

SOUTH AFRICA / JUDGMENT

Minister of Safety And security v Butana (CA165/2014) [2014] ZAECHGHC 90 (29 October 2014) [2014] ZAECHGHC 90

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering, E. Revelas, J.W. Eksteen

CASE / FILE NUMBER

CA165/2014

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

Case no: CA165/2014

Date heard: 27 October 2014

Date delivered: 29 October 2014

In the matter between

MINISTER OF SAFETY & SECURITY

Appellant

vs

TRYISHILE BUTANA

Respondent

JUDGMENT

PICKERING J:

- [1] This is an appeal to the Full Bench, with the leave of the court a quo, against the judgment of Dambuza J, delivered on 7 November 2013, in which the learned Judge granted an order condoning the respondent's failure to comply with the provisions of section

3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act”).

- [2] For the sake of convenience I will refer to the present appellant as respondent and the present respondent as applicant.
 - [3] It is common cause that applicant was arrested by members of the South African Police Service for having allegedly discharged a fire-arm in a public place on 28 August 2006. Pursuant to his arrest he was detained in the Cradock police cells until 30 August 2006 when he appeared in the Cradock magistrate’s court and was released on warning. Thereafter, the case was postponed on a number of occasions until, on 2 October 2007, the charge against him was withdrawn by the public prosecutor. Applicant alleges that his aforesaid arrest and detention were unlawful and that his subsequent prosecution was malicious.
 - [4] In terms of s 3(1) and (2) of the Act applicant was obliged to give notice of any intended legal proceedings against respondent within six months of the date on which his cause of action arose i.e. within six months of 28 August 2006. He did not do so. Instead, the requisite notice was only sent to the Commissioner of Police by registered mail on 24 August 2009. On 26 August 2009 applicant’s summons was served on respondent. In his particulars of claim applicant claims damages in respect of his alleged wrongful and unlawful arrest and detention and in respect of his alleged malicious prosecution.
 - [5] The notice in terms of s 3(1) of the Act, which had been posted on 24 August 2009, was only received by the Commissioner of Police some time after the summons had already been served. Respondent accordingly raised a special plea of non-compliance by applicant with the provisions of s 3(2) of the Act, this special plea being served on applicant on 18 November 2009.
 - [6] Eventually, on 5 March 2011, applicant launched an application in terms of s 3(4) of the Act for condonation of his failure to comply with the provisions of s 3(2) thereof. The application was opposed by respondent and respondent’s answering affidavit was filed during April
2011. According to applicant he did not have sufficient funds at that time to pursue what had become an opposed application. He states that he eventually managed to enter into a contingency fee agreement with counsel which enabled him to continue with the matter. He does not state when it was that he entered into the aforesaid agreement. What does appear from the application, however, is that his replying affidavit was only filed during December 2012, some twenty months after respondent’s answering affidavit had been filed. The application for condonation was then argued before Dambuza J on 5 May 2013. The learned Judge was of the view that although there were certain shortcomings in the application and that applicant had been “lethargic” in his conduct of the proceedings, respondent was not prejudiced thereby and such shortcomings as there were could be adequately

addressed by the costs order. She accordingly granted the application but ordered applicant to pay respondent's costs.

- [7] Mr. Beyleveldt S.C., who, with Mr. Simoyi, appeared for respondent, submitted that Dambuza J had erred in doing so. He submitted that applicant had failed to furnish any satisfactory reason for his failure to have delivered the requisite s 3(2) notice timeously and had also failed dismally to establish that he had any prospects of success on the merits.
- [8] It is accordingly necessary to have regard in more detail to applicant's averments in support of the application before

Dambuza J.

- [9] Applicant states that, after his arrest and before the withdrawal of the case against him, he approached Legal Wise for assistance in instituting his civil claim against respondent. Legal Wise was, however, unable to assist him.
- [10] He avers that at the time of his arrest he was employed as a plumber by the Inxuba Yethemba Municipality. He states that his employer "would not give me time off to even attempt to appoint an attorney to investigate a civil action against respondent." In the same breath, however, he states that he "had to take time off work to be in court." Why he was unable to approach an attorney during the time that he was attending court or why he was unable telephonically to contact an attorney and arrange for a consultation after his working hours is not explained.
- [11] Be that as it may he states that in December 2006 he was suspended without pay for being absent from work after having attended court during late November. He remained so suspended until June 2007 when he was "offered a settlement" by his employer and paid the sum of R8 000,00 whereafter he moved to Port Elizabeth in search of employment. He states that he could not use this money for purposes of his litigation as he had been living from hand to mouth for more than six months without any salary.
- [12] He states that in the interim, during 2006 and "early 2007", he approached the Legal Aid Board in Cradock for assistance, but to no avail.
- [13] Whilst in Port Elizabeth he approached an attorney, Mr. Ingram, "during late 2007". Ingram informed him of the provisions of the Act concerning the giving of notice to respondent within six months of his cause of action having arisen. Ingram also agreed to request a copy of the docket and other documents from the South African Police Service in order to apprise himself of the circumstances pertaining to the matter.
- [14] Applicant states that Ingram eventually received the docket and documents "over a protracted period", which applicant, however, does not specify. He states that he was then called by Ingram and advised that he did have a cause of action but that he would have to pay for the litigation. He states that at that stage he did not have money to do so. He thereafter remained unemployed in Port Elizabeth until he left during November 2008 for

East London. There too he remained unemployed until, during August 2009, he obtained employment in Idutywa with Amathole District Municipality, by whom he is still employed.

[15] Having obtained employment he instructed Ingram to proceed with the litigation by giving respondent the requisite notice in terms of the Act and by issuing summons. In the notice letter of 24 August 2009, written by Ingram, reference is made to the issue of non-compliance with the Act and a request was made for respondent's written consent for the institution of the proceedings in terms of s 3(1)(b) of the Act.

[16] During October 2009 the National Commissioner of Police replied thereto stating, inter alia, that the letter "does not comply" with the relevant provisions of the Act and that the matter was regarded as finalised. Although the letter does not

specifically refer to the request that applicant's failure be condoned it can be inferred therefrom that such request was refused.

[17] As stated above, this correspondence was followed by respondent's plea, filed on 17 November 2009, in which the special plea of non-compliance with the provisions of the Act was raised.

[18] In this regard applicant states that he was advised by Ingram that he could apply to the Court for condonation of his non-compliance should the respondent persist with the special plea. He states further that respondent regrettably did so persist, hence the application to court.

[19] As I have said, respondent's plea was filed on 17 November

2009. No explanation is given by applicant as to why, on receipt of the letter from the National Commissioner of Police during October 2009 or on receipt of the special plea during November 2009, immediate steps were not taken to bring the application for condonation. Instead, the application was only filed on 15 March 2011, over 13 months later, despite applicant having been in gainful employment since August 2009.

[20] Section 3 of the Act provides that:

"(1) No 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 has become due, be served on the organ of state in accordance with section 4(1) ...”

[21] Section 3(4) of the Act provides that:

“(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”

[22] As was stated in *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC) notices of this kind have long been familiar features of South Africa’s statutory terrain. Didcott J stated further at para 9, page 128 E:

“The conventional explanation for demanding prior notification of any intention to sue such an organ of government is that, with its extensive activities and large staff which 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.”

[23] Although respondent initially raised a plea of prescription this was abandoned and the only remaining issues before Dambuzza J were whether applicant had shown good cause for his failure to have complied timeously with the provisions of s 3(2) and whether respondent had been unreasonably prejudiced thereby.

[24] In *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA), Heher JA stated as follows at 316 C, para 8:

“[8] 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 eg Die Afrikaanse Pers Beperk v Neser 1948

(2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context.”

[25] As to the requirement of “good cause” Heher JA stated at 316E- F, para 10 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.”

[26] At 317 C – G, para 12, the learned Judge continued to state as follows:

“‘Good cause for the delay’ is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two main elements at play in s 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration.

[27] See too the remarks of Majiedt AJA (as he then was) in *Minister of Agriculture and Land Affairs v C.J. Rance (Pty) Ltd* 2010 (4) SA 909 at 117 F – G, para 37, namely:

“[37] The prospects of success of the intended claim play a significant role - ‘strong merits may mitigate fault; no merits may render

mitigation pointless’. The court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of an intended action, eg where an expert report central to the applicant's envisaged claim is omitted from the condonation papers.”

[28] It will be convenient to commence with the issue of applicant's prospects of success.

- [29] Mr. Beyleveldt submitted that applicant had failed to set out in any detail his prospects of success on the merits of his intended action, applicant having merely stated in this regard that “I submit that I have reasonable prospects of succeeding in my action against the respondent if given the opportunity to do so.”
- [30] He referred further to the fact that in her judgment Dambuza J had stated that she was “not able to pronounce on the applicant’s prospects of success on the merits” but was “of the view that this is a matter of such importance that a full ventilation of the issues is merited.”
- [31] I do not agree with the submission that applicant has failed to show that he has reasonable prospects of success. In this regard applicant’s somewhat laconic statement as to his prospects of success does not stand alone. There is too the letter written by Ingram to the respondent. This letter is noteworthy for the detail it contains concerning the events and circumstances leading up to and around applicant’s arrest and detention. It consists of 7 typed pages of which 4 pages contain a detailed exposition of applicant’s cause of action. It includes the names of certain of the policemen alleged to have been involved therein. It includes too detail allegedly contained in a “Prosecuting Information Form” completed by a detective constable Tshawe. Obviously much of this detail must have been gleaned by Ingram from the police docket.
- [32] Having regard to what is contained in the letter I am of the view that subject to issues of credibility which may arise at the trial, applicant has shown that he does have reasonable prospects of success in his proposed action.
- [33] Furthermore, I do not believe that respondent has, in these circumstances, been prejudiced by the delay in delivering the s 3(1) notice. This is not a case such as the Rance matter, *supra*, where the court is left in the dark on the merits because, for instance, of the omission of an expert report central to the applicant’s envisaged claim.
- [34] I turn then to consider the reasons put forward by the applicant for his delay in delivering the notice.
- [35] Mr. Beyleveldt submitted that applicant had failed to furnish an acceptable explanation for such delay. In her judgment Dambuza J appeared to agree to some extent with this submission. She stated:
- “Indeed, the explanation is silent on why the notice was not given in 2007 or 2008.”*
- [36] In my view, however, with respect to the learned Judge, the applicant did furnish an explanation in this regard. His cause of action arose on or about 28 August 2006. Approximately four months later, in December 2006, he was suspended without pay. Although he did receive the amount of R8 000,00 during June 2007 he had been without means of support for the intervening period of 6 months and was accordingly not in a position to utilise the money for purposes of litigation.

[37] He had also approached Legal Wise and the Legal Aid Board for assistance during 2006 and early 2007, so it can be inferred that he was not sitting back supinely, doing nothing to further his case. He was still unemployed when he consulted with Ingram, who, understandably, was loath to issue the s 3(1) notice, which was in any event already out of time, without having seen the docket. Ingram's actions in this regard cannot, in my view, be faulted. What was stated in Madinda's case, *supra*, at para 19 is apposite, namely:

"[19] The summary in the preceding paragraph shows that the appellant consulted an attorney as soon as could reasonably be expected, given her misconception, and, having done so, reacted expeditiously and in good faith on his advice. Mr Dullabh furnished a rational explanation to her for not immediately sending the notice (that someone else might have acted first and sought information afterwards does not render it less rational), an explanation which she could not have been expected to debate with him. Prudence before embarking on a process which may lead to heavy costs in litigation is to be commended unless the consequences of delay are likely to damage one's client's prospects. I do not think Mr Dullabh had reason to think that he would be criticised for being careful. The unexplained period (which must lie in the peculiar knowledge of her attorney) is not of such a degree of seriousness as to shipwreck her otherwise sound reliance on good cause."

[38] Thereafter applicant remained unemployed, unable to finance his litigation, until August 2009 when he obtained employment. It is noteworthy that, immediately on obtaining employment in August 2009, he again approached Ingram and instructed him to proceed.

[39] In these circumstances it does not appear to me, with respect, that he was "lethargic" in pursuing his claim.

[40] In my view therefore Dambuza J correctly granted applicant condonation.

[41] Accordingly the appeal is dismissed with costs.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

E. REVELAS

JUDG OF THE HIGH COURT

J.W. EKSTEEN

Appearing on behalf of Appellant: Adv. Beyleveldt, Adv. Simoyi

Instructed by: Whitesides Attorneys, Ms. Bosman

Appearing on behalf of Respondent: Adv. Williams

Instructed by: Nolte Smit Attorneys, Ms. Moodley

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