

SOUTH AFRICA / JUDGMENT

Boshielo and Others v Ekurhuleni Metropolitan Municipality and Others (22/22259) [2024] ZAGPJHC 723 (5 August 2024) [2024] ZAGPJHC 723

COURT

South Gauteng High Court, Johannesburg

BEFORE

Baloyi

CASE / FILE NUMBER

22/22259

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,
JOHANNESBURG)

CASE

NO: 22/22259

1.

REPORTABLE YES/NO

2.

OF INTEREST TO OTHER JUDGES YES/NO

3.

REVISED

In

the matter between: LEBELOANE
DAVID BOSHIELO
1st Applicant
TSHEPO
MAESELA
2nd Applicant
RAMATSEMELA
HELLEN MAESELA
3rd Applicant
and
EKURHULENI
METROPOLITAN MUNICIPALITY
1st Respondent
MINISTER
OF POLICE
2nd Respondent
NATIONAL
DIRECTOR OF PUBLIC PROSECUTION
3rd Respondent

JUDGMENT

Introduction

1 The applicants are plaintiffs in a suit in which they seek damages against the respondents. In this application, they seek condonation for non-compliance with section 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act 49 of 2002 (Institution of Legal Proceedings Act) for failure to give notice of their intentions to institute their claim for damages within the period prescribed in section 3(2) of that Act. They seek condonation in terms of section 3(4). The application is opposed by the first respondent, Ekurhuleni Metropolitan Municipality, (the “municipality”).

2 In the suit, the first and second applicants claim damages for unlawful arrest and detention by members of the municipality’s Metro Police Department and South African Police Service, the first and second respondents respectively, and against the third respondent for malicious prosecution. The third applicant claims damages only against the first and second respondents for “wrongful and unlawful misappropriation of liquor”.

3 In support of the application for condonation, the first and second applicants rely on the affidavit of the first applicant, Lebeloane David Boshielo, (with a confirmatory affidavit by the second applicant) while the third applicant has separately deposed to her affidavit in support of condonation.

4 The first and second applicants allege that they were arrested on 12 April 2020, an allegation admitted by the municipality, that they were detained by members of the SAPS and released on bail on the same day and, following a trial in which they were charged with contravening the Disaster Management Act for “allegedly failing to remain confined into our places of residence and for allegedly selling liquor”, they were discharged in terms of section 174 of the Criminal Procedure Act, 1977. While in her affidavit the third applicant makes reference to “... damages arising from unlawful arrest and detention...”, she does not allege or claim damages for arrest and detention and it appears that the reference to unlawful arrest and detention may be no more than the result of her legal representatives inattentive drafting.

5 The municipality opposes condonation on the ground that the applicants have not shown good cause for their non-compliance with section 3(4)(b), in particular that they have failed to give a proper explanation for their delay.

The case for condonation

6 Section 3 of the Institution of Legal Proceedings Act prescribes the requirement for notice to be given to an organ of state before legal proceedings are instituted and gives the court the power to condone non-compliance therewith and for the organ of state to consent to non-compliance with the prescribed requirements. It is convenient that I quote section 3 in its entirety

“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 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 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 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 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.”

7 Accordingly, in terms of section 3, (i) no legal proceedings for recovery of a debt may be instituted against an organ of state without prior written notice of the intention to do so or the organ of state consents in writing to non-compliance with the notice requirement (s3(1)); (ii) a compliant notice must be served within 6 months from the date when the debt became due (sec 3(2)); (iii) a debt becomes due on the date the creditor gains knowledge of the identity of the organ of state and of the facts giving rise to the debt, and a creditor shall be regarded as having acquired such knowledge as soon as they could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge of the debt (sec 3(3)(a), this being the fixed date contemplated in section 3(3)(b). The applicants do not allege that they were prevented by the respondents from acquiring knowledge of the debt.

8 The applicants’ notice of intention to institute legal proceedings was served on the municipality on 31 March 2022 and on the South African Police Service on 7 April 2022. On their own account, and for purposes of section 3(3)(a), the applicants became aware of the creditors’ identities and of the fact on which their claims are based on 12 April 2020. This is the fixed date when the debt became due for purposes of section 3(2)(a). Notice was accordingly served on the first respondent well outside of the six months period in section 3(2)(a), a few days short of 24 months from the date when the debt became due.

9 In terms of section 3(4)(b), to succeed in an application for condonation, an applicant must satisfy the court that: (i) the debt has not been extinguished by prescription; (ii) good cause exists for the failure to comply with the prescribed notice period; and (iii) the creditor was not unreasonably prejudiced by the delay. All three requirements must accordingly be satisfied.

10 There is no controversy between the parties that summons was served on the first respondent on 22 July 2022 and on the second respondent on 30 June 2022. This is not disputed by the first respondent and is accordingly common cause. Accordingly, prescription is not an issue in this matter as summons was served within 3 years of the date, 12 April 2020, when the debt became due as prescribed by section 11(d) of the Prescription Act 68, of 1969.

Have the applicants shown good cause for the delay?

11 Our courts have avoided and declined to define the concept “good cause” to avoid limiting the discretion of a court in determining whether on the facts before it, there is sufficient cause to exercise its discretion to condone non-compliance. Notwithstanding, factors have emerged over time which the courts have accepted as some of the factors to be considered in establishing ‘good cause’ and in this regard, *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008

(4) SA 312 (SCA), is instructive where that court said that (at para [10]):

“‘Good cause’ looks at all those 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.” (own underlining).

12 It is so that no one factor is individually decisive of the question and “[t]he relevant circumstances must be assessed in a balanced fashion. The fact that the applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved.” – see *Madinda*, para [13].

13 The delay sought to be condoned is a few days short of 24 months and is undoubtedly a significant delay and the applicants do not contend otherwise. Mr Boshielo’s explanation for the significant delay is that it is only on 8 March 2022 that he and the second applicant became aware from advice of their attorney, Mr Mthombeni, that (i) they could claim damages; and (ii) that they were required to serve a section 3(1) notice before they instituted legal proceedings. Mr Mthombeni accordingly served notices on the respondents as I have mentioned above. Accordingly, the applicants explanation for the delay is that until advised by Mr Mthombeni, they did not know that they had a claim for damages. Mr Boshielo further states that they are “lay persons in so far as the service of the notice of civil damages against the organs of the state is concerned. Had I known about the 6 (six) months’ notice period, I would have instructed an attorney to draft and serve same upon the 1st and 2nd Respondent within the 6 (six) months.”

14 On Mr Boshielo's reason for the non-compliance with section 3(2), that the applicants only gained knowledge on 8 March 2022 that they could lay a claim for damages, was rejected by the Constitutional Court in *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC), which concerned the similarly worded section 12(3) of the Prescription Act, 1967, which reads "(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable

care". The Constitutional Court, held that attaching a meaning to section 12(3) that "the knowledge of the facts from which the debt arises' includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non- legal professions." (at para [63]). This is equally applicable to the meaning of section 3(2) in the present matter and to grant condonation on the basis claimed by Mr Boshielo would be an assault on the meaning of section 3(2), which is not supported by our authorities, including *Mtokonya*.

15 As is the case with section 12(3) of the Prescription Act, section 3(2) requires only that the notice must identify the organ of state and set out facts giving rise to the claim and such particulars as are known to the applicants. As counsel for the municipality correctly submits, the applicants became aware on 12 April 2020 that the police officers who arrested them were members of the municipality and therefore were aware of the identity of the debtor and were also aware the facts which gave rise to the debt, namely their arrests which they protest was unlawful because, as they protest, they were not in contravention of the Disaster Management Act at the time of arrest. These are all the facts they required to comply with section 3(2). Mr Boshielo's assertion that he would have instructed the attorneys to serve the notice within 6 months had he known of the requirement is perhaps an inadvertent admission that the applicants had the necessary facts to comply with section 3(2). It follows that the alleged ignorance that they could institute a claim arising from their arrest by members of the municipality is not adequate explanation for the non-compliance with section 3(2).

16 Perhaps recognising the inadequacy of their explanation for the delay, the applicants belatedly in their written and oral argument submitted that "The whole cause of action was a continuous process from the day of the arrest right through detention and finally prosecution." This means, on the applicants' contentions, that the six months prescribed in section 3(2)(a) would have commenced to run on 19 October 2021 when the first and second applicants were discharged in terms of section 174, in which case, condonation would not be required by the first and second applicants as notice would have been served timeously. Suffice to say that there are two fatally destructive reasons that this belated reliance on a single continuous cause of action fails and they are –

- (i) this characterisation of an arrest, detention and prosecution as one continuous cause of action has been firmly rejected by our courts – see for instance *Minister of Police NO v Yekiso* 2019 (2) SA 281 (WCC) and *Makhatholela v Minister of Police* (2021/3710) [2022] ZAGPJHC 983 (13 December 2022); and (ii) this is not the case relied upon in the applicants' founding papers - a party is not permitted to introduce or change their case midway of the matter for the obvious reason that the first respondent has been denied an opportunity to answer the new case or grounds relied upon. I do not consider that I need say more in this regard.

17 In addition to failing to provide an adequate and satisfactory reason for the delay, as I have discussed above, the applicants have also failed to provide a full and frank explanation for the delay, explaining every step and instance of the delay. Mr Boshielo offers no explanation why it is that he and the second applicant would only have consulted with their attorney Mr Mthombeni on 8 March 2022 when he allegedly informed them of their claim for the first time. As the municipality points out, he was after all their attorney when they were released on bail on 12 April 2020 and discharged in October 2021, and is presently their attorney

of record. For his part, Mr Mthombeni provides only a standard confirmatory affidavit which says no more than that he has read the affidavit of Mr Boshielo and confirms its contents as relate to him. More was, in my view, required of him, in particular why and how it was only in March 2022 that he advised his clients of the requirements of section 3(2), a failure which, if true, would perhaps be reflective of inattentiveness to his clients' cause for which recourse would lie elsewhere and not with the municipality. In the absence of an explanation from Mr Mthombeni, one is left to speculation which includes the improbability that Mr Mthombeni could not have been aware of the requirement of section 3(2), an allegation he and the applicants do not make.

18 Mr Boshielo's explanation for the delay falls woefully short of a frank and full explanation. His reliance on his standing as a lay person to avoid the consequence of the delay is convenient considering that the applicants were at the relevant time represented by Mr Mthombeni. Neither the applicants nor their attorney has offered a satisfactory explanation for the substantial delay and the non-compliance with section 3(2). The first and second applicants have not provided a satisfactory explanation for the manifestly significant delay.

19 The first and second applicants have offered no satisfactory explanation for the significant delay. However, this is not the end of the enquiry as I must consider the applicants' prospects of success in the action and determine whether, if the prospects of success are good or strong, they compensate for the woefully inadequate explanation of the significant delay and the reasons provided. Addressing the prospects of success, Boshielo states only that "I state that there are strong prospects of success of my claim against the Respondent and we must be afforded an opportunity to present the case in court. ...". Mr Boshielo does not say why it is that he has come to this conclusion and leaves one to surmise. The first and second respondents were found at a place that sells alcohol and Mr Boshielo admits that he was in possession of and consuming alcohol at the time when members of the first respondent confronted him. He states that he ran away to avoid arrest but was unsuccessful and that this occurred at a time when the sale of

alcohol was prohibited and South Africans were, by decree of the government prohibited to from leaving their homes – the lockdown period. The applicants have not demonstrated that they have reasonable prospects of success. In any event, any prospects of success is far outweighed by the failure to provide a satisfactory full and frank explanation for the delay.

20 Regarding prejudice, Boshielo pleads that “The extreme prejudice that we I am likely to suffer far outweighs the prejudice that the Respondents may suffer should the condonation for late filling of the notice not be granted in our favour as we have never abandoned nor waived my right to pursue the claim against the Respondents.” It may well be that the applicants suffer prejudice if condonation is refused, and yet this is not a reason to grant condonation, as is clear from the requirements in section 3(4)(b). Any prejudice that may be suffered by the applicants would be the result of their own failure to show good cause for the court to condone their default and is a consequence suffered by every unsuccessful candidate for condonation who failed to satisfy the court that there was good cause to condone their non-compliance. So far as it is necessary to say anything about any prejudice to the municipality, suffice to say that the municipality has not alleged or shown that the non-compliance unreasonably caused it prejudice and prejudice should not be assumed in the absence of evidence from the municipality which lays a basis for any such prejudice – *Madinda supra* para [21].

21 The third applicant fares no better. For her part, she does not pretend to explain her delay whatsoever. She contented herself with stating only that she consulted with Mr Mthombeni but does not state when and provides no other information to explain why her notice was not given within the prescribed period. Mr Mthombeni too offers no explanation in this regard with his confirmatory affidavit that I have referred to which is obviously inadequate and of no assistance to understand the third applicant’s non-compliance with section 3(2)(a). It is fair to surmise that the failure to provide any explanation at all must be because there is no reasonable and satisfactory explanation to offer. In the absence of any explanation at all for the substantial delay, the prospects of success and whether the respondents are unreasonably prejudiced by the default do not in my view arise for consideration – in any event, her affidavit says nothing about the prospects of success and there are therefore no factors to balance to determine whether there is good cause to condone the third applicant’s delay. It follows that the third applicant has failed to satisfy me that there is good cause to excuse the delay. The third applicant’s quest for condonation is doomed for this

reasons.

Conclusion

22 The explanation for the substantial delay offered by the first and second applicants is not satisfactory. They have also failed to show that their claim has reasonable prospects of success and the prejudice that they claim is generic and speaks nothing of their case. It follows that the first and second applicants have not shown good cause for the delay and for condonation to be granted.

23 The third applicant offers no explanation for the lengthy delay and is silent of n the prospects of success and prejudice should condonation be refused. This is fatal for her case and her application stands to be dismissed for that reason.

Costs

24 The municipality has succeeded to resist the application for condonation. There is no reason to depart from the general rule that a successful party must be awarded their costs. The applicants have not offered any and I propose to make an order accordingly. I do so mindful that since the matter was heard and judgment reserved, rule 67A has come into effect and it prescribes different scales for costs. However, since the matter was heard before the rule came into effect, it is fair that the then prevailing scale of party and party costs, in the absence of facts that warrant a punitive scale, must hold.

ORDER

25 In the premises, the following order is made:

- (i) The first, second and third applicants' application for condonation is dismissed.
- (ii) The applicants are to pay costs, on the ordinary scale of party and party, the one paying, the other to be absolved.

MS BALOYI AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

APPEARANCES:

For the Applicant:

Instructed by:

Mthombeni Attorneys Inc

For the Respondent:

Adv. L Moela

Instructed by:

State Attorney

Judgment

heard:

07 February 2024

Judgment

delivered:

05 August 2024

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