

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2021/3710

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

NKOSI CHRIS MAKHATHOLELA

APPLICANT

AND

MINISTER OF POLICE

FIRST RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SECOND RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 13th of December 2022.

DIPPENAAR J:

[1] The applicant seeks condonation for the late delivery of a notice in terms of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act¹("the Act"). The main issue to be determined is whether the applicant's non-compliance with the Act ought to be condoned in terms of the requirements of s 3(4)(b) of the Act.

[2] The respondents challenged compliance with these requirements and further contended that the applicant's delay in seeking condonation is fatal and that the notice contained substantive defects which are not condonable. It was further argued that the applicant has not made out a case for condonation as the bulk of his claims have prescribed, he has not shown good cause nor a lack of prejudice which could justify condonation.

[3] The background facts are that the applicant was arrested on 13 January 2012 on the strength of allegations that he was in possession of an unlicensed firearm. On 14 January 2012 he was taken to Brixton police cells where the applicant alleges he was assaulted and coerced to make a written confession statement. He was later charged with various other charges, including attempted murder, ATM bombing and car high jacking. The applicant's bail application was refused and he remained in custody. The applicant never pleaded and the trial never commenced, despite multiple court

¹ 40 of 2002 as amended

appearances. The applicant remained incarcerated for 8 years, 10 months and 5 days. The charges against the applicant were withdrawn on 18 November 2022 due to a lack of evidence. During the criminal trial, the applicant was represented by Legal Aid South Africa.

[4] On 29 November 2020 the applicant consulted attorneys and was advised that he would need to ask for condonation for non-compliance with the notice period in the Act, if the respondents were to plead prescription. A written notice in terms of s 3 of the Act (“the notice”) was sent to the respondents on 2 December 2020.

[5] The action proceedings were instituted on 29 January 2021. The respondents objected by way of special plea to the applicant’s non-compliance with the Act on 17 March 2021. The respondents pleaded that the notice was not served within the six months prescribed in terms of s 3(2) of the Act without any further facts being pleaded. In his replication the plaintiff pleaded that the written notice was given on 2 December 2020. The applicant amended his particulars of claim on various occasions, increasing the quantum of his claim.

[6] On 13 April 2022 the respondents delivered a notice of intention to amend their special plea and plea to raise the issue of prescription in relation to the applicant’s claim for unlawful arrest and detention and to amend their plea. The trial, which had been enrolled for hearing on 19 April 2022 was postponed as a result. Trial bundles have been prepared and expert notices and summaries delivered. The respondents’ amendment was effected on 12 May 2022. The present application was launched on 5 May 2022.

Is the delay in asking for condonation fatal?

[7] An applicant for condonation must furnish a proper explanation for his default which would be sufficiently comprehensive to enable a court to understand why it

occurred and therefore to enable a court to make a proper assessment as to whether to exercise a discretion in applicant's favour².

[8] Condonation must be applied for as soon as the party concerned realises that it is required³. It is well established that the delay in launching a condonation application should be fully explained and the explanation must be reasonable and cover the entire period of the delay. As explained in by Heher JA in *Madinda*⁴, failure to do so may adversely affect condonation or it may merely be a reason to censure the applicant or his legal representatives without lessening the force of the application. In general terms the interests of justice play an important role in condonation applications. If a court is satisfied that the three requirements of s 3(4)(b) have been met. In practical terms this means the overall impression made on a court by the facts set out by the parties.⁵

[9] The respondents argued that condonation should have been sought after delivery of their special plea on 17 March 2021 challenging compliance with s 3 of the Act. According to the respondents, the applicant's version was nonsensical, internally contradictory and mutually destructive, given that his attorneys had already raised the possible need to seek condonation during the consultation of 29 November 2020. According to the applicant the special plea was vague and he only appreciated that he needed to seek condonation once the respondents raised prescription.

[10] I do not agree with the respondents' contention. The special plea was cast in broad terms with only the conclusion pleaded that the applicant failed to comply with s 3 of the Act. No primary facts were pleaded in support of that contention and prescription was not expressly raised. From the applicant's replication it is clear that he relied on the s 3 notice of 2 December 2002. The applicant's version that he could not read into the special plea of 17 March 2021 as to what was implied thereby, is not unreasonable.

² Premier, Western Cape v Lakay 2012 (2) SA 1 (SCA) para [17]

³ Minister of Agriculture v CJ Rance 2010 (4) Sa 109 (SCA) para [39]

⁴ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA)

⁵ *Madinda* paras 32-35

[11] It was only after delivery of respondents' notice of intention to amend that their case pertaining to non-compliance with s 3 and prescription became apparent. The condonation application was launched shortly thereafter.

[12] The matter was clearly very much alive it was not suggested that the respondents were prejudiced or misled by the additional delay.

[13] In those circumstances, it cannot be concluded that there was an inordinate delay in the launching of the condonation application or that the application was not launched as soon as the applicant knew that it was required, justifying the dismissal of the application on this basis alone.

Are there substantive defects in the notice which cannot be condoned?

[14] The applicant's contention that the court is bestowed with the power to excuse any failure to comply with the rules of court is misconceived, as it disregards that the rules set out in the Act are statutory rules, distinct from a courts power to condone non-compliance with the rules of court⁶. The Act does not contain any provision empowering a court to condone the failure to comply with the notice's substantive requirements⁷. Thus only non-compliance with the time period can be condoned.

[15] The respondent argued that the notice contained substantive defects falling into two categories. The first category was that the respondents were informed of a claim in an amount far less than the claim he now pursues, given that the notice referred to a claim of R15 million, action was instituted for an amount of R20 million and the applicant's claim has increased to R50 million. It was argued the applicant failed without explanation to properly equip the respondents to do what the Act intends, being to properly assess whether and how to commit public funds to either defending or settling the claim.

⁶ Premier, Western Cape v Lakay 2012 92) SA 1 (SCA) para [14]

⁷ Mhloni v Minister of Defence 1997 (1) SA 124 (CC) paras [17] and [19]

[16] In my view, this argument does not pass muster. Considering the underlying purpose of s 3 of the Act ⁸, which is to assist the organ of state to conduct proper investigations into the claim and then to decide whether to make payment or defend the intended action,⁹ a subsequent increase of the amount claimed by the applicant would not have had a material impact on the respondents' decision, given that they had already elected to defend the claim based on the initial amount claimed in the notice. Whether the applicant will in due course be able to prove the substantial amount presently claimed, is for the trial court to determine.

[17] The second category of defects contended for was that the notice failed to inform the respondents that a claim of malicious prosecution could be forthcoming, which claim amounts to 60% of his claim. It was argued that the notice did not contain any allegation that the prosecution was undertaken with the requisite malice necessary to sustain that cause of action and the respondents were never placed in a position to responsibly consider whether to commit public funds to defending the case or approach a settlement.

[18] The s 3 notice set out various facts pertaining to the applicant's arrest and detention, his assault and coercion to make a confession, his multiple court appearances after investigations were completed in June 2012, the fact that the trial never commenced and his incarceration until 18 November 2020 when the charges were finally withdrawn due to lack of evidence. The notice attached a copy of the docket and the charge sheet.

[19] The letter stated:

"As a result of the unlawful arrest and detention, our client suffered injuries as a result of the assault by the officers, defamation of character, unlawful detention, was imprisoned for approximately 9 years, his right to freedom and dignity was infringed and had to endure an unnecessary and protracted process of litigation".

⁸ Mabaso v National Commissioner of Police and Another 2020 (2) SA 375 (SCA)

⁹ Para [13]-[15]

[20] In terms of s 3(2) of the Act, the applicant was obliged to briefly set out the facts giving rise to the debt and such particulars of the debt as were within his knowledge.

[21] In my view, the facts set out in the notice are sufficient to comply with the requirements of s 3(2). Read in context, although the words “malicious prosecution” were not expressly used, it is clear from the substance of the letter that the applicant intended to claim for all the events which transpired including the “litigation” (or rather prosecution) which ensued.

[22] I conclude that the respondents’ challenge on this ground must fail.

Has the applicant established the requirements of s 3(4)(b) of the Act?

[23] Section 3 of the Act provides:

“(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 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 not be regarded as being due until the creditor has knowledge of the identity of the organ of state and 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 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."

[24] The requirements of s 3(4)(b) are cumulative and a court may only exercise its discretion to condone non-compliance if all three requirements are met ¹⁰.

[25] It is well established that the phrase "if the court is satisfied" sets a standard which is not proof on a balance of probabilities but an overall impression made on a court which brings a fair mind to the facts set up by the parties¹¹.

[26] The first requirement envisages that the court must be satisfied that the applicant relies on an extant cause of action¹² .

¹⁰ Madinda para [6]

¹¹ Madinda para [8]

¹² Madinda para [[9]

[27] According to the respondent the majority of the applicant's claims have prescribed, given that the applicant was arrested on 13 January 2012 and released on 18 November 2020. Reliance was placed on ss 11(d) and 12(1) of the Prescription Act¹³ in arguing that the alleged debts claimed by the applicant prescribed three years after they were due.

[28] The applicant disputed that his claims have prescribed and argued that the claim for unlawful arrest, subsequent detention and malicious prosecution was a continuous transaction which could not be regarded as complete until the outcome of the criminal prosecution when the charges against him were withdrawn.

[29] That characterisation is contrary to established law.¹⁴ An unlawful arrest is not a continuing wrong, nor is it inextricably linked to an alleged unlawful detention that may follow it¹⁵. The approach with a continuous wrong is that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures. The applicant's claim is thus based on three different causes of action.

[30] I agree that the applicants claim for unlawful arrest has become prescribed as it accrued on the date of his arrest. In relation to the applicant's claim for unlawful detention the applicant sues for separate debts arising on each day of his detention¹⁶. The continued detention gave rise to a separate cause of action for each day the applicant was so detained during the detention period. Although a portion of the applicant's claim may well have prescribed it cannot be concluded that his entire claim has prescribed. In relation to the claim for malicious prosecution, that claim has not prescribed, given that prescription commences to run when the prosecution fails¹⁷.

¹³ 68 of 1969

¹⁴ Minister of Police v Yekiso 2019 (2) SA 281 (WCC) para [19] and the authorities cited therein; Lombo v African National Congress 2002 (5) SA 668 (SCA) para [26]; Barnett and Others v Minister of Land Affairs and Others 2007 (6) SA 313 (SCA) para [20]

¹⁵ Lombo supra; Minister of Police and Another v Yekiso 2019 (2) SA 281 (WCC) para [19]

¹⁶ Lombo para [19]; Barnett para [20]

¹⁷ Human v Minister of Safety and Security 2013 JDR 2302 (GNP)

[31] I conclude that the applicant has established that at least part of his claims remain extant.

[32] As held in *Madinda*¹⁸, a determination of good cause entails a consideration of all those factors which have a bearing on the fairness of granting condonation and affecting the proper administration of justice. Relevant factors might include: (i) the prospects of success in the proposed action; (ii) the reasons for the delay; (iii) the sufficiency for the explanation offered; (iv) the bona fides of the applicant and (v) any contribution by other persons or parties to the delay and the applicant's responsibility therefor. In any given factual complex, it may be that only some of many such possible factors become relevant. Ultimately an applicant must at least furnish an explanation for his default sufficiently full to enable a court to understand how it really came about and to assess his conduct and motives.¹⁹

[33] In considering good cause, the prospects of success on the merits play an important role, depending on the reasons for the delay which are provided by the applicant. If there are no prospects of success, it raises the question as to why a court should exercise a discretion to condone²⁰ .:

[34] As explained in *Madinda*, the issue is whether the applicant has produced acceptable reasons for nullifying in whole or at least substantially any culpability on his part which attaches to the delay in serving the notice timeously. It is trite that strong merits may mitigate fault and a lack of merit may render mitigation pointless. As further explained by Heher JA²¹,

"There are two main elements at play in s 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an order of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of the notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could

¹⁸ *Madinda v Minister of Safety and Security* 2008 94) SA 312 (SCA) para [10]

¹⁹ *Madinda* para [11] and the authorities cited therein

²⁰ *Madinda* para [12]

²¹ *Madinda* para [12]

be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is not prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interests, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement for good cause for the relay, the prospects of success re a relevant consideration."

[35] The concept of good cause was examined in *Minister of Agriculture and Land Affairs v CJ Rance (Pty)Ltd*²². The prospects of success as relevant to the test for good cause was explained thus by Majiedt AJA:

"The prospects of success of the intended claim 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 of 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, eg where an expert report central to the applicant's envisaged claim is omitted from the condonation papers"

[36] The respondents argued that the applicant has fallen far short of the requirements established in *CJ Rance* and that it would be speculative and inappropriate for the court to determine that there are prospects of success that go to satisfy good cause.²³ They further argued that the applicant has made fatal admissions in his replication to the respondent's amended plea pertaining certain issues justifying his further detention. In doing so they invited the court to consider the pleadings filed in the matter.

[37] In his founding affidavit the applicant alleged that he has high prospects of success. His case was that the first respondent proceeded with the arrest and lengthy detention while it was unreasonable and no objective grounds or justification existed for his detention and it failed to take any reasonable steps whatsoever to ensue applicant was released from prison. The second respondent did not act with an honest belief founded on reasonable grounds that the institution of the criminal proceedings was

²² 2010 (4) SA 109 (SCA) para [37]

²³ Yekiso para [34]

justified whilst there were no legal grounds for arresting and detaining him. Although in his founding affidavit, the applicant devoted only a few paragraphs to his prospects of success, he attached a copy of his particulars of claim, setting out the material facts on which he relies in the action in relation to his claims for unlawful arrest, unlawful detention and malicious prosecution.

[38] Pleadings have closed and the issues have crystallised between the parties. The pleadings establish that there are triable issues which require oral evidence to be led in order to be determined. Extensive trial bundles have been prepared and expert reports delivered. As those documents were not part of the application, I will not consider them in any detail. Their existence is however a factor which cannot be ignored.

[39] It would not in my view be appropriate to express any firm view on the alleged “fatal admissions” contended for by the respondents as they are issues which will be for a trial court to determine in due course. Suffice it to state that on the available facts placed before me, I am not persuaded by the argument that the applicant has placed insufficient evidence before the court to establish reasonable prospects of success.

[40] In my view considering all the facts placed before me, the applicant has set up a prima facie case of unlawful arrest, unlawful detention and malicious prosecution. The applicant’s fundamental right is to have his oral evidence evaluated in a fair trial against the opposing evidence that the respondents can produce. There are numerous factual disputes on the pleadings applicant which can only be determined once evidence has been led.

[41] The applicant used the first available opportunity to assert his determination to see justice done when he sought an attorney’s advice a few days after he was released. The s 3 notice followed a few days later and action was instituted the following month.

[42] The applicant explained the reason for the delay that he had no access to appropriate legal representation prior to his release when the charges were withdrawn against him. No countervailing evidence was presented by the respondents. It was not disputed that the applicant was represented by Legal Aid and did not have access to legal representation regarding any delictual claim whilst he was in detention²⁴.

[43] The respondents further argued that the applicant has not shown that he proceeds in good faith, thus indicating a lack of good cause. Reliance was placed on the applicant's alleged contradictory versions about the need for condonation, which it was argued is inherently unbelievable. I have already dealt with that issue. And provided reasons why I disagree.

[44] Reliance was also placed on the applicant's alleged failure to explain the delay of more than a year in bringing the application and his failure to inform the court of significant substantive defects in the notice. I have already deal with the latter issue and why it lacks merit.

[45] Regarding the delay in launching the application, as pointed out in *Madinda*,²⁵ post notification delays are not a factor which ought to be taken into account in determining good cause as they related not to good cause but to condonation.

[46] Heher JA held: "*Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s 3(4) but it is not, in this statutory context, an element of good cause.*" In this context any delay on the part of the applicant in launching the current application after delivery of the respondents' special plea during March 2021 is not a relevant consideration to take into account for purposes of determining good cause.

²⁴ Minister of Police v Yekiso 2019 (2) SA281 (WCC)

²⁵ Madinda paras [14] and [20]

[47] I am not persuaded that the respondents' argument pertaining to a lack of good faith passes muster. For the reasons advanced, I conclude that the applicant has illustrated good cause as envisaged by s 3(4)(b)(ii).

[48] I turn to consider the issue whether the respondents were unreasonably prejudiced by the applicant's failure to timeously give the notice. The respondents complained that they were not given a proper opportunity to consider the applicant's claims and were unreasonably prejudiced and that the applicant has not illustrated that they were not.

[49] The respondents argued that granting condonation would be unreasonably prejudicial to them, facilitating the precise prejudice to the state which the Act is designed to avoid being to defend a case where it was never given the statutorily mandated opportunity to consider the proper response in light of its custodianship of public funds.

[50] The applicant's case on this issue is that the first and second respondents are jointly liable, are state organs and therefore cannot suffer any prejudice if the condonation application is successful. I agree with the respondents that such notion lacks merit.

[51] The Act expressly makes provision for the absence of unreasonable prejudice as a specific factor of which the applicant must satisfy a court and emphasises "*the need to give due weight to both the individual's right of access to justice and the protection of state interest in receiving timeous and adequate notice*"²⁶.

[52] As held in *Madinda*, the approach to the existence of unreasonable prejudice requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice existed often lie peculiarly within the knowledge of the respondent.

²⁶ *Madinda* para [15]

Although the onus is on an applicant to bring the application within the terms of a statute a court should be slow to assume prejudice for which the respondent itself did not lay a basis.

[53] At this stage it cannot be ignored that the parties have been litigating at full stretch for nearly two years and that the matter would have proceeded to trial in April 2022 were it not for the respondents' notice of intention to amend their plea and introduce a special plea of prescription. The respondents have had adequate time to plan to face the applicant's claims and have done so. The docket and all the available documents have been discovered and it cannot be concluded that the respondents have been unable to investigate the applicant's claims.

[54] The fact that the quantum of the applicant's claims has increased, does not alter this position. It cannot on the facts of this case be concluded that the respondents have been wholly ill prepared to properly assess the claims and quantum thereof brought by the applicants.

[55] The fact that the applicant has increased his claim over time is not sufficient to constitute unreasonable prejudice of the kind contended for by the respondents. The applicant will have to prove his claims at trial. I have already concluded that the applicant's notice was not fatally defective as contended by the applicant.

[56] Other than broad generic averments, the respondents have not put up any facts to support their contention of unreasonable prejudice. Although the applicant's contention lacks merit, it cannot on the facts be concluded that the respondents have been unreasonably prejudiced.

[57] For these reasons, I am satisfied that the applicant has met the requirements in s 3(4)(b) of the Act.

Should condonation be granted?

[58] It is well established that once a court is satisfied that all three requirements have been met, the discretion to condone operates according to the established principles in such matters.²⁷

[59] Considering all the relevant facts, and applying the relevant principles, I am persuaded that the applicant has provided a sufficient explanation for the delay. I am further persuaded to exercise the discretion afforded in favour of the applicant and that condonation should be granted.

[60] There is no reason to deviate from the normal principle that costs follow the result. Both parties were represented by two counsel. I am persuaded that the employment of two counsel was warranted, where so employed.

[61] I grant the following order:

[1] The late delivery of the applicant's notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 Of 2002 is condoned;

[2] The respondents are directed to pay the costs of the application, including the costs of two counsel, where employed.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

²⁷ Madinda Para [16] referring to eg United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A) at 720 E-G

APPEARANCES

DATE OF HEARING : 06 October 2022

DATE OF JUDGMENT : 13 December 2022

APPLICANT'S COUNSEL : Adv U.B. Makuya
Adv V. Rikhotso

APPLICANT'S ATTORNEYS : Rikhotso M.O. Attorneys Inc.

RESPONDENT'S COUNSEL : Adv F.J. Nalane SC
Adv D. Linde

RESPONDENT'S ATTORNEYS : The State Attorney