



**IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY**

Not reportable

**CASE NUMBER: 972/2020**

In the application of:

**GERALD BOMANI**

APPLICANT

and

**MINISTER OF POLICE**

RESPONDENT

**AND:**

**CASE NUMBER: 635/2021**

In the application of:

**THAMSANQA MGANDO**

APPLICANT

and

**MINISTER OF POLICE**

RESPONDENT

*In re:*

**CASE NUMBER: 972/2020**

In the matter between:

**MONNAPULE SONTLABA**

1<sup>ST</sup> PLAINTIFF

**GERALD BOMANI**

2<sup>ND</sup> PLAINTIFF

**THAMSANQA MGANDO**

3<sup>RD</sup> PLAINTIFF

and

**MINISTER OF POLICE**

DEFENDANT

**Neutral citation** : *Bomani v Minister of Police (Case number 972/20); Mgando v Minister of Police (Case number 635/2021); 10 November 2023*

**Delivered** : 10 November 2023

**Coram** : Olivier AJ

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## JUDGMENT

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OLIVIER AJ

### INTRODUCTION:

1. This Court was approached by Gerald Bomani (herein after referred to only as “*Bomani*”) under case number 972/2020 as well as by Thamsanqa Mgando (herein after referred to only as “*Mgando*”) under case number 635/2021 for an order in terms whereof the failure by Bomani and Mgando (herein after jointly referred to as “*the Applicants*”) to serve timeous notice in terms of the provisions of **Section 3** of the Institution of Legal Proceedings against Certain Organs of State Act<sup>1</sup> (herein after referred to only as “*the Act*”) be condoned.

The Applicants did not move for any sort of costs order, in either of the afore-said applications, against the Minister of Police (“*the Respondent*”).

2. The facts as set out in the Applicants’ Founding Affidavits in both applications as well as the reasons as to why the service of the required notices were delayed, were virtually identical and the applications were consequently dealt with simultaneously.
3. Both the applications were opposed by the Respondent.

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<sup>1</sup>Act 40 of 2002.

**BACKGROUND:**

4. Bomani and Mgando, together with a third Plaintiff by the name of Monnapule Sontlaba (herein after referred to only as “*Sontlaba*”) instituted separate actions against the Respondent (as Defendant) on the dates and under the case numbers as set out below:
  - 4.1 Sontlaba on 25 February 2019 under case number 410/2019;
  - 4.2 Bomani on 17 June 2020 under case number 972/2020; and
  - 4.3 Mgando on 1 April 2021 under case number 635/2021.
5. All of the above claims are based on alleged unlawful arrests, detentions and assaults by officials of the South African Police Services during or about August 2018.
6. The Respondent filed Pleas in all of the above matters and in the matters of Bomani and Mgando, Special Pleas were raised in terms whereof the Respondent alleged that the Applicants did not comply with **Section 3** of the Act in the sense that the required notices were not served timeously.
7. Subsequent to the exchange of further notices and documents, the representatives on behalf of Mgando and Bomani as well as the Respondent conducted pre-trial conferences on 20 and 24 January 2022 respectively (herein after referred to as “*the January 2022 Conferences*”).

A further pre-trial conference in respect of all of the above claims was held on 6 April 2023 (herein after referred to as “*the April 2023 Conference*”).

The importance of mentioning the afore-said pre-trial conferences and specifically the dates upon which the conferences were held, will become evident in due course.

8. Both the applications for condonation which form the subject of this judgment were lodged on 10 September 2021, both were formally opposed and in both instances Answering and Replying Affidavits were filed.
9. It is important for purposes hereof, to note that the Answering Affidavits in respect of the condonation applications of Bomani and Mgando were filed in September 2021 and October 2021 respectively, in other words before the January 2022 Conferences were conducted.
10. It should furthermore be mentioned that the Applicants filed Supplementary Affidavits in both applications to which the Respondent (unsurprisingly) objected by filing a notice in terms of **Rule 30** of the Uniform Rules of Court (herein after simply referred to as “*the Rules*”).

These notices were filed during November 2021 in other words also before the January 2022 Conferences were conducted.

I will proceed in shortly dealing with these notices herein under.

#### **THE RULE 30 NOTICES:**

11. It is trite that a party to proceedings in which an irregular step has been taken, may apply to Court to have such irregular step set aside.<sup>2</sup>
12. It is also trite that a “run of the mill” application usually consist of three sets of affidavits to wit a Founding, Answering and Replying Affidavit, but that the Court may, in its discretion, allow the filing of further affidavits.<sup>3</sup>
13. It was held that the filing of further affidavits

*“... is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.”<sup>4</sup> (My underlining and omissions)*

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<sup>2</sup>Rule 30(1) of the Rules.

<sup>3</sup>Rule 6(5)(e) of the Rules.

14. The above underlined passage reiterates the position that a party that wishes to file a further set of affidavits in an application, needs to make application to Court to file a further set of affidavits and also needs to provide the Court with good reasons as to why it is necessary to file the intended further affidavit(s).<sup>5</sup>
15. The following remarks of Dlodlo J in the matter of **Standard Bank of SA Ltd v Sewpersadh & Another**<sup>6</sup> are apposite:
- “Clearly a litigant who wishes to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the court file ...”*<sup>7</sup> (My omissions)
16. The Respondent’s objection to the filing of the Supplementary Affidavits by the Applicants was primarily based thereon that the Applicants did not obtain leave from the Court to file same.
17. Although it should be said that the Applicants did purport to move for leave from this Court to file the further Supplementary Affidavit, it was done so only by way of a single paragraph in the further Supplementary Affidavit itself and it is common cause that prior leave to file the further Supplementary Affidavit was neither sought nor granted.
18. The Applicants furthermore did not provide a proper explanation, in my view, as to why the information that is contained in the Supplementary Affidavit, was not contained in the initial Founding Affidavit and in view of this fact as well as in view of what is set out above, I can unfortunately not accede to Mr. Matlejoane’s fervent pleas that I exercise my discretion in favour of the Applicants in this instance.
19. I consequently deem the Supplementary Affidavits a *pro non scripto* and do not consider the contents thereof for purposes hereof.

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<sup>4</sup>Hano Trading CC v JR 209 Investments (Pty) Ltd & Another 2013 (1) SA 161 (SCA) at paragraph [11].

<sup>5</sup>See **James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons, NO** [1963] 4 All SA 524 (A) at page 528.

<sup>6</sup>[2005] JOL 13336 (C).

<sup>7</sup>See **Sewpersadh**, *supra* at paragraph [13].

It should however be mentioned that the fact that the contents of the Supplementary Affidavits were not considered, had no bearing on my eventual finding set out herein under.

**MERITS:**

20. **Section 3(4)(a)** of the Act provides that a creditor may approach a Court with an application to condone a failure to serve the required notice in terms of **Section 3(1)** of the Act.
21. The Act furthermore states that such notice should *inter alia* be served within 6 (six) months after the debt became due.<sup>8</sup>
22. It is common cause that in both the matter of Bomani as well as the matter of Mgando, the required notices were not served timeously in other words not within the above-mentioned period of 6 (six) months.
23. The Act however furthermore states that a Court may condone failure to serve proper notice if the Court is satisfied:
  - 23.1 That the debt had not become prescribed;
  - 23.2 That good cause exists for the failure to serve proper notice; and
  - 23.3 That the organ of state was not unreasonably prejudiced by the failure to serve proper notice.<sup>9</sup>
24. The parties in this instance were *ad idem* that the claims of Bomani and Mgando had not become prescribed.
25. In both instances the Applicants explained the reasons as to why their respective notices were filed out of time, by stating under oath that they were laymen who were unaware of

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<sup>8</sup>Section 3(2)(a) of the Act.

<sup>9</sup>Section 3(4)(b) of the Act.

the fact that they might have possible claims against the Respondent and that it was only after they consulted with an Attorney (some time after the alleged incidents took place) and were afforded proper advice, that they decided to proceed with their actions against the Respondent.

The Applicants stated that the respective notices in terms of the Act were served immediately thereafter.

26. Mr. Ramabulana did make a half-hearted submission that the Applicants' explanation for their delay in serving the required notice lacked some particularity, but he did not argue the point with any amount of conviction. He indicated instead that the primary reason for opposing the Applicants' application for condonation, was that the Respondent was prejudiced by the late filing of the required notices.
27. It should be stated that I find the Applicants' explanation as to why the required notices were served out of time, acceptable.
28. In as far as prejudice to the Respondent is concerned and if I understand the provision in the Act and the relevant authorities correctly, the Respondent was required to show that it was unreasonably prejudiced by the late serving of the required notice.<sup>10</sup>
29. The Respondent, in as far as prejudice is concerned, merely states in his Answering Affidavits in both applications that:  
  
*"... the Respondent will be prejudiced if condonation is granted as the Respondent is now in a precarious position to secure documents, witness statements and witnesses."*
30. I find the above statement by the Respondent rather strange to say the least if regards are to be had to the fact that during the January 2022 Conferences which were conducted subsequent to the filing of the afore-said Answering Affidavits, it was indicated on behalf of the Respondent that the Respondent did not suffer any prejudice as a result of the Applicants' non-compliance with the Rules and absolutely no reference was made in the January 2022 Conferences to possible prejudice suffered by the Respondent as a result of the late serving of the notices in terms of the Act.

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<sup>10</sup>See **MEC for Education, KZN v Shange** [2012] ZASCA 98 (SAFLII Reference) at paragraph [22].

In the minutes of the April 2023 Conference, it is indicated on behalf of the Respondent that the Respondent records prejudice as a result of non-compliance by Bomani and Mgando with **Section 3** of the Act, but no particulars as to how the Respondent was prejudiced was given.

31. During argument Mr. Ramabulana reiterated that the prejudice suffered by the Respondent was a result of the fact that three separate actions were instituted which meant that the Respondent would have had to prepare for three separate cases.
32. It should however be mentioned that the three separate actions were in fact consolidated on 8 April 2022 after an application to this effect was lodged by the Applicants and Sontlaba.

The consolidation order was granted on an unopposed basis.

33. After being confronted with the fact that the actions were now consolidated into one action, Mr. Rabulana rightfully conceded that the Respondent cannot rely on being prejudiced any longer.
34. The Respondent failed to make out a case for prejudice as a result of the late serving of the required notices in terms of the Act in any event.
35. In view of the above, I see no reason why the applications for condonation cannot and should not be granted.

**COSTS:**

36. As was already mentioned herein above, the Applicants sought no form of costs order against the Respondent in any of the applications and a case was also not made out by the Applicants during argument, as to why the Respondent should be ordered to pay the costs of the applications, or why costs should be costs in the cause.



There was also no attempt on behalf of the Respondent to persuade me to grant a costs order in favour of the Respondents.

37. I consequently deem it unnecessary to spend any further time on the issue of costs.

**ORDER:**

38. In view of all of the above, the following order is made:

**38.1 The application for condonation lodged by Gerald Bomani under case number 972/2020 for his failure to serve timeous notice in terms of the provisions of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, Act 40 of 2002, is granted;**

**38.2 The application for condonation lodged by Thamsanqa Mgando under case number 635/2021 for his failure to serve timeous notice in terms of the provisions of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, Act 3 of 2002, is granted;**

**38.3 No order as to costs in either the application under case number 972/2020 or the application under case number 635/2021, is made.**

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**OLIVIER AJ**

**For APPLICANTS** : Mr. L. Matlejoane  
Matlejoane Attorneys  
**KIMBERLEY**

**For RESPONDENTS** : Mr. M. Ramabulana  
The State Attorney  
**KIMBERLEY**

