

SOUTH AFRICA / JUDGMENT

Khoele v Minister of Defence (28030/2021) [2024] ZAGPPHC 1268 (2 December 2024) [2024] ZAGPPHC 1268

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa

CASE / FILE NUMBER

28030/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE Number: 28030/2021

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

02/12/2024

In the matters between: -

DR KWENA BRANDALINE KHOELE

APPLICANT

And

MINISTER OF DEFENCE RESPONDENT

JUDGMENT

BAQWA, J

Introduction

- [1] This is an application for condonation of applicant's failure to serve a notice of intention to bring legal proceedings against an Organ of State as required in term of section 3 (2) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act).
- [2] It is common cause that the applicant's statutory notice was served outside of the prescribed time period as required by the Act. The notice must be given within 6 months after the plaintiff becomes aware of the debt.
- [3] The first applicant became aware of her claim against the defendant on 16 March 2020 and she gave notice of her intention to institute legal proceedings on or before 15 September 2020, but she only served her notice on 19 April 2021, hence the application for non-compliance with the Act. In this judgment the plaintiff is referred to as the applicant and the defendant as the respondent.

Background

- [4] In order to contextualise these proceedings it ought to be noted from the onset that the respondent disputes this Court's jurisdiction to adjudicate this matter. The jurisdictional challenge is based on two exceptions filed against the particulars of claim.
- [5] The first exception is to the effect that this court is precluded from adjudicating upon constructive dismissal disputes which, so it is submitted, have to be determined through the Labour Relations Act 66 of 1995 (LRA), section 2 (a) of which excludes members of the SANDF from the operation of the LRA.
- [6] This is a misconception which can be dealt with, with reference to the decision in *Murray v Minister of Defence*[1] where the SCA held that:

"The Labour Relations Act 66 of 1995 (LRA) expressly excludes members of the South African National Defence Force from its operation. Its expansive protections therefore did not cover the plaintiff in his employment with the defendant. However, s23 (1) of the Bill of Rights (of which the LRA is the principal legislative offshoot) provides that '(e)veryone has the right to fair labour practices' This includes members of the defence force."[2]

And further

In 1995 the LRA expressly codified unfair employer-instigated resignation as a dismissal. Even though that does not apply here, the constitutional guarantee of labour practice continues to cover a non LRA employee who resigns because of intolerable conduct by the employer, and to offer protection through the constitutionally developed common law. It is thus found that unfair conduct by the navy forced the plaintiff to resign, he would be entitled to damages for dismissal. This follows from the fact that all contracts are subject to constitutional scrutiny; this includes employment contracts outside the LRA. Whether an employer dismisses such an employee in violation of the right to fair labour practices, or unfairly precipitates a resignation, is a matter of

form, not constitutional substance.”

[7] The above dicta would seem to fairly lucidly explain the misconception referred to earlier and clarify that the jurisdiction of this court is not

ousted.

[8] The second exception is about the non-compliance with the provisions of the Act by not timeously notifying the respondent of her intention to institute legal proceedings against it. The application for condonation is meant to address the respondent’s second exception.

Sequence of events

[9] The applicant was permanently employed on 1 April 2024 where she held the rank of Major from September 2012 to March 2020. She was employed as a Psychiatrist, Medical Specialist at One Military Hospital, Pretoria.

[10] After being constructively dismissed on 16 March 2020 she engaged the services of Mr Hendri Pretorius, an attorney, who referred the applicant’s matter to the General Public Service Sector Bargaining Council (GPSSBC) where it was conciliated on 5 June 2020.

[11] The respondent challenged the GPSSBC’s jurisdiction to determine constructive dismissal disputes on 4 August 2020 and on 19 August 2020, the GPSSBC ruled in respondent’s favour.

[12] The applicant had to give notice of her intention to institute legal proceedings on 15 September 2020.

[13] The applicant instructed her attorney to proceed with an action in this court and Pretorius informed her on 23 September 2020 that the particulars of claim would be finalised after which she confirmed on 6 October 2020 that her claim would include compensation and reinstatement.

[14] On 25 November 2020 the attorney forwarded the particulars of claim to counsel and on 19 April 2021 he caused the statutory notice in terms of the Act to be served on the respondent.

[15] The summons was issued on 7 June 2021 and served on the respondent on 14 July 2021.

[16] The respondent filed a notice of intention to defend the matter on 12 August 2021.

[17] Attorney Pretorius passed away on 18 March 2022 and applicant was only informed by his partner, Alex Davies that he had passed on 13 June 2022.

[18] The applicant contacted her current attorneys, Arthur Channon Attorneys, during the first week of July 2022. The attorneys had to request the applicant’s file from her previous attorneys and received same during the last week of July 2022.

[19] An opinion on prospects of success were provided by counsel on 16 August 2022.

- [20] The applicant became aware that Pretorius had served the statutory notice in term of the Act out of the time and that the respondent filed an exception to her particulars of claim on 16 August 2022.
- [21] A consultation was arranged with counsel on 29 August 2022 but due to the constraints on the part of counsel he started drafting the condonation application at the end of October 2022.
- [22] The finalisation of the condonation application took time due to missing documents, explanation for all the time periods and getting corroborating documents.
- [23] Applicant's current legal team only got involved in the matter from July 2022 and had to deal with voluminous bundles of documents. The delay was exacerbated by the passing of attorney Pretorius. The applicant had no knowledge as to why Pretorius had not adhered to the requisite time periods.
- [24] It is however common cause that the matter would have become prescribed on 15 March 2023.
- [25] The applicant concedes that Pretorius ought to have informed the applicant of the relevant statutory requirements but disputes that the failure prejudices the respondent.

The Law

- [26] The SCA considered the aspect of condonation within the ambit of the Act including the deeming provision in section 3(4) (b) in *Madinda V Minister of Safety and Security*[3] the SCA held that :

"The phrase 'if [the court] is satisfied' in s 3(4) (b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See Die Afrikaans Pers Beperk v Naser[4]. I see no reason to place stricter construction on it in the present context."

- [27] It can therefore not be disputed that section 3(4) (b) referred to above, empowers the court to grant condonation if it is satisfied that the debt had not become prescribed if there exists good cause for the applicant's failure, and if the organ of state was not unreasonably prejudiced by the applicant's failure to give notice.

Good Cause

- [28] Regarding the requirement of good cause, the SCA in *Madinda* (para

- 10) held “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 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 therefore.”
- [29] In the matter of Premier Western Cape V Lackay[5] the SCA summarised good cause as consisting of the following factors:
- 29.1 The prospects of success in the proposed action
- 29.2 The reasons for the delay
- 29.3 The sufficiency of the explanation offered
- 29.4 The bona fides of the applicant and
- 29.5 Any contribution by other persons or parties to the delay and the applicant’s responsibility therefor.
- [30] Even though not called upon to delve into the merits, I accept that in term of the pleadings the applicant has pleaded a prima facie case of constructive dismissal which is supported by serious allegations and a strong case against the respondent.
- [31] The applicant narrated all the facts that contributed to the delay in this matter and her evidence in that regard demonstrates an intention at all times to prosecute her claim against the respondent.
- [32] It suggests very strongly that Dr Chabalala’s conduct caused the applicant’s admission to a mental health institution. And that as a result she is still under professional treatment and chronic medication to enable her to cope with daily responsibilities.
- [33] Notably the respondent only filed an exception to the particulars of claim instead of filing a plea to the merits. More importantly the respondent did not except to the particulars of claim on the basis that it lacks the necessary averments to sustain a cause of action for constructive dismissal. It is therefore quite startling for respondent’s counsel in his heads of argument to submit “the basis of defendant’s exception was that the plaintiff’s particulars of claim lack the necessary averments to sustain a cause of action or that they do not disclose a cause of action;” and then he supports that with reference to the LRA exception/ exclusion. That was a jurisdictional point not a point regarding the cause of action.
- [34] In light of the above, it is clear how it occurred that the statutory notice was served late and that it was not due to any action attributable to the applicant.

[35] In the result I am satisfied that it would serve the interests of justice for condonation to be granted for the applicant to proceed with her damages claim against the respondent and the following order ensues:

1. Condonation is granted to Applicant / Plaintiff for her failure to serve a notice of intention to bring legal proceedings against the Respondent / Defendant within the period specified in section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002;
2. The Respondent / Defendant is ordered to pay the costs of the application.

SELBY BAQWA

JUDGE OF THE HIGH COURT

Date of hearing: 11 November 2024

Date of judgment: November 2024

Appearance

On behalf of the Applicants Adv JP Prinsloo instructed by Arthur Channon Incorporate Att
cobus.legal@gmail.com On behalf of the Respondents Adv MS Mphahlele SC Adv D
Sigwavhulimu 082 550 5428 instructed by The State Attorney

[1] 2009

(3) SA 130 (SCA).

[2] At para 5.

[3]

[2008] ZASCA 34; 2008

(4) SA 312 (SCA). Para 8.

[4] 1948

(2) SA 295 © at para 297.

[5] 2012

(2) SA (1) (SCA) at para 20.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2024/1268.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/khoele-v-minister-unknown-topic-agpphc-2024--6a3ea51d3b1caa912981410b>

Prepared on 10 October 2026 · Esheria