

SOUTH AFRICA / JUDGMENT

Gaobepe v Minister of Justice and Correctional Services (94619/2016) [2025] ZAGPPHC 396 (3 April 2025) [2025] ZAGPPHC 396

COURT

North Gauteng High Court, Pretoria

BEFORE

JM Matsemela

CASE / FILE NUMBER

94619/2016

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

CASE NO: 94619/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

3 APRIL 2025 JM MATSEMELA

In the matter between

OTSILE RHUEL GAOBEPE

APPLICANT

AND

MINISTER OF JUSTICE AND

RESPONDENT

CORRECTIONAL SERVICE

JUDGMENT

MATSEMELA AJ

Introduction

1. The Applicant launched this application for condonation following a special plea raised by the Respondent to the Applicant's claim for damages based on an alleged assault by employees of the Respondent.
2. This matter concerns the provisions of section 3 (2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("Act"), which require that before a creditor institutes legal proceedings for recovery of a debt against an organ of state, that creditor must first serve a notice (the notice) on the organ of state within 6 (six) months from the date on which the debt become due.

BACKGROUND

3. This Application is instituted by the Applicant, who is claiming damages against the Respondent for injuries sustained following an alleged assault by prison officials employed by the Respondent on or about 13 December 2013. At the time of the alleged assault the Applicant was an inmate at Mogwase Correctional Centre.
4. The Applicant alleges that the prison officials who assaulted him acted unlawfully and negligently. They breached their statutory duties and/or failed to protect him from being assaulted when they had a legal duty to do so.
5. The Applicant claims damages suffered as a result of the alleged assault in the amount of R800 000.00, made up of R100 000,00 for estimated future hospital, medical and related expenses and R700 000.00 for general damages.
6. On 30 October 2014 after consulting with his erstwhile attorneys of record, these attorneys served the notice on the Respondent on 27 October 2014. The action proceeding were subsequently instituted against the Respondent on 5 December 2016.
7. It is alleged that in the Applicant's particulars of claim, there is no mention of compliance with the statutory provisions of the Act prior to the institution of the action.
8. Due to Respondent not having entered appearance to defend, the Applicant applied for default judgment on 14 November 2017 and the matter was set down for hearing on 25 January 2018.
9. On 24 January 2018 the Respondent delivered a notice of intention to oppose this application and the matter was removed the unopposed roll with the Respondent being ordered to pay the wasted costs on the very same day 25 January 2018.
10. On 22 August 2018 the Respondent entered an appearance to defend the action.

11. On 24 January 2019 the Applicant once-more applied for Default judgment, the notice of set down in respect of which was delivered on 30 January 2019, containing a hearing date of 4 April. Apparently the Respondent was served with notice of bar before.
12. The Respondent subsequently delivered its plea which included a special plea on 14 February 2019. In its special plea, the Respondent adopts the stance that the Applicant is precluded from bringing his action due to his non-compliance with the provisions of Section 3 of the Act, for failure to have served such notice within the prescribed period.
13. It is interesting to note that counsel for the Applicant addressed this Court to the effect that the bar was not lifted when the plea was served. This was also confirmed by counsel for the Respondent.
14. On 12 February 2019, the Applicant instituted the current application for condonation in terms of section 3 and 4 of the Act on 7 April 2022 (the condonation application). The said application was served on the respondent's Attorneys on 30 March 2023.
15. On 2 August the Respondent delivered its answering affidavit in opposition to the condonation application.
16. The Applicant has always and is in custody of the Respondent as an offender and through all these years, he was resident he was resident in two correctional centres but was moved in between from time to time.

COMMON CAUSE

17. There exists no dispute between the parties that the Applicant ought to have delivered the said notice within a prescribed period and thus this application concerns Applicant's failure to do so.

LEGAL DISPUTES

18. The Applicant argues, that the statutory notice was delivered four months late and that such delay is not inordinate. Counsel for the Respondent, however argues that it is not a simple matter of a four-month delay, but rather concerns extensive delays over a period spanning for almost more than 10 years since the institution of the action and this demonstrates a flagrant disregard for the time periods imposed by the Act.
19. Counsel for the Respondent argues further that Applicant who has at all material times been legally represented, ought to have applied for condonation at the time when the statutory notice was delivered as the notice was delivered manifestly late during October 2014. No attempts were made to seek condonation until some almost 8 (eight years later in April 2022). The application for condonation is also brought 3 (three) years after the application was alerted to his non-compliance with the Act in the Respondent's plea, during February 2019. Applicant's time delays are therefore inexcusable.

THE LAW

20. Section 3 of the Act provides:

Notice of intended legal proceedings to be given to organs 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 state in question notice in writing of his or her or its intention to institute the legal proceeding 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.
- (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 ought not to have been extinguished by prescription;
 - (ii) good cause exists for the failure by the creditor and lastly;
 - (iii) the organ of state must not be unreasonably prejudiced by the creditors' failure.

CONDONATION

21. The Applicant approached this Court in terms of section 3 (4) (a) and
- (b) of the Act for an order condoning the delay in giving the statutory notice. This Court is required to determine whether the Applicant has made out a case for condonation as contemplated in the said section. It is also saddled with the issue of costs occasioned by this application. This section lays down the requirements which the Applicant must satisfy before a court can grant the condonation sought.

22. The importance and dictates of the Act is that any person intending to issue legal proceedings against an organ of state must first issue a written notice of the impending legal proceedings.
23. The factual situation in this matter is that the notice was issued on the 30 October 2014 whilst the cause of action arose on the 13 December 2013. A simple numerical court suggests that the Notice was due in June 2014. It is an argument before this Court that the current notice was issued about four months late. I agree.
24. The Court in *Mogopodi v Member of the Executive Council for the Free State* 122/2008[2008] ZAFSHC 38 at paragraph 7 explained the purpose of section 3 (1) notice as that:

“[7] I am of the view that no reason exists to find that the underlying purpose for the giving of notice in terms of section 3 of Act 40 of 2002 is any different to the reasons enumerated in these decisions, namely one of convenience in order to assist the particular organ of state to conduct proper investigations into the claim and then to decide whether to make payment or defend the intended action”.
25. The purpose of the Statutory Notice must be considered with all the available facts in line with the evidence proffered by the Applicant. With the short delay in giving the notice, this Court wonders if the purpose of the notice was defeated or not in this case. It is my view that the purpose of the notice was not disturbed at all.
26. The argument by the Respondent loses sight of the purpose of condonation. The purpose of condonation is to allow the action to proceed despite the fact that the peremptory provisions of s 3 (1) have not been complied with. Section 3 must be read as a whole.
27. Thus either a complete failure to send a notice or the sending of a defective notice, entitles a creditor to make an application.

Even if this is qualified, it is only when ‘if an organ of state relies on a creditor’s failure to serve a notice’ that the creditor may apply for condonation.

28. If then organ of state makes no objection to the absence of a notice or a valid notice, then no condonation is required. In fact, the objection of the organ of state is a jurisdictional fact for an application for condonation, absent which the application would not be competent.
29. The appropriate course that the Respondent should have adopted in the matter was to have either objected to the notice in terms of the Act or to have delivered a special plea after summons was served.
30. In the *MEC for Education, KZN v Shange* (529/11) [2012] ZASCA 98 (1 June 2012) the SCA upheld the granting of condonation of the court below for condonation on four basis:

30.1 Firstly, it concluded that a child whose course of action that arose before the commencement of section 17 of the Children’s Act 38 of 2005, is still entitled to the same period of time in which to institute his or her claim for damages as she or he should have been, had the age of majority not been changed.

30.2 Secondly that the Respondent became aware of this claim on 18 January 2006, the date of the first consultation with an attorney.

30.3 Thirdly, that notice to the Minister of Education and not the appellant (until much later) was an oversight on the part of the Respondent's attorney that should not be attributed to the Respondent.

30.4 Fourthly, that 'any prejudice which the Appellant may have suffered as a result of failure to give notice, could not be regarded as unreasonable or insurmountable in the circumstances.

31. In the case of the Chairperson of the North West Gambling Board & Another v Sun International SA LTD (1214/2019) [2021] ZASCA 176 at paragraph 20 the Court held that:

"...It is trite that in applications for condonation and reinstatement:

- (a) The applicant must provide a proper explanation of the causes of the delay and explain each of the periods of delay.
- (b) It is not sufficient for an application to set out a 'number of generalized causes without any attempt to relate them to the time-frame of its default or to enlighten the court as to the materiality and effectiveness of any steps taken by the Board's

legal representatives to achieve compliance with the Rules at the earliest reasonable opportunity.

- (c) The court has a discretion which the applicant must show should be exercised in its favour".

32. With regard to the facts of the case I hold the view they are distinguishable. This Court has a discretion to exercise its discretion on condoning the non-compliance or the delay.

33. The facts of this case should also be evaluated against the merits of the case although this Court is only dealing with the condonation application. The Applicant, allegedly was assaulted by the employees of the Respondent who were on duty and acting under supervision and control of the Respondent.

34. The Applicant suffered bodily injuries that led to him being hospitalised and undergoing bodily pains and suffering. The actions

of the employees of the Respondent cannot be justified and same warrant examination by the trial court.

35. The Applicant seeks compensation for damages suffered at the hands of the employees of the Respondent. The Applicant has taken this Court in his confidence by explaining the delay in filing the condonation application. Such is succinctly enumerated in the supplementary affidavit.

PRESCRIPTION

36. In *Minister of Safety and Security v De Witt* [2008] ZA SCA 103; 2009 (1) SA 457 (SCA) paragraphs 5, 11 and 13, it was held that condonation in terms of s 3 (4) (b) of the Act could appropriately be granted even if no notice was given, or notice was given after the service of summons, provided that the debt had not prescribed.

37. Section 11 of the Prescription Act 68 of 1969 provides that:

“11. The periods of prescription of debts shall be the following –

(a).....

(b) save where an Act of Parliament provides otherwise, three years in respect of any other debt”.

38. The Applicant issued summons within the prescribed time of three years and as such the action is not affected by prescription.

Therefore, prescription is not a negative factor impacting on the action. The Applicant has issued and served the summons in time. He has satisfied the first requirement by illustrating that the debt was not extinguished by prescription at the time of issuing summons.

GOOD CAUSE

39. The next requirement for the court to consider is whether there is a good cause to grant condonation. The Court in the case of *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) para 10 Heher JA defined the term good cause as follows:

“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.”

40. The Supreme Court of Appeal in the case of *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA) at para 26 stated that good cause for a delay is determined from:

“A full detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility”.

41. In *Madinda*, supra further at paragraph 8 the SCA further held that the determination of good cause entails considering factors such as:

“ (i) prospects of success, (ii) the reasons for the delay, (iii) the sufficiency of the explanation offered, (iv) the bona fides of the applicant and (v) any contribution by other parties to the delay”.

42. The above factors, though important, are not the only factors that a court must consider. The court considers some and all of the factors. As the learned judge of appeal state in Madinda supra paragraph 14

“[14] One other factor in connection with ‘good cause’ in s 3(4) (b)(ii) is this: it is linked to the failure to act timeously. Therefore subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms. Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s 3(4), but it is not, in this statutory context, an element of ‘good cause’.

43. It is necessary to evaluate the above principles in line with the evidence tendered by the Applicant in his founding affidavit and the supplementary affidavit filed on record. The Applicant was always under the impression that this erstwhile attorneys of record had complied with all statutory requirements until same surfaced at a later stage. The Applicant only signed a power of attorney on 18 August 2014 and never knew at this stage he should have acted earlier.
44. It should be noted that he is an inmate in custody which renders him immobile with little access to private attorneys and the required resources.
45. It is my view that the statutory notice was issued 4 months after the required period. The delay of 4 months is not inordinate and this Court is inclined to condone same. Condoning the 4 months non-compliance will be in the interests of justice since the Applicant issued summons which the trial court will adjudicate at a later stage. It will be a travesty of justice if the condonation application is not granted.

PREJUDICE

46. The last requirement is to examine, if there is any prejudice to be suffered by the organ of state. This can be answered with a question of what possible prejudice could have been suffered by the Respondent in this instance. In paragraph 7 of the Founding Affidavit fully explains that this is a short delay of 4 months and one wonders what would have changed in that short period.
47. Counsel for the Respondent is arguing about prejudice but the actual prejudice is not demonstrated. He argues that the Respondent might suffer prejudice if their witnesses shall have resigned by time of the trial. This argument does not take the case of the Respondent any further. If their witnesses have for some reason or the other have resigned they can always trace and subpoena them to court. I hold the view that there is no evidence before this Court to suggest that the Respondent has or will suffer prejudice.
48. In the case of Marumo V Minister of Police, (37401/2011) [2014] ZAGPPHC 640 (25 August 2014) Modiba AJ held at paragraph 8:

“The defendant made various averments illustrating the undue prejudice that it stands to suffer if the section 3 notice is not filed timeously. He has not advanced facts that show that he has suffered actual prejudice as a result of the Plaintiff’s omission. It was submitted on behalf of the defendant that it cannot trace some of the witnesses. However he failed to indicate which witness cannot be traced. In her particulars of claim, the plaintiff alleges that she was arrested by one police officer at her home. Counsel for the plaintiff argued that the fact that the defendant has pleaded evidences the absence of prejudice because he could not have pleaded unless the defendant had consulted with the officer who was involved. He also could not plead unless he had referred to documentation regarding that gave rise to the plaintiff’s claim. In my view, the defendant has failed to show that he stands to suffer prejudice if the application is granted’.

49. The Applicant has made a compelling case of condoning the non-compliance with section 3 of the Act. A proper explanation was

proffered on the circumstances of non-compliance. Having said that I therefore make the following order.

Order

Application for condonation is granted with costs.

MOLEFE MATSEMELA

Acting Judge of the Pretoria High Court

This judgement is delivered by circulating it to the parties and loading it to caselines. The date of delivery is deemed to be the 3 April 2025

Heard on 19 January 2025

For the Applicant

Adv Phathela

Instructed by

Makwerela Attorneys

For the Respondent

Adv M Rantho

Instructed by

State Attorney

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