respondents in their capacities as defendants in the action.

of claim to the summons, issued in December 2014 in the Regional Court, Kimberley, are based on two incidents.

[2.] The allegations about the first incident are that on 25 December 2011 the first defendant, the second defendant and employees of the third defendant assaulted the appellant when he was accused of having committed the crime of housebreaking with intent to steal and theft at the home of the first defendant, that he was subsequently arrested by members of the South African Police Service and that he was detained until 28 December 2011.

[3.] The first three claims are based on this incident. Claim 1 is against the first three defendants for damages caused by the assault. Claim 2 is against the 1st defendant for damages caused by malicious prosecution, following the first defendant's allegedly false complaint against the appellant. Claim 3 is against the fourth defendant, and is for damages suffered as a result of the appellant's allegedly unlawful arrest and detention.

[4.] In the second incident the appellant was arrested by members of the South African Police Service on 29 May 2012, again on a charge of housebreaking with intent to steal and theft, and he was detained until 12 June 2012. Claim 4 is based on this incident and is against the fourth defendant for damages suffered as a result of this arrest and detention.

[5.] It is common cause that both arrests took place without warrants. It is furthermore common cause that, as regards the first incident, the prosecution of the appellant was terminated on 25 February 2013, when the charge against him was withdrawn, and that the second housebreaking charge ended in the appellant's acquittal in August 2013.

[6.] Claims 3 and 4, against the fourth defendant, are the subject of this appeal. In terms of the provisions of section 3 of the **Institution of Legal Proceedings**

against Certain Organs of State Act[2] (*"the Act"*) legal proceedings in respect of these claims would have had to be preceded by a notice, *"within six months from the date on which the debt became due"*, to the fourth defendant *"in accordance with section 4(1)"*[3]. In terms of section 4(1)(a) of the Act the notice would in this particular case have had to be sent to *"the National Commissioner and the Provincial Commissioner of the province in which the cause of action arose"*.

[7.] On 25 July 2014 letters were respectively sent by registered post and hand delivered to the *"SOUTH AFRICAN POLICE SERVICES MINISTRY OF SAFETY AND SECURITY PRIVATE BAG X922 PRETORIA 0001"* and the *"STATE ATTORNEY WOOLWORTHS BUILDING FIRST FLOOR KIMBERLEY"*. The contents of the two letters are identical and both are headed *"LETTER OF DEMAND IN TERMS OF SECTION 3 OF THE INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE, ACT 40 OF 2002"*. The letters were therefore clearly not addressed to either the National or the Provincial Commissioner of the South African Police Service.

[8.] In a letter dated 15 August 2014 the Provincial Head, Legal Services; Northern Cape, of the South African Police Service in Kimberley responded to the notice by stating that it was *"not accepted as is* (sic) *not addressed to national* (sic) *Commissioner"*.

[9.] Another letter was hand delivered to *"SOUTH AFRICAN POLICE SERVICES TRANSVAAL ROAD KIMBERLEY"* on 23 September 2014, but apparently only with a view to obtaining access to the police dockets concerning the two housebreaking charges against the appellant.

[10.] Section 3(4) of the Act provides that, if notice has not given been timeously or properly and if the particular organ of state *"relies"* on that failure as a defence, the Court may on application grant condonation:

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[2] 40 of 2002
[3] Section 3(2)(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."

[11.] *"These requirements are conjunctive and must be established by the applicant"*[4].

[12.] Such an application was instituted in July 2015. It was dismissed with costs and the present appeal is against that judgment and order.

[13.] It is common cause that neither of claims 3 or 4 has become prescribed.

[14.] In his application the appellant sought only condonation of the failure to serve the notice timeously. The founding affidavit in the application addressed only the fact that the notices had not been sent within the prescribed period of 6 months after the debts became due. The fact that the notices had not been sent to the National Commissioner and to the Provincial Commissioner of this province, where the causes of action arose in this case, was not dealt with at all. As I have already pointed out, this is the only aspect that was in fact raised when the fourth defendant rejected the notice. The question could be asked whether the fourth defendant had in fact *"relied"*, for the purposes of section 3(4)(a) of the Act, on the fact that the notice had been given outside the prescribed period of 6 months. Would the *"rejection"* of the notice on the basis of a different failure have triggered the need to apply for condonation of a failure that had not been pertinently relied upon by the organ of State? In **Minister of Safety and Security v De Witt**[5] it was held that *"the objection of the organ of State is a jurisdictional fact for an application for condonation, absent which the application would not be competent"*. The question would then be whether an application for the condonation of a failure to which the fourth defendant had never objected, was

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[4] **Van Niekerk and another v Member of the Executive Council for Police, Roads, Transport, Free State; Van Jaarsveld v Member of the Executive Council for Police, Roads, Transport, Free State** [2017] JOL 39250 (FB) para [5]; See also **Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd** 2010 (4) SA 109 (SCA) para [11]

[5] 2009 (1) SA 457 (SCA) para [10]

competent. The fourth defendant, however, never objected to the application for condonation on this basis. In fact, it answered fully to the case made out by the appellant for condonation of his failure to adhere to the 6 month requirement. In view of the conclusion reached below it is not necessary to decide this.

[15.] On the papers, and on the grounds of appeal, the issue is whether the Regional Magistrate erred in refusing to condone the fact that the notice had not been given within the prescribed period.

[16.] For purposes of what follows the relevant dates as far as the first arrest and period of detention are concerned are 25 December 2011 (arrest), 28 December 2011 (release) and 25 February 2013 (withdrawal of charge), and as far as the second arrest and period of detention are concerned, 29 May 2012 (arrest), 12 June 2012 (release) and August 2013 (acquittal).

[17.] Mr Sampson, the attorney of Legal Aid South Africa who has at all material times hereto represented the appellant, argued that the two debts that are the subjects of claims 3 and 4 only became due, for purposes of section 3(2)(a) of the Act, when the criminal proceedings in respect of the two charges culminated in, respectively, a withdrawal of the first charge and an acquittal on the second charge. He relied on the judgment in **Makhwelo v Minister of Safety and Security**[6]. In that case the Court distinguished, for purposes of the onset and the running of the 6 month period, claims for damages caused by unlawful arrests and detention from other delictual claims. The reasoning adopted by the Court seems to have been as follows:

18.1 A "*debt must be immediately claimable for it to be due .....*"[7].

18.2 For this to be case, a plaintiff would have to be able to allege and prove, in the case of an arrest without a warrant, "*that the arresting officer had*

[6] 2017 (1) SA 274 (GJ) (Also reported at [2015] 2 All SA 20 (GJ))
[7] *Ibid*, para [52]

no reasonable suspicion that he had or was going to commit a scheduled offence"[8].

18.3 This the plaintiff would not be able to do "*prior to the outcome of the criminal trial or prior to charges being dropped or otherwise withdrawn*"[9], because the arrest and attention "*will be justified if there is a conviction*"[10]. A claim for unlawful arrest and detention is therefore not "*immediately claimable and therefore justiciable*" before the finalisation of the criminal proceedings[11] and is therefore distinguishable from other delictual claims in that it is "*dependant on the outcome of criminal proceedings*"[12].

18.4 It was also held that such a plaintiff would not, without the police docket, be able to know whether "*the arresting officer was acting unlawfully when effecting the arrest rather than that the complainant had falsified a charge against him*", and that "*the docket is not available to an accused until the investigation is completed and he is presented with the indictment*"[13].

[18.] In this regard Spilg J relied on the judgment in **Unilever Bestfoods Robertsons (Pty) Ltd and Others v Soomar and Another**[14], and on the fact that the Supreme Court of Appeal had in that matter confirmed the principle that a Court "*should not be called on to prejudge the findings of a criminal court*", like would be the case where damages are claimed on the basis of malicious prosecution before the prosecution has actually been finalised or terminated.

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[8] *Ibid*, para [56]
[9] *Ibid*, para's [57], [58]
[10] *Ibid*, para [58]
[11] *Ibid*, para [58]
[12] *Ibid*, para's [58], [50]
[13] *Ibid*, para [55]
[14] 2007 (2) SA 347 (SCA)

[19.] In the first place the existence, at the time of the arrest, of a reasonable suspicion as required by the provisions of section 40(1)(b) of the **Criminal Procedure Act**[15] is not an element of the crime of housebreaking with intent to steal and theft. I fail to see how the determination of the issue of the existence of such a suspicion, even if it is for the moment assumed that the civil trial could precede the criminal trial, could compromise or "*prejudge*(d) *the findings of the criminal court*" trying a charge of housebreaking. The appellant would therefore not in these civil proceedings have been a party "*seeking in* (those) *proceedings to controvert or anticipate a finding given or to be given against him*"[16] in the criminal proceedings, and neither would the fourth defendant have been, and the principle could therefore not in the present circumstances apply to the same extent as it would have, had the intended damages claim been based on malicious prosecution.

[20.] Secondly an unlawful arrest cannot in the manner suggested in the **Makhwelo** judgment[17] be "*justified*" by a subsequent conviction of the accused, and conversely an acquittal or the withdrawal of the charge could not in itself serve as proof that the arrest without a warrant had been unlawful[18]. I cannot therefore agree that the justiciability of a damages claim for unlawful arrest and detention would be dependent on the outcome of criminal proceedings in respect of a charge that is itself completely unrelated to the arrest and the detention.

[21.] Thirdly it is not clear to me why the contents of the police docket regarding a charge of housebreaking would necessarily have assisted in obtaining particulars regarding the belief of the arresting officer at the time of the arrest. In any event, why should a plaintiff like the appellant have to speculate about the

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[15] 51 of 1977

[16] **Unilever Bestfoods Robertsons (Pty) Ltd and Others v Soomar and Another**, *supra*, para [29]

[17] **Makhwelo v Minister of Safety and Security**, *supra*, para [58]

[18] Compare **R v Moloy** 1953 (3) SA 659 (T) (Also reported at [1953] 4 All SA 9 (T)) at 662E; **Scheepers v Minister of Safety and Security** 2015 (1) SACR 284 (ECG) para's [18], [19]; **Minister of Safety and Security and Another v Mhlana** 2011 (1) SACR 63 (WCC) para [15]; **Qaku v Minister of Safety & Security** 2013 JDR 2188 (ECM) para [13]; **Terblanche v Minister of Safety and Security and others** [2009] 2 All SA 211 (C) para [84]; **Van Wyk v Minister of Police** 2016 JDR 2163 (GP) para [17]; **Visser v Minister of Police** 2015 JDR 2217 (GP) p23, para 47

information that caused the officer to arrest, and about whether the arresting officer had not himself been misled, and have to investigate this before serving a notice. The arrest without a warrant would *prima facie* be unlawful[19] and should surely in itself therefore be sufficient cause for, at the very least, issuing and serving the notice.

[22.] Lastly, the **Unilever** case was in any event distinguishable and did not concern claims for damages suffered as a result of unlawful arrest and detention.

[23.] Insofar as the Court in the **Makhwelo** case may have found, relying on the **Unilever** case, that a claim for unlawful arrest and detention would only arise if and when there is an acquittal in the criminal proceedings in respect of the charge on which the arrest took place, or the charge is withdrawn, I must respectfully disagree. In my view the debts that are the subjects of claims 3 and 4 would have been due, at the very latest, on the respective dates of the appellant's release from detention[20].

[24.] The explanation for the delays between when the two debts became due and when notice was given is contained in the appellant's founding affidavit and in the supporting affidavit of Mr Sampson. Their explanation is briefly as follows:

26.1 The appellant approached Mr Sampson late in November 2013 *"to discuss possible commencement of Summons Proceedings"*.

26.2 Mr Sampson advised the appellant that he needed access to the police dockets pertaining to the two incidents. Mr Sampson says that this was necessary *"in order that we would be in a better position to make a judgment call as to whether the arrest and detention was unfounded and also to have sight of what transpired in the respective court appearances"*.

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[19] Compare **Minister of Safety and Security v Sekhoto and Another** 2011 (5) SA 367 (SCA) para [7]
[20] Compare **Lombo v African National Congress** 2002 (5) SA 668 (SCA) para [26]; **Maduray v Minister of Safety & Security of the RSA & another** [2005] JOL 15836 (D) p21; **Taylor v Minister for Safety & Security & Another** 2006 (3) SA 328 (SCA) para [9]

26.3 The appellant did not have the particulars of the dockets and the case numbers, and it would seem that Mr Sampson then requested him to get this information. During the course of 2014 the appellant provided Mr Sampson with "*various bits of information*".

26.4 "*... one Saturday Morning during 2014*" Mr Sampson and the appellant visited the scenes were the appellant had been assaulted and according to Mr Sampson the appellant "*pointed out the places at which the various attacks took place*". Mr Sampson says that "*this enabled* (him) *to make a better adjudication upon what was actually transpiring and assisted* (him) *with the furtherance of the drafting of the documentation*".

[25.] The first and most obvious problem with the explanation is that it does not cover the periods between when the appellant was released from detention, on the one hand, and the date that the appellant went to Mr Sampson with a view to have summons issued.

[26.] In the case of claim 3 this period amounted to almost two years, from 28 December 2011 to November 2013. The second release took place on 12 June 2012, and the appellant only went to Mr Sampson approximately 17 to 18 months later. These two periods constitute extraordinary long delays and the appellant has not even bothered to claim that he was unaware of the statutory requirement of notice of the intention to institute the legal proceedings.

[27.] After the appellant's initial consultation with Mr Sampson a further approximately 8 months expired before the notices were eventually dispatched and hand delivered. It has not been explained why the fact that the appellant may not at that stage have been able to furnish Mr Sampson with the numbers of the relevant police dockets and cases would have prevented Mr Sampson from preparing notices containing the particulars that are required by section 3(2)(b)

of the Act, *viz "the facts giving rise to the debt"* and *"such particulars of such debt(s) as* (were) *within the knowledge of the* (appellant)". It is not claimed, for example, that the appellant could not at that stage remember when and where he was arrested, when he was released, what the charges were that he was arrested for and what the outcome thereof was. There is also no apparent reason why the appellant would not have been able to describe to Mr Sampson, at that stage already, what the circumstances were under which the arrests had taken place.

[28.] Neither the appellant nor Mr Sampson attempted to explain exactly what particulars it is that were not available at the time of the first consultation and that prevented Mr Sampson from drafting notices complying with the statutory requirements, and when those particulars eventually became available.

[29.] The statement that the appellant had in the course of 2014 *"on numerous occasions"* furnished Mr Sampson with *"various bits of information"* in a piecemeal fashion is hopelessly vague. When was this information given to Mr Sampson and what did it consist of? Did it include any of the particulars eventually included in the notices and, if so, how did the appellant manage to obtain that information without access to the dockets?

[30.] It is in any event clear that Mr Sampson had in the end managed to prepare the notices with sufficient particulars even before he managed to access the contents of the police dockets.

[31.] A visit to the scenes of the attacks on the appellant during the first incident could also not have assisted Mr Sampson with the drafting of a notice about the arrest that had taken place after those attacks.

[32.] The explanation as a whole was not nearly *"sufficiently full to enable the Court to understand how it really came about"*[21], and this would have been my conclusion

[21] **Silber v Ozen Wholesalers (Pty) Ltd** 1954 (2) SA 345 (A) at 353A

even if the two debts had only become due on the dates of the finalisation or termination of the relevant criminal proceedings.

[33.] The situation is exacerbated by the fact that, despite it being trite that an application for condonation has to be brought as soon as possible after the need therefore becomes known[22], the present application was only lodged during July 2015. For this too there is no explanation.

[34.] This brings me to the issue of the prospects of success of the appellant's claims against the fourth defendant, which could in appropriate circumstances *"play a significant role – 'strong merits may mitigate fault; no merits may render mitigation pointless'. The court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of an intended action, ..."*[23].

[35.] As a result of the fact that the appellant's arrests took place without a warrant the arrests would, as already mentioned, have been *prima facie* unlawful, and it would have been for the fourth defendant to prove the contrary.

[36.] The appellant has, however, conceded that the police had on the first occasion arrested him after he had been identified as a suspect who had broken into the house of the first defendant. Housebreaking with the intent to commit an offence is one of the offences listed in Schedule 1 to the **Criminal Procedure Act**. If the arresting officer reasonably suspected the appellant of having committed a Schedule 1 offence, as he or she surely would have suspected after such a report,

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[22] Compare **HL v MEC Health of the Free State Provincial Government** [2018] 1 All SA 522 (FB) para [37]

[23] **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd**, supra, para [37]; See also **MEC for Education, Kwa-Zulu Natal v Shange** 2012 (5) SA 313 (SCA) para's [12], [15]

the arrest of the appellant without a warrant would have been lawful[24]. The appellant did not make out a case that there was a reasonable prospect that the fourth defendant would not be able to discharge its onus to prove that the report made to the police on that occasion was objectively sufficient, in the circumstances, to justify a reasonable suspicion as required in section 40(1)(b) of the **Criminal Procedure Act** for purposes of a lawful arrest without a warrant under such circumstances.

[37.] Also as regards the second arrest the appellant never even so much as alleged that the fourth defendant would not, in the trial of the action that he had instituted, be able to discharge the onus of proving that the arrest was lawful despite the absence of a warrant, or at least that he had no reason to believe that the fourth defendant would be able to discharge the onus. The fact that the fourth defendant would in the trial of the action have been burdened with the onus to prove the lawfulness of the arrests (and therefore of the subsequent detention) did not, in my view, relieve the appellant from the duty, in his application for condonation and in making out a case that there was good cause for condonation, to deal with the prospects of success with claims 3 and 4.

[38.] It can therefore not be said, in respect of any of the two arrests and periods of detention, that such strong prospects of success appear from the papers that the inadequate explanation of the default can be said to have been mitigated thereby.

[39.] In his founding affidavit the appellant went no further, as far as the issue of prejudice is concerned, than to make the bald and unsubstantiated allegation that there would be no prejudice, presumably for the fourth defendant, if condonation was granted. This too was in my view not sufficient, as it is generally accepted that the party who seeks condonation would have to satisfy

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[24] Compare **Minister of Safety and Security and Another v Swart** 2012 (2) SACR 226 (SCA) para's [16], [17]

the Court as to the absence of prejudice, not the other way around[25]. It was for the appellant to make out this case in founding, and the fact that the fourth defendant may have been vague about this issue in the answering affidavit does not assist the appellant in this regard. This aspect is, however, not in my view decisive, because the application for condonation was in any event doomed to fail on the basis that one of the three requirements, *viz* good cause, had not been shown.

[40.] It follows that the appeal should in my view be dismissed and there is no reason why the costs should not follow this result.

[41.] In the premises the following order is made:

THE APPEAL IS DISMISSED WITH COSTS.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.

C C WILLIAMS
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the appellant:	**MR B SAMPSON** **(Legal Aid South Africa, Kimberley)**
For the 4th defendant:	**MR P VISAGIE** **(Office of the State Attorney)**

[25] Compare **Ex parte Chenille Corporation of SA (Pty) Ltd and Another: In re Chenille Industries (Pty) Ltd** 1962 (4) SA 459 (T) at 461H; **Rosen v Bruyns, NO** 1973 (1) SA 815 (T) at 818H