IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

NOT REPORTABLE

Case no: 620/2023

In the matter between:

MOTLALEPULA EMMANUEL MOKHETHEA	**Applicant**
and	
MINISTER OF POLICE	**First Respondent**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Second Respondent**

JUDGMENT

Govindjee J

[1] This is an opposed application for condonation for failure to comply with s 3(2) *(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act 40 of 2002 (the Act).

[2] The applicant was involved in a motor vehicle collision on 13 March 2020 in which three pedestrians were killed (the accident). The applicant was charged with three counts of culpable homicide. Following investigation, a J175 ‘Summons to appear in court’ was issued by the second respondent and served on the applicant by members of the first respondent on 21 January 2021. The applicant appeared before a magistrate and was found not guilty of the abovementioned charges on 21 March 2021.

[3] Notices in terms of s 3(2) of the Act were only sent by mail to the respondents on 21 April 2022, some months after the prescribed six-month period. Summons was issued on 3 March 2023.[1] The defendants raised special pleas pertaining to non-compliance with the provisions of the Act on 26 January 2024. The present application for condonation was served and filed a month later.

[4] The applicant alleges that he was wrongfully and unlawfully arrested and detained without a warrant in Johannesburg during January 2021, to face four charges of culpable homicide pursuant to the accident. Subsequent to his arrest and detention, he was warned by police officials to appear at the Humansdorp Magistrate’s Court on 27 January 2021 for a first court appearance, and was released after spending three hours in police custody. The applicant avers that there was no reasonable and / or probable cause for the prosecution that followed. The charges lacked substance, were ‘not true’ and malicious.

[5] The applicant is a lay person. His founding affidavit explains that he was not alive to his possible legal claims, let alone the requirements of the Act. At some stage during 2022, community members advised him of a possible claim. He then attempted to obtain assistance from numerous attorneys. This proved difficult due to lack of finances. He was eventually referred to his current attorneys of record, who agreed to represent him on 21 April 2022. Notices were issued the following day. No response having been received, summons followed in March of the following year.

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[1] Following a notice of exception served and filed on 14 June 2023, the applicant gave notice of his intention to amend his particulars of claim on 21 July 2023. Amended particulars of claim were filed on 24 August 2023.

[6] It is common cause that the matter had not been extinguished by prescription at that time. As to prospects of success, the applicant states only that his prospects are good, placing reliance on the averments contained in his particulars of claim. The applicant states that he would be severely prejudiced should this application be refused, whereas the respondents would suffer no prejudice that cannot be remedied by an appropriate costs order.

[7] The respondents bemoan the lengthy delay in serving the notices, arguing that this has been inadequately explained. On the merits, the first respondent denies the arrest and detention, indicating that the applicant was warned to appear in the Humansdorp Magistrate's Court on 27 January 2021, so that the claim is frivolous and will result in unnecessary expenditure on the part of the state. In reply, the applicant accepts that he was released by the police and warned to appear in court but avers that this occurred only after he had been arrested and detained for a period of three hours. Moreover, there was no prima facie evidence or proof that he was the cause of the collision, as a result of which he was discharged in terms of s 174 of the Criminal Procedure Act, 1977, on 21 March 2021. There is a dispute on the papers as to whether the witness statements are in favour of or against the applicant's version of events.

[8] The second respondent avers that there existed a prima facie case against the applicant considering the statements of various witnesses which indicate that he was on the wrong side of the road when the collision occurred. As such, its employees did not act with malice or *animus iniuriandi*, as alleged by the applicant. The second respondent's case is that the applicant had failed to establish prospects of success relating to his claims and not made out a case for good cause to explain the late filing of the application.

The condonation requirements[2]

[2] The following paragraphs, and aspects of the analysis, are drawn from this court's reasoning in *Simanga v The South African National Roads Agency SOC Ltd* [2023] ZAECMKHC 97 paras 6–18.

[9] The application is premised on s 3(4) of the Act.[3] Interpreting the requirements stipulated in the Act requires appreciation of s 39(2) of the Constitution, so that a generous and purposive interpretation may be given. Refusing the application would adversely implicate the applicant's constitutional right to access to court to advance the merits of his claim. This is an important consideration but does not to suggest that proper compliance with the set requirements may be overlooked. The requirements to be considered before a court may be 'satisfied' that condonation ought to be granted are conjunctive and are to be established by the applicant.[4]

[10] In *Minister of Safety and Security v De Witt*[5] (*De Witt*), the SCA held that a strict approach to interpretation would lose sight of the purpose of condonation.[6] The SCA concluded that either a complete failure to send a notice, or the sending of a defective notice, entitled a creditor to make application in cases where the state relied on the creditor's failure to comply with the Act.[7]

[11] The first requirement, that 'the debt has not been extinguished by prescription', has been met. 'Good cause', the second requirement, is linked to the failure to act timeously.[8] It requires consideration of all factors impacting on the question of fairness of granting condonation, bearing in mind 'the proper administration of justice'[9] and the 'interests of justice'.[10] Relevant factors, to be assessed in a balanced fashion, 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.[11]

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[3] In essence, no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given that organ of state notice in writing of the intention to institute legal proceedings. The notice must be served on the organ of state within six months from the date on which the debt became due. A court may grant an application for condonation if it is satisfied that: i) the debt has not been extinguished by prescription; good cause exists for the creditor's failure; and the organ of state was not unreasonably prejudiced by the failure.

[4] See *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) ('*Rance*') para 11.

[5] *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) para 5.

[6] Ibid para 10.

[7] Ibid para 10.

[8] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) ('*Madinda*') para 14.

[9] Ibid para 10.

[10] *Rance* above n 4 para 35.

[11] *Madinda* above n 8 paras 10, 12. The fact that the applicant is strong in certain respects and weak in others must be borne in mind in the evaluation of whether the standard of good cause has been achieved: *Madinda* above n 8 para 13.

[12] As will be illustrated, the case turns on the court being satisfied that good cause exists for the applicant's failure. A survey of decisions of the SCA offers guidance on the point.

[13] In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*,[12] the court *a quo* granted condonation in circumstances where it was satisfied that there was good cause for a two-year delay in service of the notice and based on the respondent's failure to demonstrate any prejudice. This decision was overturned by the SCA, partly on the basis that the company had erred by fixating on the three-year prescription period when it could have acted with greater alacrity in its investigations as to the identity of the debtor.[13]

[14] In *Madinda v Minister of Safety and Security* ('*Madinda*'),[14] the court *a quo* refused condonation based on 'complete disinterest' in the conduct of the appellant's case and the consequent failure to maintain contact with her attorney for a period in excess of a year.

[15] In *Ferreira v Ntshingila*,[15] the SCA was confronted with an application for condonation (based on non-compliance with the Uniform Rules) premised on an affidavit filed by a candidate legal practitioner.[16] The court bemoaned the failure of the supervising attorney to file an affidavit explaining the level of oversight that had been provided, or omitted, in respect of the work at hand.[17] The question remained whether condonation should be granted in circumstances where the merits of the matter were strong. The outcome was that condonation was refused based on the failure to provide a full and satisfactory explanation for the delays that had occurred. This in circumstances where the attorney had acted with gross negligence to the extent that the prospects of success became immaterial.[18]

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[12] *Rance* above n 4.
[13] *Rance* above n 4 para 41 and following.
[14] *Madinda* above n 8.
[15] *Ferreira v Ntshingila* 1990 (4) SA 271 (A) ('*Ferreira*').
[16] It must be noted that principles emerging from cases dealing with non-compliance with court procedure should not be applied uncritically to the requirement of good cause in s 3(4) of the Act: *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) ('*Lakay*') para 14.
[17] *Ferreira* above n 15 at 280E – F.
[18] Ibid at 281G – 282B.

[16] Finally, in *Shange v MEC for Education, KwaZulu-Natal*,[19] notice had been sent by the applicant's attorney to the national Minister of Education, rather than the respondent, in circumstances where the applicant was unaware of the error and the attorney took responsibility for the oversight. Both the High Court and SCA, in *MEC for Education, KwaZulu-Natal v Shange* ('*Shange*'), had no difficulty in holding that good cause had been established. This in the following circumstances: 'a devil's brew of mistakes, failures and delays in the prosecution of applicant's case' could not be attributed to the applicant, and where those responsible for looking after his interests had 'failed him miserably'; the applicant was not an ordinary litigant but was a minor seeking to advance a legitimate claim; the applicant was bona fide and enjoyed strong, uncontested prospects of success; and where the importance of the case to the applicant was manifest.[20]

[17] It is expected that the party seeking condonation will furnish a sufficiently full explanation of their default, so that the court is able to assess the way it arose, and the defaulter's conduct and motives.[21] The explanation must cover the entire period of the delay and must be reasonable.[22] As Heher JA explained in *Madinda*:[23]

'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.'

[18] This necessarily includes consideration of prospects of success.[24] A case without merit may render mitigation of fault pointless:[25]

'…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.'

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[19] *Shange v MEC for Education, KwaZulu-Natal* 2012 (2) SA 519 (KZD).
[20] Ibid paras 35, 37, 38; *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA) ('*Shange*') para 16 and following.
[21] *Madinda* above n 8 para 11, citing *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H – 353A. In *Lakay*, the SCA referred to 'an explanation of the default sufficiently full to enable the court to understand how it really came about …': *Lakay* above n 16 para 17.
[22] *Rance* above n 4 paras 35, 48.
[23] *Madinda* above n 8 para 12.
[24] *Rance* above n 4 para 37.
[25] *Madinda* above n 8 para 12.

[19] The court must be placed in a position to make an assessment on the merits to balance that factor with the cause of the delay as explained by the applicant:[26]

'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.'

[20] Beyond this, determination of good cause in each case depends on its own facts.[27]

[21] The third leg of the enquiry is separate and specific. It requires the applicant to satisfy the court that the respondents have not been unreasonably prejudiced by the failure to serve the notice timeously:[28]

'This must inevitably depend on the most probable inference to be drawn from the facts which are to be regarded as proved in the context of the motion proceedings launched by an applicant. The approach to the existence of *unreasonable* prejudice (not simply any level of prejudice …) requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.'

Analysis

[22] Summons having been issued and served before the end of the prescriptive period, the court enjoys a discretion to condone the late service of the notice.[29] By my calculation, the notices were served some nine months outside the time period stipulated by the Act. To be 'satisfied', in terms of s 3(4)*(b)* requires a decision based

[26] *Rance* above n 4 para 37.
[27] *Lakay* above n 16 para 17.
[28] *Madinda* above n 8 para 21.
[29] Ibid paras 11, 21.

on the ‘overall impression made on a court which brings a fair mind to the facts set up by the parties’.[30] It does not require proof on a balance of probability.

[23] The applicant’s case is premised on his lack of knowledge about the possibilities of instituting action, let alone the associated legal formalities, pursuant to what occurred following the collision. There appears to be no reason to cast aspersions on this averment. The applicant is a lay person and explains that it was only in 2022, a year after the collision, that he first became aware of a possible claim. Even if this occurred in January 2022, it is apparent that within a period of approximately three months he had taken concrete steps to press his potential claim. The intervening period is also properly explained on the papers: the applicant struggled to obtain assistance from ‘numerous attorneys as I had no finances to pay any attorney I had approached, until I was assisted by a member of my community who informed me about my current attorneys of record that were processing his claim as well, and they agreed to assist me as well on 21 April 2022.’

[24] Leaving aside the delay in bringing the present application, discussed below, little more could have been expected on the part of the applicant or his attorneys thereafter. The immediate dispatch of the notices followed. I am satisfied, in the present circumstances, that a full and proper explanation for the delay has been provided. The explanation is bona fide and must be assessed as sufficient and reasonable in respect of the applicant’s own conduct. To answer the question posed by *Madinda*, the applicant has produced acceptable reasons for nullifying in whole any culpability on his part which attaches to the delay in serving the notice timeously.

[25] There is, however, a paucity of information which makes it difficult to assess the prospects of success with any precision.[31] I accept the argument that, considering the failure to provide sufficient detail about the alleged arrest and detention, it cannot be said that the prospects are good. The risk of deficiencies in this respect lies with the applicant. Even considering what appears in the amended particulars of claim, the prospects of success are even at best in respect of the claim against the first defendant. Given the general difficulties in establishing ‘malice’ in

[30] Ibid para 8.
[31] See *Rance* above n 4 para 50.

respect of prosecutorial conduct, as well as the burden of proof in that regard, and considering only what appears on the papers before me, I must go further and hold that the prospects in respect of the claim against the second defendant are more questionable. Nonetheless, the explanation for the period of delay is sufficiently full, in my view, to compensate for this so that there is good cause to allow the applicant an opportunity to ventilate both claims in court.

[26] The respondents claim that they will suffer prejudice if condonation is granted in that it will have to expend a considerable amount of money in respect of litigating a frivolous dispute to finality. In assessing this component, I am mindful of the Act's rationale to ensure that state organs, with their extensive bureaucracy, are afforded sufficient opportunity to investigate and consider cases launched against them. Very little prejudice, if any, has been alleged by the respondents on the papers and what is cited is certainly not the kind of prejudice that constitutes 'unreasonable prejudice'. Complaining, as an organ of state, about the costs of litigation and highlighting the obvious benefits of timeous notice falls short of the test. As in *Shange*, the complaint of prejudice is general and unspecified and unrelated to any facts that indicate prejudice.[32] My overall impression is that the respondents were not unreasonably prejudiced by the applicant's failure.

[27] Having assessed the requirements for condonation, the court is in a position to consider whether to exercise a discretion to grant condonation according to the established principles.[33] This includes an assessment of the combined weight to be attributed to the three elements of s 3(4)*(b)*[34] and consideration of unexplained periods of delay in instituting condonation proceedings after the notice was *de facto* given.[35] I am mindful that provisions such as s 3 are designed primarily for the benefit of organs of state, rather than prospective litigants.[36] I am also alive to the reality that national state departments 'have a difficult task in monitoring and evaluating complaints and claims made against them … Their jurisdiction extends

[32] *Shange* above n 20 para 22.
[33] *Madinda* above n 8 para 16.
[34] Ibid para 29.
[35] Ibid para 20.
[36] *Mabaso v National Commissioner of Police and Another* 2020 (2) SA 375 (SCA) ('*Mabaso*') para 13.

over large geographical areas and encompass many individual employees and officials.'[37]

[28] Despite the suggestion in the Act that a creditor may await correspondence from an organ of state, confirming its intention to take the point, before launching an application for condonation, this is not the position of the SCA. The period between April 2022, when the notices were sent, and February 2024, when the application was launched, should have been fully explained. This is because the application should have been brought as soon after the default as possible to alleviate possible further prejudice to the other parties, who are required to gather and preserve information and evidence as part of preparation for trial.[38] As in *Madinda*, however, such delays cannot fairly be ascribed to disinterest on the part of the applicant. But the failure to have brought the application earlier is a reason for censure.[39] I intend to do so in respect of costs.

[29] Considering the relevant factual complex in a balanced fashion, and despite the limited assessment of the prospects of success, particularly in respect of the second respondent, it would be unjust to deny the applicant a trial on the merits. The court enjoys a wide discretion which, in present circumstances, is exercised in favour of the applicant in the interests of justice.

Costs

[30] An application for condonation in terms of the Act is unrelated to the usual case where condonation is sought due to failure to adhere to expected court procedure. The applicant seeks permission to enforce a right. Where such an application is opposed, costs will typically follow the result.[40]

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[37] Ibid para 49.
[38] *Madinda* above n 8 paras 14, 28: subsequent delay by an applicant, for example in bringing an application for condonation, ordinarily not fall within the enquiry as to 'good cause' but is part of the exercise of the discretion to condone in terms of s 3(4); Cf *Shange* above n 24 para 24. Also see *Mabaso* above n 36 para 49 and following.
[39] Ibid.
[40] *Lakay* above n 16 para 25.

[31] In this instance, however, it would be inequitable for the respondents to bear the applicant's costs. Following decisions such as *Dauth and Others v Minister of Safety and Security v Others*,[41] their opposition was not unreasonable and the application ought to have been launched sooner, alternatively an explanation should at least have been provided to explain this further period of delay. Fairness demands that no order as to costs should be made.

Order

[32] The following order is made:

1. Condonation is granted for the applicant's failure to serve the notices contemplated in s 3(1)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ('the Act') within the period laid down in s 3(2)*(a)* of the Act.

2. There is no order as to costs.

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A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 08 August 2024

Delivered: 20 August 2024

Appearances:

For the Applicant:	Adv T Mashiyi Chambers, Gqeberha

[41] *Dauth and Others v Minister of Safety and Security and Others* 2009 (1) SA 189 (NC) para 10.

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