



**IN THE HIGH COURT OF SOUTH AFRICA
[EAST LONDON CIRCUIT LOCAL DIVISION]**

CASE NO.E.L 873/2019

In the matter between:

SIBULELE MFIKILI

Applicant

And

THE MINISTER OF POLICE FOR THE

REPUBLIC OF SOUTH AFRICA

First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

JUDGMENT

TOKOTA J

Introduction:

[1] The applicant instituted an action for damages' claim arising from the alleged unlawful arrest and detention against the first respondent (claim 1), malicious

prosecution against the first and second respondents (claim 2) and loss of income against the first and second respondents (claim 3). The respondents raised a special plea contending that the plaintiff is time-barred for failure to comply with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of the State Act No. 40 of 2002 (the Act). The Act creates time-bar limits enjoining a person who wishes to sue the State to give six months' notice from the date on which the debt becomes due, with the provision for condonation of the late giving of such notice. In that notice the claimant must briefly set out the facts giving rise to such debt. The purported notice was issued outside the six-month period. This is an application for condonation for failure to comply with the provisions of the Act. The application is resisted by the respondents.

Factual background:

[2] On 12 July 2017, the applicant was arrested by the police without a warrant of arrest. He was detained until he appeared in court. The papers do not indicate the date of his appearance in court. Since this is not an issue it can be safely assumed that he appeared within the forty-eight-hour period required in terms of section 50(1) of the Criminal Procedure Act 51 of 1977 (the CPA). The respondents pleaded that the applicant was arrested on reasonable grounds of suspicion that he had committed murder and robbery which are offences referred to in schedule 1 of the CPA.

[3] The applicant appeared in court on several occasions without his case being tried. The information given by the parties is so scanty that one does not know when

exactly was he released on bail. On 19 July 2018, the charges against the applicant were withdrawn. The applicant alleges that the magistrate remarked that the reason for the withdrawal was that there was no case against him. According to the record it is recorded "case withdrawn by PP". The record does not reveal that the magistrate said there was no case against the applicant.

[4] On 2 October 2018, a letter purporting to be a notice in terms of section 3(2) of the Act was sent by registered mail to the National Commissioner of Police. No such notice was sent or served on the second respondent. On 12 August 2019, the summons was served on the first respondent and on 24 January 2020, the summons was served on the second respondent. On 19 June 2020, the summons was served on the Provincial Commissioner.

[5] Generally speaking, as the applicant was arrested on 12 July 2017 and assuming that the arrest and detention were unlawful, the debt would have become due on that date and the six month-period would have expired in January 2018.

[6] The applicant stated that sometime after he was released he got to know that he could institute a claim for damages for unlawful arrest and detention and malicious prosecution. He then started looking for a lawyer who could take his case on a contingency basis. He contacted an attorney who wrote a letter on 2 October 2018. Then on 12 August 2019 and 24 January 2020 summons was served on the respondents respectively.

[7] The applicant does not tell the court when exactly after his release did he know that he had a claim against the respondents.

Statutory Framework:

[8] Section 3 of the Act provides:

“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 her 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).

3(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(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...”

[9] Section 3(4) of the Act provides:

“(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”.*

[10] Section 12(3) of the Prescription Act 68 of 1969 is worded in a similar fashion as section 3(3)(a) of the Act where it provides:

“A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

[11] Subject to the provisions of section 3(4) of the Act, if the creditor fails to serve the notice within six months from the date on which the debt became due he is precluded from instituting legal proceedings against an organ of State. The debt becomes due when the creditor gains knowledge of the facts giving rise to it and of the identity of the debtor, or from the date on which he must be regarded as having acquired knowledge thereof by reason of exercising reasonable care.

Discussion:

[12] The question to be determined is whether the applicant’s failure to serve notices on the respondents in terms of section 3(2)(a) of the Act can be condoned. Section 3(4)(b) gives the court the power to grant condonation upon being satisfied that the applicant has met the three requirements mentioned therein.

[13] Condonation is not granted for mere asking¹. A party seeking condonation must make out a proper case showing good cause entitling it to the court's indulgence.² For condonation, an applicant is expected to explain the entire period of the delay.³

[14] I now consider whether the applicant has satisfied the threshold set out in section 3(4) of the Act to enable the court to grant condonation. In **Road Accident Fund and Another v Mdeyide** 2011 (2) SA 26 (CC) (2011 (1) BCLR 1; [2010] ZACC 18) para 8, for the vital importance of prescription the Constitutional court said:

'This court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence.'

[15] In considering whether or not condonation should be granted I am guided by the requirements set out in section 3(4)(b) of the Act. Concerning the first requirement, the applicant was arrested on 12 July 2017. The case against him was withdrawn on 19 July 2019. As can be gleaned from the above it is clear that when

¹Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC) (2014 (1) BCLR 65; [2013] ZACC 37) para 23.

²Von Abo v President of the Republic of South Africa 2009 (5) SA 345 (CC) (2009 (10) BCLR 1052; [2009] ZACC 15) in para 20; and Van Wyk *infra* n 2 in para 22.; Grootboom v NPA 2014 (2) SA 68 (CC) (2014 (1) BCLR 65; [2013] ZACC 37) para.23

³Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) (2008 (4) BCLR 442; [2007] ZACC 24) para 22.; Von Abo v President of the RSA 2009 (5) SA 345 (CC) (2009 (10) BCLR 1052; [2009] ZACC 15) para.20; Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd 2012 (2) SA 637 (CC) ([2009] ZACC 12) para.15; eThekweni Muni v Ingonyama Trust 2014 (3) SA 240 (CC) (2013 (5) BCLR 497; [2013] ZACC 7) para.28

the summons was served, the claims had not yet prescribed. Therefore the first requirement has been satisfied.

[16] Concerning the second requirement, the applicant proffered an explanation that 'some time' after his release he got to know that he could institute civil proceedings claiming damages against the respondents. The applicant does not take this court into confidence and explain when exactly did he obtain this legal advice. He tenders no explanation for the period between his arrest and his release.

[17] In considering the good cause a distinction must be drawn between knowledge of facts giving rise to the debt and knowledge of a right to sue. In **Minister of Finance and Others v Gore NO**⁴the court held:

[17] This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'. [Footnotes omitted.]

[18] The applicant was arrested on 12 July 2017. Six month-period expired on 13 January 2018. He does not explain why the notice was only issued on 2 October 2018. There is a gap of unexplained period of eight months prior to the issuing of the notice. The special plea was raised on 8 January 2020 and this application was launched on 3 November 2021. However, the subsequent delay in bringing the application for condonation, after the special plea was raised, does not fall within the

⁴Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA 98) para 17.

ambit of section 3(4)(b)(ii). I mention it merely to indicate the dilatory tendency of the applicant. The applicant was legally represented at the criminal trial.

[19] In **Truter v Deyssel** 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16-17 a case which dealt with section 12(3) of the Prescription Act it was said

“For the purposes of the Act, the term ‘debt due’ means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.

[17] *In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:*

‘A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.’⁵

[20] In **Madinda v Minister of Safety & Security** 2008 (4) SA 312 (SCA) ([2008] 3 All SA 143; [2008] ZASCA 34) para.10 it was said:

. ‘Good cause’ looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the

⁵ See also *Links v Dept of Health*, NP 2016 (4) SA 414 (CC) (2016 (5) BCLR 656; [2016] ZACC 10) para.31

sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.

[21] The applicant knew or must have known of the facts giving rise to the debt as well as the identity of his debtor when he was arrested. According to him, he protested about his arrest. It does not appear from his affidavit that he did not know about facts. What becomes clear is that he did not know if he could institute a claim against the respondents. He only sought advice in this regard 'some time' after he was released.

[22] Knowledge of the right to institute damages' claim against the respondents is a conclusion of law which does not "*constitute factual ingredient of the cause of action.*"⁶ In his affidavit, he does not claim that he did not know the facts nor does he claim not to have known the debtor prior to the expiry of six months after his arrest and detention. As to the prospects of success, the applicant merely states that "*I am advised that the prospects of succeeding in the claim against the respondents are good.*"

[23] With regard to the claim for malicious prosecution, the cause of action in that regard arose when the case was withdrawn against the applicant on 19 July 2018. The so-called notice was then issued on 2 October 2018 which was still within the six months' period. In the letter of demand dated 2 October 2018, the applicant's attorneys demanded R400 000.00 for 'humiliation and embarrassment, pain and suffering' and R2 million rand for 'bully boy conduct' of the members of the South

⁶ Truter supra para.17

African Police Services assisted by the prosecutor in causing the applicant to be detained.

[24] From the contents of the purported notice, it is clear that the notice did not comply with section 3 in that it refers to something else other than the claim that the respondents are facing. At the risk of repetition, the claims against the respondents are (a) unlawful arrest and detention (claim 1); malicious prosecution (claim 2) and (3) loss of earnings. (Claim 3). There is no explanation for this discrepancy. There is no link between the claim and the notice whatsoever. There is also no explanation in the affidavit why the claims mentioned in the letter were not pursued.

[25] There was no notice given to the second respondent at all. The applicant in his affidavit did not address this problem. He gave no explanation whatsoever as to why such notice was not given. Furthermore, he does not seek any condonation for not having done so. There is therefore nothing to consider in relation to the second respondent and the application in this regard should be dismissed *cadit quaestio*. In relation to the first respondent since the aspect of the malicious prosecution was not addressed and I refrain from making any findings in this regard.

[26] As regards prospects of success, the applicant merely states that he has been advised that there are prospects of success. That is not enough. In dealing with prospects of success the applicant is expected to deal with each head of his claim. In this regard, there is no such exposition. I agree with Mr *Jikwana* who appeared for the respondents that the applicant has not demonstrated that there are prospects of

success in his claims. The claims of torture are not supported by any evidence. He does not even state how he was tortured. Furthermore, there is no claim for assault.

[27] I now turn to deal with the reasons for the delay. As pointed out above the explanation for the delay is poor. All the applicant did 'some time' after his release was to seek legal advice regarding the claims.

The only excuse I could glean from the affidavit is that the applicant did not know if he had a claim against the respondents until 'some time' after he got advice from his lawyers. The right to claim against the respondents as stated in the above-quoted cases relates to the conclusion of law and therefore falls outside the ambit of section 3(4).⁷

[28] In an application for condonation, a full explanation for the entire period is required.⁸ The applicant has failed to do so. In their answering affidavit the respondents pertinently pointed out that "*at the time of his arrest and subsequently thereafter, the applicant knew the minimum facts necessary to institute a claim against the respondents*". The applicant filed no replying affidavit to demonstrate the contrary.

[29] The respondents in their answering affidavit point out that at the criminal trial the applicant was legally represented and therefore had access to legal advice. The State did not prevent him from acting against it. The applicant elected not to file any replying affidavit to contend otherwise. I agree with Mr *Jikwana* that the applicant knew or ought, by reasonable exercise of care, to have known all the minimum facts

⁷ See *Eskom v Bojanala Platinum District Municipality and Another* 2003 JDR 0498 (T): para [16] ;

⁸*Uitenhage TLC v SARS* 2004 (1) SA 292 (SCA) ([2003] 4 All SA 37; [2003] ZASCA 76) para.6

giving rise to the debt as well as the identity of the debtor as envisaged in the Act as far back as 12 July 2017 and elected not to do anything regarding his claims. It has been held that a man whose legal interests are threatened should be vigilant to protect them and not to wait for others to protect them for him. The law comes to the aid of those who act and not those who slumber; *Vigilantibus non dormientibus jura subveniunt*.

In **Mtokonya v Minister of Police** 2018 (5) SA 22 (CC) (2017 (11) BCLR 1443; [2017] ZACC 33) para.145 Jafta J stated “*the purpose served by s 12(3) is to prevent the commencement of prescription being delayed by the negligent inaction of the creditor who faces no impediments to instituting legal proceedings. The legitimate purpose served by provisions of a limitation such as s 12(3) is founded on public policy and is underpinned by two principles. The first is the interest of the state which requires that there should be a limit to litigation. The second is that the law helps the vigilant and not those who slumber.*”

[30] In all the circumstances I am of the view that the applicant has failed to meet the second requirement of section 3(4)(b).

[31] With regard to the prejudice, the applicant in his purported notice letter dated 2 October 2018 no mention is made of any unlawful arrest and detention. Although malicious prosecution is mentioned, according to the notice, the claims were for humiliation and embarrassment, pain and suffering in the amount of R400 000 and a ‘bully conduct’ of the members of SAPS for R2million rand. In this regard the prejudice is obvious. The cause of action is now something different from the notice itself. No opportunity was given to the respondents to consider their positions in terms of the claim.

[32] In all the circumstances to the extent that the claim concerns unlawful arrest and detention as well as loss of income the applicant has failed to give a reasonable explanation why section 3 of the Act was not complied with.

Costs:

[33] The general rule is that costs should follow the result. There is no reason why the rule should not apply in this case.

[34] In the result the following order will issue:

1. The application for condonation in terms of section 3 of Act 40 of 2002 is dismissed with costs.

**B R TOKOTA
JUDGE OF THE HIGH COURT**

Appearances:

For the applicant:

J L Kilani

Instructed by Lutango Sigcawu

Attorneys

For the Respondents:

T M Jikwana

Instructed by State Attorney

Date of Hearing: 2 June 2022.

Date delivered: 12 July 2022.