IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

_____ _____

DATE SIGNATURE

CASE NUMBER: 64408/2019

CITY OF TSHWANE METROPOLITAN COUNCIL First Applicant / Defendant

THOMAS **MAGWAI**
Second Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTION Third Defendant

MINISTER OF POLICE
Fourth Defendant

WARRANT OFFICER H KGANYAGO
Fifth Defendant

CAPTAIN D J RACHEKHU
Sixth Defendant

CAPTAIN M A MALULEKA
Seventh Defendant

WARRANT OFFICER KOKA
Eighth Defendant

and

J D GUIAMBA
Plaintiff/Respondent

_____

This judgment is handed down electronically by circulation to the Parties/ their legal representatives by email. The Judgment is further uploaded to the electronic file of this matter on Caseline by the Judge's secretary. The date and time for handing down this judgment is deemed to be the 13 June 2023 at 10h00

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JUDGMENT

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MAKAMU AJ:

INTRODUCTION

[1] I will refer ti the Applicant as the Plaintiff in the main action Mr Jose Domingos Guiamba instituted legal proceedings against the City of Tshwane and other eight Defendants whom I will refer as Defendants in the main action claiming some money emanating from assault by the second Defendant who is an employee of City of Tshwane as a member of traffic police. The summons was served by the Sheriff on the 27 August 2019, whereas the incident happened on the 12 April 2018. The Notice in terms of Section 3(1)(a) of Institution of Legal Proceedings against Certain Organs of The State of Act 40 of 2002 was only served on the first Defendant on 20 March 2019 after he received advice from his attorney and it is the subject of this application for condonation.

NATURE OF APPLICATION

[2] The Plaintiff brought the application for condonation for having failed to issue the notice within a period of six months after the debt became due as required by the Act. The applicant also asked for punitive costs order against the first respondent for failing to grant consent to the Plaintiff to bring an

application for condonation. This is the reason why this matter is opposed by the Defendant and not for the application for condonation itself.

The provision of the section states as follows:-

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 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) 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 swerved 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 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 a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in a 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.
(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."

SUBMISSIONS

[3] The Plaintiff sets out a claim in the Particulars of Claim for an amount of R4 144 150.00 (Four million hundred and forty-four thousand and hundred and fifty rand only) arising from the assault by second Defendant and other people unknown to the applicant.

[4] First, third and fourth Defendants have been enjoined since the second Defendant is employed by the first Defendant as traffic officer. Third Defendant as National Director of Public Prosecution and fourth Defendant as Minister of Police. Defendants, 5,6,7 and 8 are members of the South African Police service, however, they were not involved in the actual assault of the Plaintiff.

[5] There is no dispute that the Plaintiff did not deliver the notice within six (6) months after the debt arose, and the first Defendant does not oppose the application in principle but only oppose, it since the Plaintiff asked punitive costs against the first Defendant for failing to give consent to the applicant to proceed with the legal proceedings.

[6] The Plaintiff did write a letter to the first Defendant informing them about his intention to bring an application for condonation as stated above. The letter of the Plaintiff was not courteous rather it was instructive to the Defendant to say consent to our application, should you not consent we will ask for punitive costs. The Counsel for the Plaintiff was not apologetic about it, but he argued that the Act does not provide that the applicant should be courteous. It may not be a requirement stipulated by the Act, but as professionals one would

expect them to be courteous by explaining what caused them not to issue a notice timeously.

[7] The Court was not to decide on whether the letter was courteous or not but that in the affidavit by the Plaintiff he spelled out the reasons why he delayed taking action and issuing the notice timeously. The Plaintiff did explain fully the reason in his affidavit and it has been considered acceptable. The First Defendant did not even want to argue against the affidavit but only opposed the application due to the threat of punitive costs against the first Defendant for not consenting to their application.

LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF THE STATE

[8] In terms of section 3(1)(a) of the Act, compels the Plaintiff to serve the notice of his intention to institute legal proceedings as a forewarning to the Defendant of what is to come. The notice must in addition briefly set out the facts giving rise to the debt and such particulars of such debt as are within the knowledge of the creditor.

[9] The reason and purpose for demanding prior notification of intention to sue organs of State is that, within its extensive activities and large staff 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.

CONDONATION

[10] Where a person has failed to deliver the notice contemplated in section 3(1)(a) of the Act, section 3(4)(a) of the Act provides that such a person may apply for condonation of such failure. This is the reason this matter is before Court to remedy the omission by the Plaintiff. The Plaintiff elaborated in his affidavit what happened that caused him to delay instituting litigation against the first respondent and others within six months.

[11] Section 3(4)(b) of the Act, provides that the court may grant condonation 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 to comply with the provisions of section 3.

[12] The Court must be satisfied that the applicant has satisfied all three requirements or, as the court in Minister of Agriculture and land Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA). In this case the applicant has satisfied all the three requirements. Once the Court is satisfied has a discretion to condone, operates according to the stablished principles in such matters, as stated in United Plant Hire (Pty) Ltd v Hills and others 1976 (1) SA 717 (A). A similar view was expressed in Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA).

[13] In Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) the Supreme Court of Appeal relied on Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A), pointed out that the applicant is required to furnish an explanation of his default sufficiently fully to enable the court to understand how it really came about and to assess his conduct and motives. The Court explained what is meant by good cause. “The second requirements is variant of one well known in cases of procedural non-compliance, Torwood Properties (Pty) Ltd v South African Reserve Bank 1996 (1) SA 215 (W). Good cause looks at all the 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.”

[14] Good cause also involves a consideration of the prospects of success on the merits of the case. This consideration requires a balancing act between the explanation of the delay and the prospects of success. Strong case or merits may mitigate any fault on the part of the applicant in serving the required notice.

[15] I am not going to labour on these issues as the first Defendant did not really oppose the application, save, for the fact that the Plaintiff proposed that the first Defendant be slapped with punitive costs in case they oppose the application and also that they did not give consent to the intended application. In this instance the Plaintiff in the letter, in terms if section 3(1)(a) of the Act, did not bother to advance the reasons for their delay to make the first Defendant to consent to the application. It sounds more like a demand to the Defendant to consent and this is the attitude that continued even during the submissions in court by the Counsel for the Plaintiff

[16] It is important to glean at the actual notice by the Plaintiff which made the first Defendant to be uncomfortable. The first Defendant was offended by the threat by Plaintiff that they will ask for punitive costs if they oppose and for failing to consent to the application, otherwise the first respondent would not have opposed the application.

[17] The First Defendant filed counter-application; where they pray for the following order:-
(1) That the Plaintiff be ordered to give security in the sum of R350 000 alternatively, an amount to be determined by the Registrar of this honourable Court and that the proceedings against the First respondent be stayed until such security be given
(2) That the Plaintiff deliver its reply to the First Defendant’s Notice in terms of Rule 35(12), 35(14) dated 9 November 2019 within 10 (TEN) days of the granting of the order.

(3) That the Plaintiff deliver his reply to the First Defendant's Notice in terms of Rule 36(4) dated 19 November 2019, within 10 (TEN) days of the granting of this order.
(4) That the Plaintiff's Notice of Bar, served on the First Defendant on the 3rd of March 2020, be struck out as an irregular step.
(5) That the Plaintifft be ordered to pay the costs of the counter-application on a scale as between attorney and own client.
[6] The Plaintiff opposed the counter-application saying the Plaintiff cannot afford an amount of R350 000 as security. In this regard the First Respondent argued that the Plaintiff is a mobile person between Mozambique and the Republic, a pelegrini. In case the claim by the Plaintiff is dismissed with costs how will the First Defendant secure its costs from then Plaintiff.

[18] The First Defendant's concern is valid since the Plaintiff has no property in South Africa which could be secured in order to pay the costs. There is no dispute that on an annual basis the Plaintiff spend not less than five (5) months in a year or even more in Mozambique. To a place unknown to the First Defendant

[19] The Plaintiff did not deliver its reply to the First Defendant's Notice in terms of Rule 35(12) and 35(14) and also Rule 36(4), however, the Plaintiff decided to Bar the First Defendant before such replies were delivered.

[20] I am on the view that the Plaintiff made a clear case for his failure to deliver Notice to the First Defendant and should be granted.

[21] The First Defendant also made a clear case for the need for security from the Plaintiff, however, I believe that the Registrar of this Court may be in a better position to determine the amount for security.

[22] The Notice of Bar by the Plaintiff before they could reply to the First Respondent notice in terms of rule (35(12) and 35(14) is an irregular step. Even when the Plaintiff ultimately delivered it does not take away the fact that

it is an irregular step. It is opportunistic to try and tie the hands of the First Defendant to his back and say let us fight. It is a sensible thing to allow the First Defendant plead properly and the matter enjoy its course to finality.

[23] I therefore make the following order:
Order: 1. The application for condonation by the Plaintiff for failure to deliver Notice on intention to litigate against a certain organ of the State is granted
2. The costs for this application will be costs in the cause.

3. The counter-application that the Plaintiff pays an amount of security to be determined by the Registrar of this Court is granted.

4. That the Plaintiff deliver its reply to the First Defendant's Notice in terms of Rule 35(12), 35(14) dated 9 November 2019 within 10 (TEN) days of the granting of the order.

5. That the Plaintiff deliver his reply to the First Defendant's Notice in terms of Rule 36(4) dated 19 November 2019, within 10 (TEN) days of the granting of this order.

6. That the Plaintiff's Notice of Bar, served on the First Defendant on the 3rd of March 2020, be struck out as an irregular step.

7. The costs for the counter-application by the First Defendant shall be the costs in the cause.

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M.S MAKAMU
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 13 JUNE 2023.