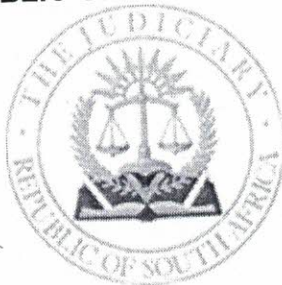


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 97052/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
22/02/19 <i>[Signature]</i>	

In the matter between:

SAMKELO NTANDOYENKOSI MNGADI

Applicant

and

**THE MINISTER OF POLICE
THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

1ST Respondent

2ND Respondent

JUDGMENT

MOSOPA J

INTRODUCTION

[1.] This is an opposed application in which the applicant is seeking an order that late service of his notice of intention to institute legal proceedings to the respondent be condoned in terms of section 3(4)(b) of the Institution of Legal Proceedings Against Certain Organ of State Act, Act 40 of 2002 ("Act"), and that the applicant be

granted leave to continue with the legal proceedings instituted under the above case number against the respondent.

FACTUAL BACKGROUND

[2.] The applicant was arrested on the 9 April 2014 at Alwyn street, Riamer Park, Bronkhorstspuit, Gauteng, without a warrant of arrest by unknown members of the respondent, on a charge of robbery.

[3.] As a result of his arrest, the applicant was detained at the Bronkhorstspuit Police Station for a period of approximately five days.

[4.] The applicant was consequently released on bail on the 14 April 2014 by the Bronkhorstspuit District Magistrate Court.

[5.] It is on that basis that the applicant is suing the respondents for the amount of R485 000 00 for his unlawful arrest and detention.

[6.] The applicant served the respondents with the notice in terms of section 3(2) of the Act, by hand, on 3 July 2015.

LAGAL PRINCIPLE

[7.] Section 3 of the Act provides;

“3 – Notice of intended legal proceedings to be given to organ of state.

1) No legal proceedings for the recovery of a debt may be instituted against the organ of state where:-

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 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).

2) A notice that:-

- 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(i); 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 it by exercising reasonable care, unless the organ of state wilfully 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 the court having a jurisdiction for condonation of such failure.

- b) The court may grant application referred to in paragraph (a) if it is satisfied that:-

- i. the debt has not been extinguished by prescription,
- ii. good care exist for the failure by the creditor,
- iii. the organ of state was not unreasonably prejudiced by the failure."

[8.] In *Madinda v Minister of Safety and Security, Republic of South Africa* 2008(4) SA 312 (SCA) Heher JA observed; "par 6 – section 3(4)(b) circumscribe a court's power to grant condonation by requiring that it be satisfied that,

- i. The debt has not been extinguished by prescription,
- ii. The good exists for the failure by the creditor, ie to serve the statutory notice according to section 3(2)(a) or serve a notice that complies with the prescription of section 3(2)(b), and
- iii. The organ of state was unreasonably prejudiced by the

failure

Par 8- the phrase "If (the court) is satisfied" in section 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set out by the parties. See eg *Die Afrikaanse Peers Beperk v Neser* 1948 (2) SA 295 (c) at 297. I see no reason to place a stricter construction on it in the present context."

9. Section 40 of the Criminal Procedure Act, Act 51 of 1977 provides:-

"40 – Arrest by a police officer without warrant.

- i. A peace officer may without warrant arrest any person
 - a) Who commits or attempts to commit any offence in his presence;
 - b) Whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody ;
 - c) Who has escaped or who attempts to escape from lawful custody;
 - d) Who has in his possession any implements of housebreaking or car breaking as contemplated in section 82 of Criminal Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;

- e) *Who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing,*
- f) *Who is found at any place by right in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence.*
- g) *Who is reasonably suspected of being or having been in unlawful Possession of stock or produce as defined in any law relating to the theft of stock or produce;*
- h) *Who is reasonably suspected of committing or having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or dependence-producing drugs or possession or disposal of arms and ammunition,*
- i) *Who is found in any gambling home or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance,*
- j) *Who wilfully obstructs him in the execution of his duty,*
- k) *Who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic,*
- l) *Who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic,*

- m) *Who is reasonably suspected of being a deserter from the South African National Defence Force,*
- n) *Who is reasonable suspected of having failed to observe any condition imposed in postponing the passing of sentence under this Act,*
- o) *Who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act,*
- p) *Who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prison;*
- ii. *If a person may be arrested under any law without warrant and subject to conditions or to existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such condition or circumstances."*

ISSUES FOR DETERMINATION

10. The following are the issues for me to determine,

- 10.1 Whether the debt has been extinguished,
- 10.2 Whether there exist a good care on the side of the creditor in delaying bringing the notice and
- 10.3 Whether the Organ of State will suffer any prejudice.

IS THE DEBT EXTINGUISHED?

11. The applicant was arrested on the 9 April 2014 and was released on bail on the 14 April 2015. The notice in terms of section 3(2) of the Act was dispatched to the respondent on the 3 July 2015 and consequently the summons issued on the 4 December 2015.

12. Since the applicant was released in detention until time when summons was issued, a period of three years has not yet lapsed and as such the debt is not yet extinguished by prescription.

GOOD CAUSE

13. In *Madinda v Minister of Safety and Security* (supra) at paragraph 12 the court observed;

"12- "Good cause usually comprehends the prospect of success on the merit of a case, for obvious reasons: Chetty v Law Society, Transvaal 1985(2) SA 756(A) at 765 D-E. But as counsel for the respondent stressed, whether that is the core must depend on the terms of the statute in which it is found. In section 3(4)(b)(ii), there is a specific link created between the delay and the good cause". According to counsel's submission, no matter how strong an applicant's case on the merits that consideration cannot be casually tried to the reasons for the delay, the effect is that the merit can be taken into account only if and when the court has been satisfied and comes to exercising the discretion to condone. I do not agree. "Good cause for 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, and 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 section 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of the Organ of State not to be unduly prejudiced limit for the giving of notice. 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 on 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 would hardly follow the interest of justice. Moreover, what can be achieved by putting the court to the task of exercising discretion 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 be easily understood to drag his or her heels. As I interpret the requirement of good cause are a relevant considerations. The learned Judge a quo misdirected himself in ignoring them."

14. The applicant gives as reasons for his delay in the following;

14.1 that he is a lay person and was hesitant to proceed with such proceedings and wary of the victimization that might follow after such step,

14.2 he was severely traumatised that his psyche is still severely insulted;

14.3 he was emotionally and psychologically imparted to such an extent that he could not act earlier particularly because his psychological trauma and consequential trauma he suffered.

15. Mr Thumbathi submitted that in addition to the above the applicant stands a good chance of succeeding in his matter as they is also another matter of Mr Mpandla emanating from the same incident, in which the respondent did not oppose his application for condonation of his late filing of section 3(2) notice.

16. Mr Malowa on behalf of the respondent contended that it is incumbent upon the applicant in order to be successful under the requirement, to state accurate, clear account of what happened. If the person is a lay person like the applicant, the person must state when did he or she consulted his or her legal representative on his particular case.

17. Furthermore the applicant alleges trauma, but does not state the circumstances that brought trauma. The applicant does not state that he saw a specialist or whether or not he was hospitalised as a result of such trauma.

18. I fully agree with Mr Malowa that the applicant did not state the circumstances that led to his trauma or that he saw a specialist who assessed his condition. However it is common knowledge that arrest and detention is traumatic, looking at the condition of the state of our prisons, overcrowding is the order of the day and abuse at the hands of the inmates is a daily occurrence in our prisons.

19. I am satisfied that the applicant satisfied this requirement and more especially in relation to how the respondent treated his case as opposed to that of Mr Mpandla which emanates from the same incident.

PREJUDICE

20. The applicant is of the view that the respondent cannot suffer any prejudice if the application is granted mainly based on the fact that, all evidence to be used in trial, with reference to the applicants docket and file is still ascertainable and can be sourced by the respondent with ease.

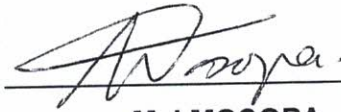
21. No evidence was presented before me that the docket is no longer available or that the possible witnesses the respondent intends to use are no longer available.

22. The onus is on the applicant to prove that the respondent will suffer prejudice if condonation is granted, and based on evidence before me. I see no prejudice suffered by the respondent. It is for that reason that this application must succeed.

ORDER

23. I therefore make the following order:

1. Application for the condonation of the late filing of section 3(2) notice is granted.
2. The respondent is ordered to pay the costs of this application.



M J MOSOPA

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

For the applicant
Instructed by

Adv D Thumbathi
Gildenhys Malatji Inc.

For respondent
Instructed by

Adv Malowa
State Attorneys, Pretoria

Date of hearing
Date of judgment

14 November 2018
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