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

**CASE NO: 2020/24049**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE: 11 March 2022

In the matter between:

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| **MABIZELA: LINDANI** | **Applicant** |
| and | |
| **MINISTER OF POLICE** | **First Respondent** |
| **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** | **Second Respondent** |

## JUDGMENT

**ALLY AJ**

## INTRODUCTION

[1] This is an application wherein the Applicant seeks condonation for the late filing of a notice in terms of Section 3 of the Institution of Legal Proceedings against certain Organs of State Act[1] (hereinafter referred to as "the Act").

[1] Act 40 of 2002

[2] The application is opposed by both Respondents.

**BACKGROUND FACTS**

[3] The Applicant was arrested on 26 October 2017 and charged with common assault. He alleges that he was found not guilty by the Court. This is as far as the Applicant goes, in this application for condonation, in dealing with the merits of his action against the Respondents.

[4] The Applicant indicates that he approached the Police Station at Moroka and was unsuccessful in trying to convince the personnel to assist him in obtaining his docket information.

[5] The Applicant had a notice issued in terms of Section 3 of "the Act" which notice was sent by registered post to the Respondents on 21 January 2020.

[6] The Applicant had a summons issued against the Respondents on 19 September 2020 and the said summons was served on the Respondents on 21 September 2020.

[7] A notice of intention to defend was filed by the Respondents on 8 October 2020 and on 18 November 2020, a plea and special plea was filed by the Respondents.

[8] The special plea related to the non-compliance by the Applicant with the provisions of Section 3 of "the Act". I deem it necessary to quote the whole of the provisions of Section 3 of "the Act" hereunder for convenience.

**THE LAW**

[8] Section 3 of "the Act" provides as follows:

> *"(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 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 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 state organ willfully prevented him or her or it from acquiring such knowledge; and*

*(b) a debt referred to in subsection 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 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 distinguished 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.*

**ANALYSIS AND EVALUATION**

[9] Applications of this nature have become a regular occurrence of late in our Courts. Our Courts[2] have thus had cause to enunciate the principles and guidelines in evaluating such applications.

[10] The Applicant contends and it cannot be denied on the facts that this application does not enter the realm of prescription and therefore it is unnecessary for the Court to consider and evaluate that aspect for the reason that it is common cause that the action arose on 27 October 2017 and that summons was issued on 21 March 2020 within three years of the cause of action having arisen. Clearly therefore Section 3 (1) does not arise. This, however, is not the end of the matter.

[11] The cause of action having arisen on 27 October 2017, it was then incumbent on the Applicant to give notice to the Defendant in terms of Section 2 within six months of the cause of action arising. Having only given notice on 21 March 2020, clearly the Applicant has not complied and the Defendant has not consented to the late delivery of the Notice.

[2] Madinda v Minister of Safety & Security of South Africa 2008 SCA 34; Maguga v Minister of Police 2018 ECHCG; Marumo v Minister of Police 2014 NGHC;

[12] The Court now needs to evaluate whether the Applicant has met the requirements of Section 3 (4) (b) of 'the Act'.

[13] Firstly, the requirement of a Court 'being satisfied' has been interpreted as relating to proof, not on a balance of probabilities but rather that it is an overall impression a Court gains from the facts placed before it by the parties[3].

[14] Secondly the requirement of 'good cause' which is a concept well known to the Courts with which this Court aligns itself with as outlined hereunder:

> *'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 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.*[4]

[15] Heher JA goes further at paragraph 12 in dealing with 'good for the delay'[5]:

> *'Good cause for the delay' is not simply a mechanical matter of cause and effect. The court must decide 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. Strong merits may mitigate fault; no merits may render mitigation pointless. 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*

[3] Madinda supra at para 8
[4] Madinda supra at para 10
[5] Madinda supra

*(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.*

[16] The Applicant has shown that his claim has not been extinguished by prescription as outlined above in compliance with Section 3 (4)(b)(i).

[17] An issue which needs to be addressed in this matter is that these are motion proceedings and the rule is that an Applicant must make out its case in its founding affidavit. The Applicant is entitled to file a replying affidavit after the Respondent has filed an opposing affidavit. Any additional affidavits may only be filed with the leave of the Court.[6]

[18] The Applicant chose to file a founding affidavit which is very brief and does not deal in detail with the requirements of Section 3(4). In this regard, one only has to have regard to the requirement of showing 'good cause for the delay' to realise that the Applicant does not come near to explaining the delay in the Founding

[6] Rule 6 (e)

affidavit. Furthermore the aspect of ‘good cause’ in the sense of prosepcts of success is also not dealt with sufficiently or at all. However, this deficiency is cured by the Applicant’s Supplementary affidavit. The Applicant, however, only provides his confirmatory affidavit supporting his allegations regarding the actions of his attorneys in his replying affidavit.

[19] The vexed question then arises whether a Court may consider the replying and supplementary affidavits together with the confirmatory affidavits of the Applicant? In my view, the answer to this question would depend on the circumstances of each case as well as the interests of justice and the attitude of a given Respondent.

[20] In this matter, the Applicant filed a supplementary affidavit[7] before Respondents filed their answering affidavit. This factor must be taken into consideration because of the prejudice that a Respondent would suffer if a supplementary affidavit is filed after its answering affidavit[8]. The answering affidavit furthermore responds to the Founding affidavit as supplemented by the Supplementary affidavit and in my view shows no prejudice to the Respondent. However, the Respondent raised the issue of supporting affidavits attached to the replying affidavit and submits that this is not permissible. This issue has been dealt with above and in my view does not deal with the merits of the assertions made in the supporting affidavit but rather a technical point dealing with the permissibility of relying on supporting affidavits attached to the replying affidavit. Looked at holistically, I am of the view that the Applicant has explained the delay in not giving

[7] Caselines Section 011-3 – commissioned on 15 February 2021
[8] Caselines Section 009-3 filed and served on 19 March 2021

notice timeously within the confines of the principles outlined by Heher JA[9] in the Madinda case.

[21] Insofar as the attitude of the Respondent is concerned, one has to evaluate same against the objective facts of the Respondent knowing the explanation of the Applicant before filing their own answering affidavit and whether this knowledge worked against them and prejudiced them in any way. In my view, no such prejudice has been shown relating to the facts contained in the founding, supplementary and replying affidavit. The fact remains that the Applicant was thwarted by the First Respondent in his efforts to access information relating to his case.

[22] However, this is not the end of the matter either. The further question in evaluating the requirements of Section 3 (4) of the Act is whether the Applicant, on the papers, has shown good prospects of success[10] in the action against the Respondents. Just as the Applicant dealt cursorily with the explanation for the delay in his founding, the same applies to the requirement of 'good prospects of success'. In an application for condonation this could sound the death knell for an Applicant. Unfortunately for the Applicant, the deficiency of the application on this ground, counts against him and the Court must perforce refuse the application for condonation for the reason that he has not dealt with the requirement of 'good prospects of success' sufficiently or at all.

**CONCLUSION**

[9] Paragraph 13 supra
[10] Unreported Judgment: Mabaso v Minister of Police 2018 GPJHC

[23] Accordingly, the application for condonation must, for the reason set out above, fail.

**COSTS**

[24] It is trite that the Court has a discretion with regard to costs but such discretion must be exercised judicially and the norm of the successful party being entitled to costs may only be deviated from in exceptional circumstances. I find no exceptional circumstances to deviate from the norm and the Respondents are entitled to their costs.

**Accordingly,** the following Order will issue:

a) The Application for condonation is dismissed;

b) The Applicant is to pay the party and party costs of the Respondents.

**G ALLY**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG**

***Electronically submitted therefore unsigned***

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 March 2022.

Date of hearing: Matter decided on the papers

Date of judgment: 11 March 2022

**Appearances:**

**Matter decided on the papers. Heads of Argument being drafted by:**

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|---|---|---|
| The Applicant | : | **L R Molope**<br>Y Bodlani Attorneys<br>Yonela.bodlani@gmail.com |
| The Respondents | : | **R. Pooe**<br>The State Attorney<br>RPooe@justice.gov.za |