



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

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: No  
(2) OF INTEREST TO OTHER JUDGES: No

08 /03/2022

DATE

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SIGNATURE

**CASE NO:  
A3080/2021**

In the matter between:

**BUTI RICHARD MAIMANE**

and

**THE MINISTER OF POLICE**

**APPELLANT**

**RESPONDENT**

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**JUDGMENT**

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**MODISE AJ:**

1. The appellant, Mr Buti Richard Maimane, instituted a damages claim against the respondent in which he alleged that he had been unlawfully detained. He failed to give the Minister notice of the claim within the prescribed period, as

he is required to do in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Legal Proceedings Act).

2. The respondent filed *inter alia* a special plea for non-compliance with the provisions of section 3(4)(a) and (b) of the Legal Proceedings Act in which this point was taken.
3. In response, the appellant brought an application for condonation of the late giving of the notice. That application for condonation was dismissed with costs by Magistrate Neyt. The refusal of condonation is now before us.
4. The appeal concerns the application and interpretation of section 3(4) of the Legal Proceedings Act. Before I consider the facts, most of which are common cause or not in dispute, I set out the terms of the statute.

## THE STATUTE

5. Section 3 of the Legal Proceedings Act provide that:

*'(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 proceeding(s)-*

*(i) without such notice; or*

*(ii) upon receipt of a notice which does not comply with all the requirements set out in subs (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 s 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.'*

6. In terms of s 3(4)(a) of the Legal Proceedings Act, if an organ of state raises a creditor's failure to serve a notice in terms of subsection (2)(a) as a defence, the creditor may apply to a court having jurisdiction for condonation of such failure. Section 3(4)(b) determines that a court may grant an application for condonation 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."

## **BACKGROUND FACTS**

7. The background facts are fully recorded in the Magistrate's judgment and they are that the appellant alleges that on or about 14 June 2017 he was unlawfully

arrested by a Traffic Officer who is in the employ of the Metro Police Department. The appellant further alleges that he was detained at Orange Farm Police Station until 15 June 2017 when he was released on warning.

8. The matter was referred to court on 19 June 2017 where after the prosecutor declined to prosecute the matter. As already alluded to above, the appellant claims damages against the respondent for the detention.
9. The appellant sought legal advice on 13 April 2018 whereafter a letter of demand was dispatched on 20 April 2018.
10. The Summons was subsequently issued and served on the respondent on 1 November 2018.
11. The respondent served its plea containing the special plea of non-compliance with the Legal Proceedings Act on the appellant on 1 January 2019.
12. The arresting officer and the Metro Police Department, who are the first and second defendants in the main action, did not oppose the condonation application and they were therefore not before the Magistrate. Only the

Minister, the third defendant in the main action and the respondent in this court, opposed the application.

### **PROCEEDINGS BEFORE THE MAGISTRATE'S COURT**

13. In the Magistrates Court the appellant stated that the cause of action arose on 14 June 2017. It is not in dispute that the notice was received, although the date of receipt is unclear. The appellant conceded that he did not give timeous notice to the respondent in terms of the Legal Proceedings Act.
  
14. It was argued on behalf of the respondent, and accepted by Magistrate Neyt, that no good cause for the failure to give notice timeously had been established.
  
15. It is also common cause that the claim had not prescribed.

### **PROCEEDINGS IN THIS COURT**

16. There are four grounds of appeal that are contained in the notice of appeal and they are recorded as follows:

“ ...

*15.1 The Learned Magistrate erred when considering the reasons for non - compliance namely the distance of travel between Grasmere and his*

*attorney of record and [considered] the fact that he required proof of his arrest and detention as insufficient.*

*15.2 Failed to consider further that it could have been excused if considering the strong merits of the appellant's case against the respondent.*

*15.3 The learned Magistrate further failed when making a conclusion, that the appellant was supposed to provide reasons why there is no prejudice to the respondent under the circumstances, however such prejudice cannot be presumed by a Magistrate or by a presiding officer and still needs to be alleged by the respondent in the allegations made when raising the special plea, and the severe infringement of the appellant's constitutional rights far outweighs any prejudice suffered by the respondent.*

*15.4 The Learned Magistrate further failed to consider that the appellant could only proceed with an application for condonation once the issue is raised by respondent, not at an earlier stage, and the appellant did not delay in bringing the application.*

## **THE APPLICABLE LAW**

17. The correct approach to condonation in terms of the Legal Proceedings Act was set out by Heher JA in *Madinda v Minister of Safety and Security*.<sup>1</sup> In the first place, the test for the court being satisfied that the requirements mentioned in s 3(4) are present involves not proof on a balance of probabilities but ‘the overall impression made on a court which brings a fair mind to the facts set up by the parties’.<sup>2</sup>
18. Secondly, the requirement of ‘good cause’ involves an examination of ‘all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice’, and may include, depending on the circumstances, ‘prospects of success in the proposed action, the reasons for the delay, the 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’.<sup>3</sup>
19. Thirdly, good cause for a delay, Heher JA held, is not ‘simply a mechanical matter of cause and effect’ but involves the court in deciding ‘whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously’; and in this process, ‘[s]trong merits may mitigate fault; no merits may render mitigation pointless’.<sup>4</sup>

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<sup>1</sup> *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA)

<sup>2</sup> Para 8

<sup>3</sup> Para 10

<sup>4</sup> Para 12

20. Fourthly, Heher JA highlighted the interests involved when he said:<sup>5</sup>

*'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 organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of 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 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 no 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 interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration.'*

21. Fifthly, it is particularly important that the circumstances relevant to just cause 'be assessed in a balanced fashion', so that the fact that 'the applicant

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<sup>5</sup> Para 12



is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved'.<sup>6</sup>

22. Sixth, it must be borne in mind that the concept of good cause is not self-standing but is linked to the delay. As a result, 'subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms'. This does not mean that such delays are irrelevant: while they are not part of the 'good cause' enquiry, they nonetheless are 'part of the exercise of the discretion to condone in terms of s 3(4)'.<sup>7</sup>

23. Finally, unlike the position in other legislation, and I would add, in the approach to condonation in the context of non-compliance with the rules of court and the like, a clear distinction is drawn in s 3(4) of the Legal Proceedings Act between good cause, on the one hand, and absence of prejudice, on the other. The purpose of the distinction, Heher JA held, is to 'emphasise 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'.<sup>8</sup>

24. When a judge decides to grant or refuse condonation, he or she exercises a discretion based on a balancing of relevant factors. In the case of what has

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<sup>6</sup> Para 13

<sup>7</sup> Para 14

<sup>8</sup> Para 15

been described as a narrow discretion, an appeal court may only interfere in the event of a misdirection on the part of the court of first instance. In the case of the discretion to grant or refuse condonation in terms of s 3(4) of the Legal Proceedings Act, the position is different. In *Premier, Western Cape v Lakay*<sup>9</sup> Cloete JA held that 'if condonation is refused by a court, an appellate court is in my view at liberty to decide the same question according to its own view as to whether the statutory requirements have been fulfilled, and to substitute its decision for the decision of the court of first instance simply because it considers its decision preferable'.

### *Good Cause*

25. It is trite that as a party seeking condonation is seeking a court's indulgence, a full explanation for non-compliance must be given, and the explanation must be reasonable enough to excuse the default.<sup>10</sup>
  
26. The appellant's explanation for the four month delay in serving the notice was that he attempted to find proof of his arrest, he stayed in Grasmere and could only consult his lawyer on 13 April 2018.

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<sup>9</sup> *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) at para 14

<sup>10</sup> *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) para 23.

27. There is no explanation as to why the appellant was of the view that he had to obtain the proof of his arrest, what attempts he made to obtain the proof, when those attempts were made. Furthermore, during argument Mr Botha acting on behalf of the appellant stated that the explanation as to why the appellant could only consult with his lawyer on 13 April 2018 was as a result of the distance between the attorney's firm and where the applicant resides. There is no evidence before the court which indicates what the distance is. There is no doubt in my mind that this explanation is wholly inadequate. During argument, the appellant's counsel correctly conceded that there are no further reasons for the delay and that the appellant has not taken the Court into his confidence at all.
28. Mr Botha submitted that there are other factors which the court *a quo* should have taken into account in exercising its discretion. He argued when considering whether the appellant has good cause, the Court should consider whether the appellant has good prospects on the merits and that if the appellant has good prospects of success then the Court can excuse the "not so good explanation" for the time that has lapsed in the circumstances and further that the plea contains a bare denial.
29. I pause to mention that Mr Botha raised the point that the court *a quo* granted condonation on the same papers in respect of the other defendants that were cited. Therefore, there is no consistency in the Magistrate's reasoning in his failure to grant condonation against the respondent. The

condonation application was not opposed by the first and second defendants in those proceedings. At any rate, this is not one of the grounds of appeal raised by the appellant before us, nor is there any evidence supporting the contention, and it requires no further consideration in this Court.

30. Mr Mgedeza acting on behalf of the respondent submitted that *“based on the authorities cited in his heads of argument, the factors which ought to be taken into account by the Court when faced with a condonation application should be considered cumulatively and/or in conjunction and not in a piecemeal fashion.”*

31. I am in agreement with this submission.<sup>11</sup>

32. In the case of *Minister of Public Works v Roux Property Fund Ltd*<sup>12</sup> when the court considered the issue of good cause it also took into account the fact that there was a further delay between the period when the objection was made in the special plea and when the application for condonation was launched.<sup>13</sup>

33. In the instant case, the special plea containing the objection regarding the non-compliance with the Legal Proceedings Act was served on the appellant

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<sup>11</sup> See *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) at para 13

<sup>12</sup> [2020] ZASCA 119

<sup>13</sup> Para 29

in early January 2019. From that point onwards, it was clear to the appellant that it was necessary to apply for condonation. The condonation application was only launched more than 2 years later in April 2021. In my view, this delay is extensive and also has a bearing on whether the appellant has established good cause for condonation. It also belies one of the appellant's grounds of appeal.

34. Insofar as the prospects of success are concerned, I am of the view that the appellant has simply set out the contents of the particulars of claim but does not set out any further facts to support a conclusion that his claim is likely to succeed. On the other hand, the respondent's plea is a bare denial.

35. Even if I find in the appellant's favour that he has demonstrated some prospects of success, I am not satisfied that he has demonstrated such overwhelming prospects that a failure to provide reasons for the delay may be overlooked. I find that when the appellant's explanation is considered in its full context, he has failed to establish good cause for the failure to give notice within the 6 month period envisaged by section 3(2)(a) of the Legal Proceedings Act.

## *Prejudice*

36. It is a requirement of condonation for the appellant to prove that the respondent did not suffer unreasonable prejudice due to the delay.<sup>14</sup>
37. Mr Botha argued that there is no prejudice that has been claimed by the respondent.
38. The respondent has indicated that as a State organ it has *“huge administration tasks and has a challenge of retention of staff to various reasons such as misconduct, resignations and death...witnesses tend to forget the facts and issues of the matter, as in this case we are dealing with the police officer and traffic officer who are dealing with a wide magnitude of matters on a daily basis.”*
39. Undeniably, an inordinate delay of two years between the time the appellant was aware that it was required to bring the condonation application and the time that it brought the application is prejudicial to the respondent. Long delays in litigation are not in the interest of justice as memories of witnesses may fade, documents may get lost and there are risks of a high turnover of staff.

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<sup>14</sup> *Madinda* para 12

40. Accordingly, the appellant has failed to satisfy the court that the appellant has not been unreasonably prejudiced by the failure to serve the notice timeously. Even if the court were to consider that the prejudice to the respondent was small, the lack of proper explanation by the appellant is not overcome.

## **CONCLUSION**

41. The Appellant has failed to establish just cause for the delay in giving notice and that there is no unreasonable prejudice on the part of the respondents. The three requirements for the grant of condonation in terms of s3(4) of the legal proceedings Act are not met. It follows that the appeal must fail.
42. The Magistrate in this regard made the correct order in respect of the condonation application

## **ORDER**

43. The following order is made:
- 43.1 The appeal is dismissed.
- 43.2 The appellant is ordered to pay the costs of the appeal.

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**T. MODISE**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

I agree.

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**S. YACOOB**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date of hearing: 26 October 2021

Date of Judgment: 08 March 2022

**Appearances**

Applicant's Legal Representative: Mr Botha

Briefed by: Mills & Groenewald Inc

Respondent's Legal Representative: Mr Mgedeza, of The State Attorney,  
Johannesburg



