THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 588/2007

THE MINISTER OF SAFETY AND SECURITY **Appellant**

and

AUGUSTUS JOHN DE WITT **Respondent**

Neutral citation: Minister of Safety and Security v De Witt (722/2007) 103 [2008] ZASCA (19 September 2008)

Coram: **Brand, Lewis and Ponnan JJA**

Heard: **11 September 2008**

Delivered: **19 September 2008**

Summary: **Section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 permits a court to condone a litigant's failure to give a valid notice required by s 3(1), prior to instituting legal proceedings, if the debt has not been extinguished by prescription, good cause is shown and the debtor is not prejudiced. Application for condonation may be made by the creditor even after proceedings have been instituted if the debt has not prescribed.**

ORDER

On appeal from High Court, Cape Town (Eastern Circuit) (Fourie J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

LEWIS JA (Brand and Ponnan JJA concurring)

[1] This appeal turns on the interpretation of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The Act was introduced to harmonize periods of prescription of debts owed by organs of state, and to make provision for a uniform requirement for the giving of notice in connection with the institution of legal proceedings. It repealed several statutes that had previously regulated proceedings against various state bodies such as the police and the defence force. And it came after a decision in the Constitutional Court – *Mohlomi v Minister of Defence*[1] - in which it was held that s 113(1) of the Defence Act[2] was unconstitutional since it made no allowance for failure timeously to notify the defence force of the intention to sue it, despite the circumstances.

[2] The Act is meant not only to bring consistency to procedural requirements for litigating against organs of state but also, it is clear, to render

[1] 1997 (1) SA 124 (CC). See also *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as amicus curiae)* 2001 (4) SA 491 (CC).
[2] 44 of 1957.

them compliant with the Constitution. The way in which it seeks to achieve a procedure that is not arbitrary and that operates efficiently and fairly both for a plaintiff and an organ of state is to give a court the power to condone a plaintiff's non-compliance with procedural requirements in certain circumstances. Thus access to courts is facilitated, while at the same time procedures against large governmental organizations that need to keep their affairs in order are regulated.

[3] The purpose of having special requirements in place for the institution of action against a state body is well-recognized and was put thus by Didcott J in *Mohlomi*:[3]

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.

It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which s 22 bestows on everyone to have his or her justiciable disputes settled

[3] Paras 11 and 12. The section in issue there provided for a shortened time period within which to sue, but the dicta are apposite also to the additional requirement of notice.

by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there, and it does not *per se* dispose of the point, as I view that at any rate. What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line.'

[4] As I have said, the way in which the legislature has sought to avoid drawing a hard and fast rule that may cause undue hardship to a plaintiff is to make provision for time limits, and notices of intention to sue, but to enable a court to condone a failure to comply with the requirements. Section 3(4) gives the court a discretion to condone non-compliance, subject to three requirements being met.

Section 3 reads:

'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.

. . . .'

[5] The section has been the subject of interpretation in several cases already. In particular, the requirements of good cause and absence of prejudice to the organ of state for condonation to be granted, set out in s 3(4)(b), were discussed by this court in *Madinda v Minister of Safety and Security*.[4] At issue in this case is a different question: where no notice is given by the creditor, or where the notice is defective in some respect, but the legal proceedings are instituted before the expiry of the prescription period, may a court condone the failure to give notice, or the giving of defective notice, after the summons or application has been served? The question takes on added significance where proceedings are served before the prescriptive period has ended, but notice is served only after that date, or where notice has been served before the prescriptive period has ended but does not comply with s 3(2).

[6] The respondent, John de Witt, together with two other men, was arrested and detained by members of the South African Police Services on 29 May 2004. On 15 June 2004 he was freed on bail. Nearly two years later, on 19 April 2006, De Witt's attorneys sent a letter to the Minister advising of his intention to sue for wrongful arrest and detention. On 29 May 2006 the National Commissioner of Police rejected the notice since it was not sent

[4] (153/ 2007) [2008] ZASCA 34 (28 March 2008) 2008 (4) SA 312 (SCA).

within six months of the date on which the debt became due (s 3(2)(a)). On 6 February 2007 De Witt and the two men with whom he was arrested and held issued a summons on the Minister claiming damages. The summons was served a week later, on 13 February 2007. It is not disputed that the summons was served before the debt had become prescribed under the Prescription Act 68 of 1969, being served within three years from the date of arrest and detention.

[7] For some inexplicable reason the failure of one of the other two plaintifffs to give timeous notice was 'condoned' by the Minister. De Witt, however, met an objection to his summons, the Minister claiming in a special plea that because no timeous notice had been served before the summons was served, the claim had prescribed. He thus sought condonation of his failure to send the notice timeously, and the Cape High Court granted it, finding that it is open to a plaintiff to seek condonation for non-compliance with s 3(2) after a summons has been served.

[8] We were referred to a number of decisions of the high courts in which condonation in similar circumstances was granted.[5] The only case of which I am aware that has found that condonation cannot be granted after a summons has been served, and when the case is pending, is that of a full

[5] *Catharina Dauth & others v Minister of Safety and Security & others* (per Lacock J) (case 729/2007 Northern Cape High Court, handed down on 23 May 2008); *Shirley Marais v Minister van Veiligheid en 'n ander* (case 2727/2005 Free State High Court (per Van der Merwe R) (delivered on 24 October 2006); and *Schlebusch v Mohokare Plaaslike Munisipalitiet* (per Van Zyl R) (case 567/2005, delivered on 11 October 2007)

court of the Natal High Court in *Legal Aid Board & others v Singh.*[6] I shall return to the reasoning in that case briefly.

[9] The argument for the Minister is that decisions granting condonation after summons has been served, and where no valid notice required in s 3(2) has been given, do not have regard to the peremptory nature of the wording of s 3(1). The section expressly refers to notice of *intended* legal proceedings, and is peremptory: no legal proceedings *may*[7] be instituted against an organ of state *unless* the creditor has given notice in writing of his or her intention to sue, or unless the organ of state has consented in writing to the institution of legal proceedings without notice, or despite a defective notice. Second, s 3(2) provides that the notice *must* be served on the organ of state within six months from the date on which the debt became due. These peremptory words, it is argued, have the consequence that condonation cannot be granted unless a valid, timeous notice is served before a summons purporting to interrupt prescription can be effective.

[10] In my view, the argument loses sight of the purpose of condonation: it 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. First, it sets out the prerequisites for the institution of action against an organ of state: either a written notice or consent by the organ of state to dispense with the notice. Second, it states the requirements that must be met in order for the notice to be valid. And third, it states what the creditor may do

[6] Per Theron J, Kruger J and Radebe AJ concurring: case no 14939/05, handed down on 25 August 2008.
[7] The Afrikaans text uses ‘kan’ instead of ‘mag’.

should he or she have failed to comply with the requirements of subsecs (1) and (2): he or she may apply for condonation for the failure. Thus either a complete failure to send a notice, or the sending of a defective notice, entitles a creditor to make the application. Even this is qualified: it is only 'if an organ of state *relies* on a creditor's failure to serve a notice' that the creditor may apply for condonation. If the organ of state makes no objection to the absence of a notice, or a valid notice, then no condonation is required. In fact, therefore, the objection of the organ of state is a jurisdictional fact for an application for condonation, absent which the application would not be competent.

[11] It follows that where no notice at all is given by the creditor, and the organ of state relies on the failure, the creditor can nonetheless apply for condonation. A fortiori, if the notice is sent out of time, condonation may be granted. The argument that the application for condonation must precede the issue and service of summons (and that if it does not the summons is ineffective) is unpersuasive. It should also be borne in mind that where no notice is given, the organ of state's objection will in all likelihood only be made for the first time after proceedings have been instituted.

[12] The very purpose of the provision allowing condonation is to give a court a discretion to determine whether the organ of state can rely on non-compliance, whatever form that may take. If this were not so, as was pointed out by Somyalo AJ in *Moise*,[8] the requirement of written notice as a precondition to the institution of legal proceedings would be in itself an

[8] Above, para 13

absolute bar to such proceedings and would constitute a real impediment to the claimant's access to court. Indeed, a blanket bar to the amelioration by a court of the hardship worked by an inflexible precondition to the institution of proceedings could hardly survive constitutional scrutiny.

[13] The discretion may only be exercised, however, if the three criteria in s 3(4)(b) are met: that the debt has not been extinguished by prescription (at issue in this case); that good cause exists for the creditor's failure; and that the organ of state has not been unduly prejudiced. The Minister does not rely on either of the latter two criteria in this appeal.

[14] The conclusion that it is open to a creditor to apply for condonation after instituting legal proceedings is borne out also by the definition of 'creditor' in the Act. A 'creditor' means a person who 'intends to institute legal proceedings' or '*who has instituted such proceedings*'. The creditor who has already instituted proceedings may thus apply for condonation if the organ of state relies on the creditor's failure to serve a valid notice before proceedings are instituted.

[15] The counter argument to this conclusion is that s 3(4)(c) provides that if an application for condonation is granted the 'court may grant leave to institute legal proceedings'. This suggests, it is argued, that condonation cannot be granted after proceedings have already been instituted. The argument carries no force, in my view. The application for condonation is just that. It does not necessarily embody also an application for leave to institute

proceedings. But if it does, then clearly the court may grant such leave. If, however, proceedings have already been instituted, as in this case, then there is no need to provide that the court may grant leave. Expressly empowering a court to grant leave to sue does not impliedly mean that one cannot sue before applying for condonation.

[16] Further support for the view that complete non-compliance may be condoned is to be found in the provision that the organ of state may in writing consent to non-compliance (s 3(1)(b)). It would be extraordinary if the debtor could in effect condone the creditor's non-compliance, but not the court.

[17] In *Legal Aid Board*[9] Theron J concluded that because section 3(1) is couched in peremptory terms, a court has no power to condone a failure to serve a notice prior to the creditor's institution of action. Her finding that 'The court does not have the power to condone the institution of legal proceedings in circumstances where the provisions of s 3(1) have not been complied with' is in my view incorrect. It fails to take into account the purpose of condonation which is to forgive non-compliance or faulty compliance provided that the criteria in s 3(4)(b) are met, and does not accord with an earlier statement in the judgment that s 3(4)(a) 'confers upon the creditor the right to apply for condonation of the failure to comply with the provisions of s 3(1).'[10]

[18] Similarly, although the court below correctly found that condonation should be granted to De Witt for his late service of notice, the court's

[9] Above para 10.
[10] Para 9.

statement that condonation cannot be granted where no notice at all is served is incorrect. It is not consonant with the wording of s 3 or its purpose.

[19] Finally, the Minister argues that condonation cannot be sought after the institution of proceedings because of the peremptory wording of s 5 of the Act. The relevant parts of section 5 read:

'5 Service of process

(1) (a) Any process by which any legal proceedings contemplated in section 3 (1) are instituted must be served in the manner prescribed by the rules of the court in question for the service of process.

. . . . .

(2) *No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of 30 days after the notice, where applicable, has been served on the organ of state in terms of section 3 (2) (a)* (my emphasis).

(3) If any process referred to in subsection (1) has been served as contemplated in that subsection before the expiry of the period referred to in subsection (2), such process must be regarded as having been served on the first day after the expiry of the said period.'

[20] In my view, s 5 applies only to the normal situation where notice has been given timeously: the creditor must wait for 30 days before instituting proceedings. Nothing in the section overrides the court's power to condone the failure to give notice at all, nor the giving of defective notice. Where condonation is warranted s 5 simply does not apply.

[21] In the circumstances, I consider that because De Witt's summons was issued and served before the end of the prescriptive period, the court had a discretion to condone De Witt's late service of notice on the Minister after the proceedings were instituted. Since it was not contended before us that De Witt had not shown good cause for his delay, nor that the Minister was unduly prejudiced, condonation was correctly granted by the court below.

[22] The appeal is dismissed with costs.

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C H Lewis
Judge of Appeal

Appearances:

For Appellant:	R C Hiemstra SC
	Instructed by The State Attorney Cape Town The State Attorney Bloemfontein
For Respondent:	D L Van Der Merwe
	Instructed by Goussard Attorneys George Matsepes Bloemfontein