IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

28 Nov 2022

DATE SIGNATURE

CASE NUMBER: 54411/2021

In the matter between:

TSHILILO WILLARD PHASANI APPLICANT

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY RESPONDENT

SUMMARY: *Notice of Motion- Application for Condonation for late filing of the Notice in terms of Section 3 (4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002--Requirements for condonation.*

ORDER

Held: The application for condonation for the late filing of Notice 3 (4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is dismissed with costs.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is an application lodged by the applicant Mr Phasani for the late filing of the notice to institute legal proceedings in terms of section 3(1) of Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ('the Act'). The applicant seeks an order for condonation for the late filing of the notice in terms of section 3(1) of the Act. The respondent, The City of Tshwane Metropolitan Municipality opposes this application.

FACTUAL BACKGROUND:

[2] The applicant issued summons against the respondent on 15 October 2020 for damages in the sum of R 5 000 000 (five million rand) plus interest at 15.5% p.a for unlawful arrest and search which incident is alleged to have occurred on 9 August 2016. The summons were served on the respondent on 16 October 2020, in response thereto, filed a plea and two special pleas in the main action. In the special pleas the respondent alleges that the applicant's claim has prescribed in terms of section 11 (d) of the Prescription Act 68 of 1969 and that the applicant failed to file a notice in terms of section 3(1) of the Act within 6 months as prescribed by the Act. On 27 July 2020 the applicant issued a notice in terms of section 3 of Act 40 of 2002 which was delivered to the respondent on 18 August 2020 at 14h20. On 12 May 2022 the applicant served the notice for the application for condonation for the late filing of the notice in terms of section 3(1) of the Act. The application for condonation is opposed on the following specific grounds-

(i) The applicant's claim has prescribed in terms of section 11 (d) of the Prescription Act 68 of 1969;

(ii) The jurisdictional requirements in section 3(4) (b) (i) Act 40 of 2002 have not been met;

(iii) The applicant's cause of action is misplaced on the basis that the applicant is confusing compensation for unfair or unlawful suspension in terms of the Labour Relations Act with compensation for damages based on a delictual claim;

(iv) That no good cause has been shown to warrant the granting of the order (relief);

(v) The respondent will suffer substantial prejudice if it has to answer at trial to an incident that occurred almost five years ago.

ISSUES FOR DETERMINATION:

[3] The court may condone the failure to issue a section 3 (1) notice if it is satisfied:-

(a) Firstly, that a debt has not been extinguished by prescription,

(b) Secondly that a good cause exists for failure by the creditor and

(c) Thirdly that the organ of state was not unreasonably prejudiced by the failure.

[4] The issues for determination are- (a) whether or not the applicant's claim for damages has prescribed in terms of section 11(d) of the Prescription Act 68 of 1969 and (b) whether or not the applicant has met all the jurisdictional requirements in terms of section 3(4) of Act 40 of 2002.

ONUS OF PROOF:

[5] The applicant bears the onus of satisfying the court that he is entitled to the relief for condonation by establishing all three jurisdictional requirements in section 3(4) of the Act[1]. The phrase 'if the court is satisfied that' does not require proof on a balance of probabilities but rather requires an overall impression made on a court which brings a fair mind to the facts set up by the parties. See ***Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA)*** para 8.

APPLICABLE LEGAL PRINCIPLES:

[6] A creditor who intents instituting legal action against an organ of state must give notice in writing of such intention in terms of section 3(1) of the Act. I deem it necessary to set out in its entirety the provisions of section 3 of the Act.

[7] Section 3 provides that –

"3(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

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[1]See *Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA)* para [16] it was stated 'The structure of Section 3(4) is now such that the court must be satisfied that all three requirements have been met. Once it is so satisfied the discretion to condone operates according to the established principles in such matters.'

(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 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.

(3) For purposes of ss (2):

(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 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 ss (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 para (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".

[8] The primary purpose of the Act is to require that notice of intention to institute legal proceedings be given to an organ of state in order to investigate the basis of such claim. In ***Mohlomi v Minister of Defence 1997(1) SA 124 (CC***) para 9 it was held 'The conventional explanation for demanding prior notification of any intention to sue such an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide,

before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.'

[9] Where a creditor has failed to give the required notice of intention to institute legal action, such creditor may apply to court for condonation in terms of section 3(4) of the Act which sets out three jurisdictional requirements which must be met. This enables the court to exercise its discretion to condone the failure to give the required notice. The purpose of granting condonation is to allow the action to proceed despite the fact that the creditor has not complied with the peremptory provisions of section 3(1) of Act 40 of 2002[2].

[10] As indicated supra, all three jurisdictional requirements must be met by the applicant who seeks condonation. There are applicable legal principles in regard to each specific requirement in section 3(4) of the Act which I deem necessary to briefly set out as follows-

(a) The debt has not been extinguished by prescription:

The requirement that the debt has not been extinguished by prescription means that the court must be satisfied that the applicant's course of action exists. The debt must be immediately enforceable by the creditor and payable by the debtor.[3] In a number of decisions, what is emphasized is that prescription begins to run against the creditor when the creditor has the minimum facts that are necessary to institute action. Section 12(3) of the Prescription Act 68 of 1969 requires knowledge of material facts from which the debt arises and does not require knowledge of the relevant legal conclusion. See ***Mkhatshwa v Minister of Defence 2000 (1) SA 1104 (SCA)*** para 23.

(b) Good cause exists for the failure by the creditor:

The requirement on the existence of good cause means that the applicant must produce acceptable reasons for the failure to give the required notice. Courts have refrained from formulating an exhaustive definition of what constitutes good cause. An applicant seeking such an indulgence must make the court to understand how the delay came about and place the court in a position to assess the conduct. good cause looks at all those factors which comes to bear on fairness of granting the relief between the parties and affecting the administration of

[2]See *Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA).*
[3]See *Standard Bank of South Africa v Miracle Mile Investments 67 (Pty) Ltd 2017 (1) SA 187 (SCA).*

justice. Whether good cause has been shown depends on the facts of each case. The court exercises discretion which rests upon two pillars-

(i) An applicant must satisfactory explain the delay for non-compliance, in other words a full and reasonable explanation must be offered which covers the entire period of delay; and

(ii) An applicant should on oath satisfy the court that the action is not ill founded or there is a valid defence, as the case may be.

(c) The organ of state was not unreasonably prejudiced by the failure:

The court must be satisfied that the organ of state was not prejudiced by the failure of the creditor to give the required notice. In ***L.F.*** **Boshoff Investments (Pty) Ltd v Cape Town Municipality 1971(4) SA 532 (CPD**) at 536 it was held '*Where an applicant claims the indulgence of condonation it is for him to show that respondent would not be adversely affected thereby to any substantial degree, and that, even if he were to be so affected, other considerations apply which would persuade the Court to grant the indulgence sought*.'

[11] The general legal principles for condonation can be summarized as follows-

[11.1] The three requirements in section 3(4) of the Act must be met. This denotes that a proper explanation for the causes of delay;

[11.2] The explanation must cover the entire period of delay;

[11.3] Condonation is not for the mere taking;

[11.4] The court has a wide discretion;

[11.5] The interest of justice must permit the granting of condonation;

] 11.6] The court must consider the applicant's prospects of success and the importance of the issues for determination;

[11.7] Balancing the prejudice that the respondent may suffer by the granting of condonation against the prejudice that the applicant may suffer if condonation is not granted.

EVALUATION:

[12] The crus of the applicant's case is that the claim has not prescribed as he was unaware that he had a delictual claim until he spoke to Doctor Sepato and after the withdrawal of the charges on 25 April 2018 . Adv. Mkhabele argues on behalf of the applicant that the claim has not prescribed on the basis that the debt became due only on 25 April 2018. He contends that the respondent will suffer no prejudice if the relief is granted that will give leave to

the applicant to have his day in court. Adv. Mkhabele submits that the applicant cannot be faulted by the reckless behaviour of his previous attorney.

[13] The respondent‘s contention is that the claim has prescribed and the applicant has failed to meet all the statutory requirements in section 3(4) of the Act. Adv. Hlalethoa argues on behalf of the respondent that the applicant is putting blame on his former attorney for the delay in serving the notice. He contends that is insufficient ground to constitute good cause. Adv Hlalethoa places reliance ***on Saloojee and Another, NNO v Minister of Community Development 1965 (2) SA 135 (A***) where Steyn CJ held that there is a limit which a litigant cannot escape the results of his attorney’s lack of diligence. Steyn CJ on page 141 further held ‘If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (*cf. Regal v African Superslate (Pty) Ltd , supra at p 23 i.f.)* and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should overlooked merely because he has left the matter entirely in the hands of his attorney.’

[14] I find the averments made by Mr Simon Sithole who deposed to an answering affidavit on behalf of the respondent (that the claim has prescribed in terms of section 11 (d) of the Prescription Act 68 of 1969 on the lapse of three years after the incident) to be more persuasive. This is on the basis that I am of the view that prescription started running on or about 9 August 2016 being the time when the applicant was allegedly searched and arrested.

[15] The rationale for this view is that the applicant had knowledge of material facts from which the debt arose to institute action for the following reasons-

[15.1] The applicant knew or reasonably ought to have known that the debt became due after alleged incident of the 9 August 2016 which was wrongful as substantiated by his averments in the founding affidavit. He states therein ‘*As I was searched and arrested at my workplace, in the presence of my colleagues, naked and at gunpoint, I was emotionally disturbed and traumatised. On the 13th December 2016, I was hospitalised at Vista Clinic due stress and depression where I stayed for about 30 days, and further consulted with Dr M.P. Sepato, a Clinical Psychologist who prepared a Psychological Report attached hereto is the said report marked annexure (‘TWP2’).’*

[15.2] The applicant knew the identity of the debtor who had committed the alleged unlawful act against him (being a member of the respondent acting within the scope of employment. He further knew the wrongfulness of the alleged actions of the debtor. Evaluating all the facts holistically it is clear that the applicant knew sufficient facts giving rise to the debt[4].

[15.3] The applicant's averment that he only became aware of the cause of action after he was advised by Dr Sepato and after the withdrawal of charges against him in 2018 is not persuasive. In my view this reasoning amounts to applicant requiring certainty of knowledge of the relevant legal conclusion. The fact that he consulted with an attorney within the two year period after the incident is indicative of the fact that the applicant had knowledge that what he allegedly experienced on 9 August 2016 was wrong. In other words, he well knew that he had a claim against the respondent. The alleged lax by the applicant's former attorney in issuing the summons within the three years and the required notice in terms of section 3(1) of the Act though regrettable, did not stop the running of prescription.

[15.4] By his own concession in his founding affidavit, the applicant became aware of the cause of action after he was advised by Dr Sepato. The applicant met Dr Sepato on his admission at Vista Clinic in 2016. The applicant does not indicate the exact period he received the advice from Dr Sepato. However, by inferential reasoning such advice would have been received during his admission at Vista Clinic. The applicant's averment that it was after the withdrawal of the disciplinary charges that he became aware of the cause of action is in my view misplaced for the simple reason that the departmental charges were for a different legal process. His cause of action is based on the alleged delict with no relevance to the withdrawal of the disciplinary process that had to do with conditions of employment. On the facts it cannot be found that the applicant lacked knowledge of his claim from the time the alleged incident which caused him stress.

[16] In the event that the above finding that the applicant's claim has prescribed as he had sufficient material facts during 2016 from which the debt arose is incorrect, I find that the applicant has failed to meet two of the requirements in section 3(4) of the Act -

[16.1] Good cause exists for the failure to give the required notice: In order to determine whether good cause exists, I have to consider factors which bear on the fairness of granting the relief as between the parties and the proper administration of justice. These factors may include prospects of success in the proposed action, the reasons for the delay, the

[4]See *Truter v Deysel 2006 (4) SA 168 (SCA)* para 16 where it was held a debt is due when the creditor acquires a complete cause of action for the recovery of the debt.

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. On the facts of this matter, regrettably the applicant has provided insufficient reasons to constitute good cause to explain the delay of one year and nine months. The applicant concedes in his founding affidavit that non-compliance covers a period of one year nine months and eighteen days yet fails to provide sufficient reasons for such delay for that period. At best he avers that from 2018 until May 2020 he made attempts to follow up with his previous attorney with no success. No specific details are provided. He offers ignorance of the legal processes as a reason for the delay. I find it to be improbable that the first time he learnt about the required notice is during the consultation with the second attorney.

[16.2] Prejudice to the respondent: On the facts of this matter, it is clear that the passage of time is prejudicial to the respondent. The applicant's averments that there will be no prejudice to the respondent on the basis that the records exist is with respect speculative. The applicant has to satisfy this court of the lack of prejudice. There is no evidence placed before this court on the availability of witnesses and any relevant evidential material. This is the very essence for requiring section 3(1) notice to be given to an organ of state so as to do the necessary investigations on the claim.

[17] Applying ***Saloojee*** to the facts in this case, the applicant cannot be absolved from providing sufficient reasons on the basis that he left the matter in the hands of his former attorney. It seems to me that the applicant puts the blame on his former attorney Mr Mamburu and on his mental state. It is surprising that the applicant's mental state caused no bar to him giving proper instruction for legal action. By his own concession the enquiries he made to his former attorney is indicative that even as a layman he was well aware that he had a claim and that there was delay in executing his claim.

CONCLUSION:

[18] In conclusion, notwithstanding the fact that I have a discretion to condone the failure to give the required notice in terms of section 3(4) of the Act, I find that the applicant's claim has prescribed in terms of section 11(d) of the Prescription Act 68 of 1969. I also conclude that the applicant knew the identity of his debtor and the material facts giving rise to the claim in 2016 giving rise to the existence of a debt. Consequently it follows that the three requirements in

section 3(4) of the Act have not been met therefore the applicant has failed to satisfy this court that he is entitled to the relief.

COSTS:

[19] Awarding of costs is at the discretion of the court which must be exercised judicially. The costs should follow the course.

Order

[20] In the circumstances the following order is made:

1. The application for condonation for the late filing of notice in terms of section 3 of Act 40 of 2002 is dismissed with costs.

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MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant	: Adv. S.V. Mkhabele
Instructed by	: Mashudu Muhanganei Attorneys Incorporated 1st Floor, Office 101 Woltemade Building Corner 116 Paul Kruger and Madiba Streets Pretoria
On behalf of the	: Adv. I. Hlalethoa
Instructed by	: Malebye Motaung Mthembu Incorporated Ground Floor, Block B, North Wing Grayston Ridge Office Park 144 Katherine Street Sandton
Date of hearing	: 30 August 2022
Date of Judgment	: 28 November 2022