IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case NO: 15017/2017

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED.
29 August 2022

Date signature

In the matter between:

CHAUKE TINYIKO JOSEPH	**1ST PLAINTIFF**
RAOLANE TEBATSO EUGINE	**2ND PLAINTIFF**
MOFOMME SOLOMON TSHEGOFATSO	**3RD PLAINTIFF**
MASEKOAMENG JOHANNES LESETJA	**4TH PLAINTIFF**
MATHOTHO HEDGES HOPANE	**5TH PLAINTIFF**
KEKANA MAKGOBA CHARLIE	**6TH PLAINTIFF**
MANYAMALALA KAYA BETHEL	**7TH PLAINTIFF**
MAILA KGABO ISAAC	**8TH PLAINTIFF**
MASHOAKWA DYROSE MANAKA	**9TH PLAINTIFF**
MOKOBODI KOENA STANFORD	**10TH PLAINTIFF**

And

MINISTER OF POLICE	**1ST DEFENDANT**

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE **2ND DEFENDANT**

NATIONAL PROSECUTING AUTHORITY **3RD DEFENDANT**

Summary: Institution of Legal Proceedings against Organs of the State Act. Timeframe for issuing notice in terms of section 3 of the Act. Failure to comply with the provisions of section 3 of the Act. Failure to apply for condonation.

Applicant contending that there was no need to apply for condonation because the parties signed at pre-trial minutes wherein the respondent stated that it suffered no prejudice in the process of preparing for the trial. The distinction between the power of the court in condoning noncompliance with statutory time frames and those provided for under the rules. Statutory time frames form part of the jurisdictional facts whereas in the case of time frames provided for in the rules the court has the latitude to grant condonation, even where no substantive application was made.

JUDGMENT

MOLAHLEHI J

[1] This judgment provides the reasons for the order made by this court on 11 April 2022. The order is varied to the extent that it erroneously did not include the finding that there was noncompliance with the provisions of section 3 (1) (a) of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2000 (the Act). The order reads as follows:

"Order

a) plaintiffs have failed to comply with the provisions of section 3 of the Institution of Legal Proceedings against certain organs of the State Act 40 of 2000.

b) The plaintiffs are barred from instituting these proceedings against the defendants, and no action can be founded by the plaintiff on the alleged unlawful arrest and detention by the employees of the defendants.

c) The matter is dismissed with costs on a party and party scale."

[2] The order was consequent of a special plea raised by the defendants concerning failure by the plaintiffs to give the defendants proper notice as required by section 3 (1) of the Act. The issue of noncompliance with the provisions of the section arose in the context where the plaintiffs instituted action proceedings against the defendants. The plaintiffs who are police officers employed by the South African Police Services (the SAPS) alleges in their particulars of claim that they were unlawfully detained by the Independent Police Investigative Directorate (IPID) at the police station in Tembisa. They were all arrested on 27 August 2015 and released from detention on 1 September 2015.

[3] The letters of demand incorporating the notice in terms of section 3(1) of the Act were issued on 20 February 2017. The summons was served respectively on 4 May 2017 and 25 May 2017.

[4] After their arrest, they were charged with the murder and torture of a person who was arrested during a robbery of motor vehicles at Kempton Park. The

alleged robber was arrested and taken to the hospital, where he subsequently died.

[5] The plaintiffs were charged and criminally prosecuted for the alleged offences at the Tembisa magistrate court. They were, however, found not guilty of all the counts and discharged.

[6] The defendants opposed the claim and filed a plea on 15 September 2017. The essence of the plea was to assert the right to the notice in terms of section 3(1) of the Act before the matter could proceed to trial.

[7] In November 2021, the parties held a pre-trial conference in compliance with the provisions of rule 37 of the Uniform Rules of the High Court (the Rules).

[8] There is no dispute that the plaintiffs failed to serve the notice envisaged in section 3(1) of the Act within six months. They have also did not filed condonation for such failure. They, however, contended that they are entitled to proceed with the trial because the defendants waived their rights to invoke the provisions of section 3 (1) of the Act.

[9] Based on the above, the plaintiffs contended that they were not obliged to file a condonation application for noncompliance with the provisions of section 3(1) of the Act.

[10] The fundamental point upon which the plaintiffs rely on in contending that they are entitled to proceed with the trial is that the defendants waived their

right to assert the requirements of the Act by signing the pre-trial minute in which they (the defendant) indicated that they suffered no prejudice in the process of preparing for the trial. In other words, the defendants agreed in terms of the pre-trial minute that the action could proceed to trial, even though there was noncompliance with the provisions of the Act. Put another way, there was no need for the plaintiffs to apply for condonation for noncompliance.

[11] The plaintiffs' Counsel, in support of the above contention, referred to the case of MEC for Economic Affairs, Environmental and Tourism, Eastern Cape v Kruzenga.[1] In that case, the SCA held that an attorney has apparent authority to bind a client at a pre-trial conference. This case, in my view, is distinguishable from the present matter as it relates to a settlement reached between the parties during a pre-trial meeting. The attorneys in that matter signed the pre-trial minutes wherein they, on behalf of their respective clients, incorporated a settlement agreement settling heads of damages claimed by the plaintiff. In other words, the provincial government accepted liability for certain of the heads of damages. The case was not about failure to comply with the time limits prescribed by a statute.

[12] In evaluating the submission made on behalf of the plaintiff a distinction need to be drawn between the approach to failure to comply with the time frames prescribed by the rules and those by a statute.

[13] In a case of noncompliance with the rules, the court has the latitude to indulge and may do so, even where there is no substantive application for condonation. In fact, in the case of noncompliance with the rules, the court will, in general, readily

[1] 2010 (4) SA 122 (SCA).

accept an agreement between the parties to waive compliance. This would, however, be done depending on the circumstances of each case.

[14] In general, statutory time frames have to do with the court's jurisdiction. Thus, where there is no compliance with the provisions of a statute, the court would have no jurisdiction to entertain the matter in the absence of condonation.

[15] There is no dispute that the plaintiffs failed to file section 3 (1) notice within the prescribed six months in terms of the Act. They also did not file any condonation in that regard.

[16] Section 3 (1) (a) 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) , , ,
>
> (ii) without such notice or; upon receipt of a notice which does not comply with all the requirements set out in subsection (2);
>
> (2) A notice must (a) within 6 months from the date on which the debt became due, be served on the organ of State in accordance with section 4(1)."

[17] The plaintiffs' case in this interlocutory hearing is that they are entitled to proceed with the trial, despite the noncompliance with section 3 (1) of the Act because they and the defendants agreed at the pre-trial conference to waive the requirements envisaged in the Act. They also, in this regard, contended that because of the agreement, there was no need to apply for condonation for none compliance. They, in this regard, rely on the phrase in the pre-trial minute that reads as follows: "Prejudice: None." This phrase was consequent to the question and answers during deliberations in the pre-trial conference.

[18] The plaintiffs contended that the above amounted to an agreement in which the defendants waived their right to invoke the provisions of section 3 (1) of the Act. They in this regard contended that the pre-trial minutes are binding on the defendants, and thus they could not renege on that agreement.

[19] In my view, Counsel for the plaintiffs conflated the issue of the time frames provided for in the rules and those in the Act. An application for condonation for noncompliance with the rules is governed by rule 27 of the Rules. Rule 27 of the Rules provides as follows:

"27 Extension of Time and Removal of Bar and Condonation

(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules.

(3) The court may, on good cause shown, condone any noncompliance with these Rules."

[20] On the other hand, condonation for noncompliance with the provisions of section 3(1) of the Act is governed by section 3 (4) (a) and (b) of the Act which provides as follows:

"(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."

[21] In general, a party that has failed to comply with the Act's provisions may not be able to pursue his or her claim unless the court has condoned such failure. In terms of section 3(4)(b)(ii), a party may approach the court to explain the reasons

why it was not possible to comply with the Act, including having to explain each period of the delay in filing the notice.

[22] An application for condonation may also be made even where the notice was not given. In *Minister of Safety and Security v De Witt,*[2] the Supreme Court of Appeal held that a plaintiff who has failed to give notice at all might approach the court for as long as the matter has not been prescribed. The plaintiff can show good cause for noncompliance, and there is no undue prejudice on the part of the State.

[23] A distinction is to be drawn between condonation for noncompliance with the time frames provided for in the Rules and those in the Act. In a case where there is noncompliance with the Rules, the court, in general, has a latitude to indulge and may do so, even where there is no substantive application for condonation. In fact, in the case of noncompliance with the Rules, the court will in general, readily accept an agreement between the parties to waive compliance. This would, however, be done depending on the circumstances of each case.

[24] The converse applies in cases involving time frames provided for in a statute. In statutory provisions, the issue of noncompliance is a jurisdictional fact which needs to be satisfied before the court can entertain the dispute. Thus, where there is noncompliance with the provisions of a statute, the court would have no jurisdiction to entertain such a matter in the absence of condonation. This

[2] *2009 (1) SA 457 (SCA)*.

means that application for condonation is mandatory for noncompliance with statutory time frames unless provided otherwise.

[25] The distinction between noncompliance with statutory provisions and the rules is succinctly set out and correctly, so in *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[3] *the court has held that:*

"Where the noncompliance relates to a statutory provision, i.e. as set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for example, where time limits relate to jurisdiction), an application must be made to the court to condone the noncompliance. In circumstances where the rules prescribe the time limit, this court would be prepared to entertain a matter even though the pleadings were not filed within the prescribed time limits, as long as there is no objection thereto by the party who stands in opposition to the party who has failed to comply with the time-limits prescribed by the rules of this court.

[26] In *SA Transport and Allied Workers Union and Another v Tokiso Dispute Settlement and Others,*[4] the Labour Appeal Court dealt with a situation where the applicant delayed in filing the review application within the prescribed period of six in terms of the Arbitration Act 42 of 1965. The applicant contended that noncompliance with the time limits set out in the Arbitration Act constituted a technical objection on a less than perfect procedural step. The LAC in dealing with the issue held that:

> "We were also referred to a number of judgments, all to the effect that technical objections to less than perfect procedural steps should not be permitted in the

[3] *[(2002) 23 ILJ 1282 (LC).*
[4] (2015) 36 ILJ 1841 (LAC).

absence of prejudice. See for example, *Trans-African Insurance Co Ltd v Mauleleka* [5]. This is correct but where the step constitutes a jurisdictional step, a time limit, and the party is out of time then, in the absence of an application for condonation, a court cannot come to the party's assistance."

[27] In light of the above, I found that the plaintiffs, having failed to apply for condonation for noncompliance with the provisions of the Act, are barred from instituting these proceedings against the defendants and no action can be founded against the defendants on the alleged unlawful arrest and detention by the employees of the defendants.

[28] It was for the above reasons that the above order was made.

_____

E MOLAHLEHI J

Judge of the High Court

Gauteng Local Division,

Johannesburg

Representations

For the Plaintiffs: Adv J Vilakazi

Instructed by: Mangxola Attorneys

For the 1st & 3rd Defendants: Adv. Z.R Nxumalo

Instructed by: The State Attorney

For the 2nd Defendant: Adv T. Mlambo

Instructed by: The State Attorney

[5] 1956 (2) SA 273 (A).

Order granted:13 April 2022

Reasons delivered: 29 August 2022