

IN THE REPUBLIC OF SOUTH AFRICA



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

CASE NO: 61707/2020

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

DATE:

In the matter between:

M. MTSHOTSHISE

APPLICANT

XOLANI MADLINGOZI

SECOND APPLICANT

and

**THE MINISTER OF DEFENCE
AND MILITARY VETERANS**

RESPONDENT

JUDGMENT

BAQWA J:

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 13 June 2022.

INTRODUCTION

[1] The Applicants herein seek an order that their late service of the Notice for Intention to Institute Legal Proceedings against the Respondent be condoned in terms of 3(4)(a) and (b) of the Institution of the Legal Proceedings against certain Organs of State Act 40 of 2002 (the Act) and that they be granted leave to proceed with the legal proceedings they have instituted against the Respondent.

FACTS

[2] The Applicants have been employees of the South African National Defence Force, the Respondent herein.

[3] During June/July 2009 they were suspended without benefits as a result of having been charged with taking part in an illegal or unprotected protest action.

[4] In August 2014 a Military Judge found them not guilty on all the charges.

[5] During the period of suspension, the Respondent introduced the technical allowance for members doing technical work which was implemented in February 2011 and backdated to July 2009.

- [6] Having been found not guilty, the Applicants applied for the technical allowance, back pay as well as the monthly allowance to which they were entitled.
- [7] The Respondent has failed to make the necessary payments to the Applicants despite having made payments to their colleagues who were not charged in regard to the protest action and who were not suspended. This was despite an acknowledgement of indebtedness to the Applicants on or about 25 September 2018.
- [8] During 2019 the Military Ombudsman was approached by the Applicants to investigate the issue of payment to due to them. In his decision, the Ombudsman ruled that the Defendant must pay the Applicants claim.

THE LAW

- [9] 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; or*
 - b) *The organ of state in question has consented in writing to the institution of that legal proceeding[s]*
 - I. *Without 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 the 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 fact 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 section (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*
The debt has not been extinguished by prescription;
 - I. *Good cause exists for the failure by the creditor; and*
 - II. *The organ of state was not unreasonably prejudiced by the failure.*

- c) *If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate”.*

THE DELAY

- [10] The section 3 notice was supposed to have been issued within a period of six months of the date of the failure to pay by the Defendant which, it is common cause, was in 2014.

REASONS FOR THE DELAY

- [11] In their founding affidavit the Applicants state that they were represented by Karlien Botma Attorneys who had sent a notice of institution of legal proceedings to the Respondent.

- [12] However due to the lack of information about further progress from the said attorneys and an inability to contact them, they appointed their current attorneys, Elliot Attorneys Inc, during or about August 2020.

- [13] As far as Applicants were aware, notice was already sent to the Respondent in terms of section 3(1)(a) as read with sections 3(2)(a).

- [14] The current attorneys attempted to contact the previous attorneys by telephone and by physical attendance at their offices in order to physically serve a letter requesting the Applicants' file but the offices were found vacant.

- [15] Elliot Attorneys then contacted the Legal Practice Council's records department to try and obtain the contact details of the erstwhile attorneys but none of these efforts were successful. Copies of letters from the current attorneys to the previous attorneys and to the Legal Practice Council have been presented as proof of the efforts made to try and retrieve Applicants' file.
- [16] Through being unable to obtain the relevant file content and copies of the notices sent, a notice in terms of section 3 of the Act was sent by the current attorneys on 13 September 2020 by electronic mail. Service of the notice was also effected by the Sheriff.

COMPLIANCE WITH SECTION 3(4)(b)

- [17] As stated above on 26 November 2019 the Ombudsman found in favour of the Applicants in that the Respondent was indebted to pay the claims by the Applicants. This finding by the Ombudsman was an endorsement of a previous finding by the Military Judge to the same effect. This was confirmed by the Respondent's Counsel in his address to this Court.
- [18] It is common cause that the Respondent has complied with neither of those findings and with reference to the date of the Ombudsman's order the Applicants contend that the claims have not prescribed as claimed by the Respondent.
- [19] The Respondent pleads in this regard that the Ombudsman finding was fraudulently obtained but absent a review and setting aside the Ombudsman's finding, the objection by the Respondent is not sustainable.

[20] The Respondent further pleads that the prescription date should be calculated from the year 2014 when the Applicants first lodged their demands with the Respondent. This plea can equally not hold water because prescription was interrupted by the exhaustion of internal remedies by the Applicants through the offices of the Military Judge and the Ombudsman. In any event, if the defence of prescription is still of any relevance, the Respondent still has the right to pursue same at the trial. The matter is not for final determination at this stage as this Court merely has to determine whether the Applicants have established a *prima facie* case or not.

PROSPECTS OF SUCCESS

[21] The Respondent pleads that there are no monies payable to the Applicants as whatever was owed to them was already paid. This defence is not sustainable in light of annexure "F" which is ostensibly an acknowledgement of debt regarding various amounts owed by the Respondent to the applicants. The Respondent contends that annexure "F" was a fraudulent document. This is yet another matter to be considered by the Trial Court because *ex facie* the document liability cannot be denied.

[22] With the common cause facts, namely the employment of the Applicants by the Respondent, the fact that the Military Judge and the Ombudsman found in their favour together with the aforesaid acknowledgement of debt, the only conclusion I can come to is that a *prima facie* case does not exist and that the Applicants have reasonable prospect of success in the circumstances.

PREJUDICE

[23] The Respondent contends that it stands to lose millions of rands in the event this Court grants the relief sought as that would possibly lead to an avalanche of similar cases. The fact of the matter is that this application has to be

decided on its own facts and not on any speculative supposition of possible future litigation.

[24] The Respondent also contends that it might find it difficult to call relevant witnesses who may have left or been dismissed by the Respondent. Bearing in mind that the Respondent is a huge organisation that keeps records especially of financial transactions, this defence is also unsustainable.

[25] In my view, it is the Applicants who stand to suffer in light of the Respondent's acknowledgment of debt aforesaid, should this Court not grant the relief sought.

THE INTEREST OF JUSTICE

[26] The considerations to be taken into account were succinctly summarised by Zondo J (as he then was) in the matter of *Grootboom v National Prosecuting Authority*¹ when he said:

"The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interest of justice."

¹ 2004 (2) SA (CC) 2014 (1) BCLR (CC) para 51

[27] Whilst the delay might appear to be excessive, a full and satisfactory explanation has been tendered by the Applicants in respect thereof. Coupled with the prospects of success and the *dictum* by Zondo J (as he then was), the interests of justice compel me to make the following order.

ORDER

[27] In light of the above the following order is made:

- 1) The Applicants' non-compliance with section 3(1)(a) and section 3(2) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act is hereby Condoned;
- 2) The Applicants are granted condonation in terms of section 3(4) of the aforesaid Act;
- 3) The Respondent is ordered to pay the Applicants' costs of the application on a party and party scale.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 16 May 2022

Date of judgment: 13 June 2022

Appearance

On behalf of the Applicants

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