



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CIRCUIT LOCAL DIVISION OF THE WESTERN CAPE
(HELD AT GEORGE, THEMBALETHU)**

REPORTABLE

CASE NO: 921/2023

In the matter between:

SWANVEST 11 (PTY) LTD

Applicant

and

**THE WESTERN CAPE PROVINCIAL MINISTER
OF TRANSPORT AND PUBLIC WORKS**

Respondent

Bench: P.A.L. Gamble,

Heard: 6 March 2024

Delivered: 18 March 2024

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on Monday 18 March 2024.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. The applicant owns a 5 storey commercial building in George known as Rentzburghof (the premises), which has a lettable area of some 4500 sq.metres. On 13 June 2016 it concluded a written agreement of lease for the premises with the respondent (the Department) for five years effective from 1 March 2016 to 28 February 2021. The material terms of the lease will appear more fully hereunder.

2. The applicant says that upon the conclusion of the lease at the end of February 2021 the Department failed to restore vacant possession and beneficial use of the premises to it, thereby breaching the terms of the lease. It claims further breaches of the lease in the Department's alleged failure to leave the premises in good order and condition, to reinstate them to their original condition, a failure to deliver the keys to the applicant and a failure to pay certain additional charges in respect of the premises during the period March 2021 to January 2022, while the applicant was deprived of vacant occupation.

3. On 16 August 2023 the applicant issued summons out of this court against the Department claiming damages in the sum of R6 871 170,64 arising out of its alleged breaches as aforesaid. There are 4 causes of action pleaded as Claims A to D respectively. In its particulars of claim the applicant made the customary allegation in matters such as this relating to its alleged compliance with s3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 (the Act) through the issuing of the prescribed statutory notice (the notice).

"18. The Plaintiff has delivered the required notice in terms of section 3 of Act 40 of 2002, and the Defendant has acknowledged receipt thereof. Copies of the notice and acknowledgment are attached hereto as **Annexures "POC4" and "POC5"** respectively."

I pause to point out that Annexure POC4 is dated 21 February 2023 and appears to have been sent by email. Annexure POC5 is dated 3 March 2023 and similarly was sent by email.

4. On or about 9 November 2023 the Department filed a plea on the merits disputing liability and, in addition, filed a special plea in which it disputed the validity of the notice.

“SPECIAL PLEA

1. *Ex facie* the Particulars of Claim, the cause of action sued upon in respect of Claims A and B arose on 23 April 2021 the date of the Plaintiff’s notice and demand at Annexure “**POC2**”¹.

2. *Ex facie* the Particulars of Claim, the cause of action sued upon in respect of Claims C and D arose on 1 March 2021 the date averred that the Plaintiff was deprived of vacant position and beneficial use of the premises.

3. Notice in terms of [the Act] was served on the defendant on 21 February 2023, more than six months after the claims arose.

4. The Defendant has not consented in writing to the institution of legal proceedings in terms of section 3(1)(b)(ii) of the Act.

5. The Plaintiff has not applied for condonation for its failure to comply with section 3(2)(a) of the Act.

6. This Honourable Court has not condoned the failure of the Plaintiff to comply with the provisions of the Act and has not granted leave to the Plaintiff to institute legal proceedings against the Defendant.

7. In the premises the Plaintiff’s claims do not comply with section 3 of the Act and therefore the Plaintiff was not duly authorized to institute legal proceedings against the Defendant.

WHEREFORE the Defendant prays that Claims A to D be dismissed, with costs.”

¹ Annexure POC 2 is a lengthy email dated 23 April 2021 from a representative of the applicant, Mr. van Schalkwyk, to Messer’s Brand and Arendse of the Department setting out the applicant’s position flowing from the Department’s alleged failure to afford the applicant vacant possession of the premises.

5. As a consequence of the point taken in the special plea, and on 30 November 2023, the applicant launched the present application requesting condonation under ss3(4)(a) and (b) of the Act for its failure to file the notice timeously. It further sought the Court's leave under s3(4)(c) of the Act to proceed with the action. At the hearing of the opposed application in this Court on 6 March 2024, the applicant was represented by Mr. W. King SC and the Department by Ms. R. Nyman SC.

THE RELEVANT PROVISIONS OF THE ACT

6. S3(1) of the Act stipulates that no legal proceedings for the recovery of a debt from an organ of state such as the Department may be instituted unless the creditor has given written notice to the Department of its intention to institute proceedings or the Department has consented to the institution of such proceedings. In terms of s2 of the Act the notice must be served on the Department within 6 months of the date on which the debt became due and must set out the facts giving rise to the debt and such particulars of the indebtedness as are known to the creditor.

7. S3(4) of the Act, which falls to be considered in this judgment, reads as follows.

“3(4)(a) If an organ of state relies on the 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.”

8. It is common cause here that the notice served by the applicant on 23 February 2023 complies with the requirements of s3(1)(a) and, further, that the debt has not prescribed. The issues are whether the applicant has established good cause under s3(4)(b)(ii) and the absence of unreasonable prejudice on the part of the Department under s3(4)(b)(iii).

THE MANDATED APPROACH IN CASU

9. Much has been written over the years regarding the correct approach in matters such as these. In order to avoid an unnecessarily prolix contribution thereto, it will suffice if I refer now only to the decision of the Supreme Court of Appeal (SCA) in CJ Rance², a matter involving a damages claim for a fire which destroyed a plantation.

“[33] In terms of s 3(4)(b) a court may grant condonation if it ‘is satisfied’ that the three requirements set out therein have been met. In practical terms this means the ‘overall impression’ made on a court by the facts set out by the parties.

[34] It was submitted on behalf of the company that it took all the necessary steps within its power to identify the owner and/or controller of the land in question. Counsel contended that such steps as had been taken by or on behalf of the company were reasonable and constituted ‘good cause’ within the meaning of that phrase in s 3(4)(b)(ii) of the Act. He submitted further that the Minister’s uncooperative attitude and the inaction of the DLA’s bureaucrats were what created prejudice for the Minister rather than the delay in serving the notice. The Minister’s servants failed to signpost the land nominally owned by the Minister and they were totally unresponsive to those affected by the fire. Whilst Du Plessis labelled the Minister and those representing her as being obstructive, counsel representing the company was rightly constrained to concede that at its worst for the Minister her bureaucrats were inept rather than wilfully obstructive.

[35] In general terms the interests of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.

² Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA)

[36] 'Good cause' within the meaning contained in s 3(4)(b)(ii) has not been defined, but may include a number of factors which will vary from case to case on differing facts. Schreiner JA in dealing with the meaning of 'good cause' in relation to an application for rescission, described it thus in *Silber v Ozen Wholesalers (Pty) Ltd*

'The meaning of "good cause" in the present sub-rule, like that of the practically synonymous expression "sufficient cause" which was considered by this Court in *Cairn's Executors v Gaarn* 1912 AD 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives'.

[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.

[38] Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant. Whereas good cause primarily concerns the applicant's conduct and its motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the protection of its interests by receiving timeous notice. The DLA serves as a good example in the present case as to why this requirement must be met. It has a large staff component dealing with many matters relating to the vast tracts of land it administers on behalf of the State. It plainly requires adequate time to sift, analyse, prioritise and decide on matters before entering into litigation.

[39] Condonation must be applied for as soon as the party concerned realises that it is

required. The onus to satisfy the court that all the requirements under s 4(b) of the Act have been met, is on an applicant, although a court would be hesitant 'to assume prejudice for which (a) respondent itself does not lay a basis'." (Internal references otherwise omitted)

10. As far as the prospects of success are concerned, the applicant limits itself to a short allegation in its founding affidavit that these exist and it refers the Court to its particulars of claim in the main action. As pithy as that allegation may be, I am satisfied, having regard to the background facts alleged in the affidavits, that the particulars of claim (read in the context of the plea on the merits) certainly make out a prima facie case for relief. This criterion is thus met by the applicant and no more need be said in that regard.

11. The nub of the application turns on the criteria relating to good cause and the absence of reasonable prejudice to the Department. In order to consider these criteria it is necessary to set out the salient facts of the matter.

THE RELEVANT FACTS

12. During the currency of the lease the Department concluded a sub-lease for 1600 sq. metres of the premises with the South African Social Security Agency (SASSA). This was to be used, inter alia, as a service point for recipients of social security grants. It is not clear when the sub-lease was concluded³ but, whenever that was, the applicant acquiesced therein and did not take issue with SASSA's presence on its premises.

13. When the lease terminated through the effluxion of time at the end of February 2021, SASSA still occupied its part of the premises. It seems as if the applicant was hesitant to seek the immediate eviction of SASSA from the premises as it appreciated the social importance of its function and that it contemplated the

³ Cl 24.1 and 24.2 of the lease provide that during the first three years of the lease the Department was permitted to sub-lease the premises (or any portion thereof) with the prior written consent of the applicant and after the expiry of that period, the Department was entitled to sub-lease without the prior written consent of the applicant.

conclusion of a further lease with SASSA as its tenant. Be that as it may, it is common cause that on 26 February 2021 the applicant's Mr. Daniel van Schalkwyk (the manager for property management and finance) and the duly authorized representatives of the Department (Messer's Edwellin Arendse and Kobus Brand) conducted a "walk through" of the premises. It was then agreed that the Department would submit to the applicant a detailed list of repairs that it considered needed to be done to the premises to restore them to the requisite condition and that the applicant could thereafter supplement or amend such list.

14. The issues discussed at the meeting were recorded by Mr. van Schalkwyk in an email to the Department dated 3 March 2021.

"After a walk through the building it was agreed:

1. The lessee will submit to the landlord a letter containing the remedial work to be done by the lessee, whereafter the landlord will comment thereon.
2. Two floors of the building could not be accessed due to unavailability of keys. The parties would meet on 1 March 2021 at 11h00 at the building for the inspection thereof.
3. Lessee will approach SASSA to expedite finalization of a future lease with the landlord.
4. The landlord place (sic) on record inter alia that:

4.1 The lessee is still occupying the building in that

4.1.1 SASSA occupies a section

4.1.2 The keys are with the lessee

4.1.3 Security is responsibility of same

4.1.4 The lessee has to do remedial work to the inside before hand over

4.1 (sic) The lessee is expected to continue paying rental (the February 2021 amount plus 5.5% escalation) monthly in advance ex 1 March 2021.

5. It is placed on record for negotiation purposes that the landlord is prepared to negotiate a monetary settlement in respect of 4.1.4 above.”

There was no response to that email from the Department’s representatives.

15. On 25 March 2021, Mr. van Schalkwyk wrote a follow-up email reminding the Department of the agreement of 26 February 2021.

“Our minutes of the 26th February meeting sent to you on 3 instant refers.

1. Just a friendly reminder that we still await your:

- Letter agreed upon in paragraph 1
- Assistance regarding paragraph 3. We made contact with your sub lessee (who occupies a section of the building namely SASSA Western Cape) who indicated that they are prepared to pay us an amount equal to what they paid you monthly; however, we if we are successful in our endeavours with SASSA any payments will be received without prejudice to our rights as contemplated in paragraph 4.1.4 and par 4.1 at the end of paragraph 4.1.
- Payment as per paragraph 4.1

2. We also confirm that the factual situation as described in paragraph 4.1.1 to 4.1.3 is unchanged and we specifically thank you for keeping your security team at the premises, safeguarding same whilst you are still occupying the building.”

The following day Mr. Brand emailed the applicant and indicated that the Department was attending to the matter and would respond as soon as possible.

16. As the email of 3 March 2021 suggests, in terms of cl 11.6 the Department was obliged to restore the premises to the satisfaction of the applicant at

the end of the lease and under cl 11.7 the applicant was entitled to recover the cost incurred in restoring the premises to that condition. I recite those clauses in full.

“11.6 If the tenant, at the expiry or termination of the lease or when it eventually vacates the leased premises, has not, yet properly repaired the leased premises to the reasonable satisfaction of the landlord in terms of that sub-clause, the landlord may have the alterations and additions removed and the leased premises repaired at the tenant’s expense. Any additions thus removed shall become the property of the landlord without him having to compensate the tenant for them.

11.7 The tenant shall on demand pay to the landlord the amount of expenditure that still has to be incurred by the landlord for the removal and repairs mentioned in sub-clause 11.6. A certificate signed by an architect of the landlord and in which the amount of expenses is stated, shall be prima facie proof of the amount due, and that the tenant is liable to pay it. This provision shall not prejudice the landlord’s right to claim damages for loss of rent and additional charges from the tenant if the leased premises, when vacated, cannot be let because the alterations and repairs have not yet been effected to the satisfaction of the landlord.”

17. The applicant says in the founding affidavit that it attempted to arrange a meeting with Mr. Brand, its architect and its representatives for 5 May 2021 for purposes of discussing the remedial work that needed to be done. It goes on to say that no one arrived to represent the Department at that meeting. After Mr. van Schalkwyk had called Mr. Brand, a certain Mr. Hendricks arrived an hour late and only remained in attendance briefly. Mr. Hendricks’ attitude was that the Department had made several alterations and improvements to the premises and that the cost thereof should be offset against any damages to the premises.

18. On 17 May 2021 Mr. van Schalkwyk addressed Messer’s Arendse and Brand in a lengthy email. The contents refer to various aspects regarding the poor condition of the building and the alleged alterations made thereto by the Department during the currency of the lease. They need not be repeated herein. However, the applicant’s dissatisfaction with the manner in which the Department approached the

circumstances surrounding the termination of the lease is reflected in the following paragraphs.

“4. We repeat our previous submissions that we are extremely disappointed in the manner how the Department has dealt with this building. We get the impression that the Department has become accustomed to simply ignoring agreed upon contractual obligations, simply because they are the Government. None of your replies, with respect, have any basis whatsoever in law if one has regard to the contract which we have signed with the Department.

5...

6. Our view remains as follows:

- you have not given us vacant occupation yet;
- Sassa (sic), as your subtenant, is still occupying the building consuming water and electricity; during our visit on 5 May 2021, most of the lights and air conditioners were switched on, even in the unoccupied sections. Therefore, the electricity account is still accruing;
- you remain responsible for water and electricity and all other services until vacant occupation is given to us.

7. We would like to emphasize again that you have not complied with our requests of 23 April 2021⁴, not even with par (d) thereof. Should we not receive your urgent feedback, we will have no other choice but to take legal advice, which will be a sad day having regard to our years of very good relationships and all our endeavours to solve this issue amicable(sic). In this regard we will be more than willing to meet the Department’s representatives and legal department in George in order to discuss the current situation. The Department’s failure to address these issues is causing us severe damages.”

19. On 18 May 2021, Mr. Brand replied to Mr. van Schalkwyk as follows –

⁴ This document was not placed before the Court in this application but it is annexed to the particulars of claim as “POC2”, which were placed before the Court. The request in the said para (d) was for the Department to urgently return the keys and access tags to the premises.

“At our exit inspection meeting held with you at the subject premises on 26 February 2021, you advised Edwellin and myself that you met with SASSA on Wednesday 26 February 2021. SASSA indicated to you that they want to continue with their occupation within the premises and is (sic) desirous to enter into a lease with you, but however they will have to get approval to sign a new lease for their occupation. You, as the Landlord, however stated that since SASSA is still in occupation of the premises, this Department still need (sic) to pay the full rental, until you have signed a lease with SASSA, notwithstanding that the Western Cape Government (WCG) have (sic) vacated the major part of the building. On 13 April 2021, this office informed you via a letter that SASSA falls under the National Government and that this Department cannot pay for their occupancy, as this will result in fruitless and wasteful expenditure, in terms of the Public Finance Management Act, Act 1 of 1999 (PFMA). Furthermore, you were also informed that SASSA, was informed during 2020, through various correspondence, that the WCG will vacate the premises on 28 February 2021.

As it is not clear exactly what was discussed/agreed at your meeting held with SASSA, numerous emails have been forwarded to SASSA (i.e. Ms. Ntsielo Sesiú) by this office to confirm the agreement with you. To date no response have (sic) been received from Ms. Sesiú.

The matter will now be referred to this Department's Legal Advisory Services to legally attend to this continued occupancy by SASSA, as well as your view to keep this Department liable for rental and other costs regarding their continued occupancy. The legal costs for this matter will either be for your account or SASSA, as SASSA is occupying the space with your knowledge. I can confirm that the Service Level agreement (SLA) was signed by representatives of SASSA and the Department of Social Development. This Department is not a party to the SLA.

Insofar as paragraph 3 of your letter is concerned, this office will respond appropriately and separately to you as soon as possible.”

20. Mr. Brand is described in the email as the “Portfolio Officer” in the Department’s “Chief Directorate: Immovable Property”. His response in this email appears to show a singular misunderstanding of the fact that there was no privity of contract between the applicant and SASSA, of the Department’s contractual obligations to the applicant under the lease and of its common law obligations both to

SASSA and the applicant under the sub-lease. But that is, no doubt, what will be sought to be explored at the trial of this matter. For now, it suffices to say that the Department had drawn the proverbial line in the sand and that the applicant was not likely to be able to rely on the Department's cooperation or goodwill going forward. Importantly, the papers filed on behalf of the applicant herein demonstrate repeatedly that it did not wish to have to resort to litigation with the Department. It made numerous overtures over a protracted period of time in an endeavour to settle the matter amicably but was rebuffed by the Department at every turn.

21. The applicant says that the Department only returned the keys to the premises and the electronic access tags during July 2021 and even then the keys were incomplete, thus limiting the applicant's access to the building. The applicant explains its predicament, which was not entirely of its own making, as follows in the founding affidavit.

"[19] The Plaintiff was therefore left in the unenviable position that it had to first try and establish what the position was pertaining to SASSA and then to try and make sense of the extent of the repairs to the building. Although the Plaintiff had no agreement with SASSA, I fully appreciated the important purpose of SASSA and it was therefore preferable not to take legal action against SASSA but to rather try and establish the details of their occupation, such as the anticipated time they would occupy the property and what infrastructure they will use. I simply couldn't out of the blue disconnect the electricity of the building to start maintenance and repairs while SASSA would still occupy the property, therefore making it extremely difficult to do planning for the Plaintiff.

20. It needs to be mentioned that the building is 4500 [sq. m]. It is a 5 storey building in George city centre. Various possibilities exist in renting such a building out. Depending on the market, one can either rent out the entire building to a tenant (such as the Defendant), or otherwise if one cannot find one tenant, the option arises that one needs to cater for many occupants. The entire structure of the building then needs to be accordingly fixed in accordance with what it is what one intends to do. Again, the fact that SASSA was occupying the building without any specified details made it extremely difficult for me to first of all assess the damage (and the claim against the Defendant), but secondly to quantify the damages.

21. I instructed experts to assess the damage to the property after receiving the keys in July 2021. It was almost an impossible task at that stage as the Department refused to provide any details of its so-called decanting process or money spent. I could only do proper planning once I was certain that SASSA would remain in the building. I did not want to do all the necessary repairs and quantifications only to find out that SASSA's portion of the building will also be vacant soon."

22. In an attempt to address the practicalities of the situation, the applicant then attempted to negotiate a lease with SASSA for that part of the premises it occupied. But this could only be done once the lease was formally advertised through a statutory tender process. The first tender for which the applicant tendered closed on 10 September 2021 but it was not awarded to the applicant and the tender thereafter lapsed. A second tender closed on 28 February 2022 and the applicant filed a bid accordingly. SASSA extended the validity period on 3 occasions – ultimately until 21 October 2022. This tender, too, was not awarded.

23. A third tender was issued by SASSA on 19 October 2022, with closing date 9 November 2022. The applicant decided not to apply but bemoans the fact in the founding affidavit (deposed to on 29 November 2023) that a year after the third tender process was commenced, SASSA remained in occupation of the property.

24. The applicant consulted its attorneys during January and February 2022 and says it was advised not to "pull the trigger of litigation lightly" but rather to try and resolve the dispute without reverting to litigation. On 9 March 2022 the applicant's attorney, Mr. van der Merwe, addressed a long letter to the Department, a letter which could be construed as the applicant's letter of demand. Once again I recite only the material portions thereof.

"11. The purpose of this letter is not to provide the Department with a comprehensive and detailed chronology of events and legal submissions but to rather attempt to resolve any disputes amicably.

12. We fully appreciate that the persons to whom we address this letter in the Department, might want to refer this letter to its legal department.

13. We would like to invite, again, the Department and/or its legal representatives, to a further meeting in a final attempt to settle any disputes between the parties. These disputes are:

13.1 The repairs that had to be conducted in order to bring the building into an acceptable condition;

13.2 Damages suffered as a result of the fact that our client could not occupy the property on 1 March 2021;

13.3 The issuing of the architect's certificates in terms of clauses 10.2 and 11.7 of the lease agreement.

14. We will have to request you to provide us with a date, within the next 14 days. If we do not receive a date, our client will assume that the Department does not want to participate in any further meetings or communication in order to resolve disputes. Our instruction will then be to merely proceed with the action against the Department.

15. We however trust that this will not be necessary and that we will hear from you."

25. Mr. Brand acknowledged receipt of Mr. van der Merwe's letter the same day and on 17 March 2022 informed Mr. van der Merwe that the matter had been forwarded to the Department's "Legal Advisory Services" and that a response would be forthcoming. On the same day Mr. Wayne Little, who is employed in the Department of the Premier in the Western Cape Government, emailed Mr. van der Merwe and informed him that he would need an indulgence in order to take proper instructions, promising a response by 11 April 2022 at the latest. Mr. van der Merwe replied immediately that the dispute should be resolved constructively and through negotiation.

26. When the 11 April 2022 deadline came and went, Mr. van der Merwe sent yet another email to Mr. Little and asked for a reply within 7 days. This arrived on 21 April 2022 in the form of a brief and blunt denial of liability with a reservation of the Department's rights. Mr. van der Merwe replied the following day noting that his letter of 9 March 2022 did not seek an admission of liability from the Department but rather a discussion on the issuing of the architect's certificate. He expressed his dismay at

the uncooperative and bullying attitude adopted by the Province and informed Mr. Little that the applicant would proceed to enforce its contractual rights.

27. On 21 February 2023 the applicant issued the aforesaid notice under s3(1) of the Act, to which there was no response from the Department and, as stated, on 16 August 2023 summons was issued. It was only in early November 2023 with the filing of the special plea, that the applicant knew that it was required to apply for condonation in terms of s3(4)(a) of the Act. It did so promptly thereafter: it lodged this application on 30 November 2023.

GOOD CAUSE

28. In Rance the SCA noted that the point of departure in a matter such as this is the interests of justice.

“[35] In general terms the interests of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.” (Internal references omitted)

29. And in Van Wyk⁵ the Constitutional Court offered this guidance as to what may be considered with regard to the interests of justice.

“[20] This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.” (Internal references omitted)

⁵ Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC)

30. Ms. Nyman was critical of the time taken by the applicant in advancing its case and pointed to significant time gaps in the chronological development of the saga. Mr. King on the other hand urged the Court to have regard to the manner in which the case evolved, pointing out that the determination of when the cause of action arose was difficult to pinpoint for the reasons explained in the founding affidavit, in particular, the difficulty in quantifying the applicant's claim.

31. As I see it, there are essentially two components to the applicant's claim. Firstly, there is the Department's holding over through the failure to give the applicant vacant possession at the end of February 2021 and the concomitant failure by the Department to deal with the problem it had created by granting SASSA a sub-lease. Yes, there was an accommodation of SASSA by the applicant which took rental payments from it in the interim but the ultimate responsibility for SASSA's presence on the premises seems to have lain with the Department. I say seems, because this is ultimately an issue for determination by the trial court.

32. The second component to the claim is the cost of restoration of the building to a condition which will enable the applicant to lease it out afresh, whether with SASSA as a tenant or otherwise. At an early stage of negotiations (it would seem around May/June 2021) the applicant was in possession of the architect's certificate which had quantified certain of the damages. It sought to discuss the extent thereof with the Department as it believed had been agreed at the "walk through" inspection on 26 February 2021. Yet when it raised this issue, the Department prevaricated and appears to have reneged on the understanding which the applicant says the parties had.

33. The applicant's difficulties are described as follows in the founding affidavit.

"[32] The difficulty the Plaintiff had was to determine the extent of any 'improvements' which the Department might have made, coupled with normal wear and tear taking into account the damage to the property which the plaintiff may claim under the lease agreement. In a building of 4500 [sq. m] it is not an overnight exercise. Subcontractors and the Plaintiff's maintenance

team took months to try to establish these facts and then to try and quantify same. The absence of the information requested by the Plaintiff, i.e. the partitioning and electrical articulation plan and COC certificates complicated and frustrated this process to a great extent.”

34. With reference to Mr. van der Merwe’s letter of 9 March 2022 referenced above, the applicant explained its difficulties as follows.

“[30] It needs to be borne in mind that Mr. van der Merwe requested the Defendant to enter into bona fide, constructive discussions in order for dispute points to be minimized. The reason for this was that it was extremely difficult for the Plaintiff to quantify damages first of all where SASSA was still in the building and secondly where the Defendant failed to provide any details pertaining to the alleged ‘improvements’. The reason was therefore not to already claim money from the Department but to rather exchange information so that the dispute points could be minimized to the extent possible. The Defendant’s reluctance to enter into these discussions was therefore a great contributing factor to the uncertainty which the Plaintiff found itself in.”

35. What one then sees when the matter is considered overall, is not a prospective plaintiff standing by idly while the prescription-clock was ticking. Rather, it was actively trying to resolve the conundrum by engaging with the Department before being obliged to resort to litigation as the final step. And when it finally did so by giving the s3 notice on 21 February 2023, the response of the Department was not to inform the applicant that its notice was out of time, but rather to say that the notice had been received, that the matter was under investigation and that the Department would revert in due course. There is no indication that the Department did revert before summons was issued.

36. Further, it is not every late s3(1) notice that requires an application for condonation under s3(4): the debtor may waive the necessity therefor under s3(1)(b) and the matter then proceeds as normal. Here, the non-compliance point was taken for the first time in the special plea and that was ultimately when the applicant was alerted to the necessity to apply for condonation.

37. In considering whether the applicant has established good cause as the Act requires, I am guided by the advice given by Innes CJ in Cohen Brothers⁶.

“In the nature of things it is hardly possible, and certainly undesirable, for the Court to attempt to [define good cause]. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown.”

38. In the result, and having regard to all of the circumstances of the matter, I am satisfied that the applicant has shown good cause for its failure to deliver the notice timeously.

ABSENCE OF PREJUDICE

39. In the founding affidavit the applicant makes the following allegations regarding the absence of reasonable prejudice to the Department.

“[34] From the chronological order of events as explained above, I will humbly submit that the Defendant suffered no prejudice by the delayed (formal service) of the Section 3 Notice. The Department has been copied in the entire process, in an open and transparent manner, from the day they vacated the premises. During this process the Department confirmed twice, even before the Section 3 Notice was sent, that the matter would be referred to their Legal Advisory Services. There could therefore have been no prejudice for the defendant. Legal argument will be presented to the Honourable Court at the hearing of this matter.”

40. The answering affidavit was deposed to by Mr. Shane Duane Hindley, the Department’s “Head of Component” in its “Chief Directorate: Immovable Asset Management”. Mr. Hindley’s name does not feature anywhere in the exchanges between the parties which preceded the issue of summons and I agree with Mr. King’s submission that it is difficult to believe his claim of personal knowledge of the facts deposed to in the affidavit. Rather, his affidavit is replete with bare and

⁶ Cohen Brothers v Samuels 1906 TS 221 at 224

unsubstantiated denials which suggest a rote, legalistic approach to the matter. One example will suffice.

41. In para 43 of the answering affidavit (which is in reply to para 15 of the founding affidavit) Mr. Hindley purports to deny the first three sentences of the said para 15, the first two sentences whereof read “*On 18 May 2021 Mr. Kobus Brand replied to Annexure ‘LJ3’. This email is attached (sic) Annexure ‘LJ4’.*” Mr. Hindley goes on to admit the fourth sentence of para 15. The denial of emails attached to the founding affidavit is nonsensical and, while one would have expected both sentences to have been admitted, they have not been.

42. Further, there is the customary attempt in the introduction to the answering affidavit to attribute the deponent’s reference to matters not within his personal knowledge to information conveyed to him. “*Where I rely on information conveyed to me by others, I believe same to be true.*” Yet, in the body of the affidavit the deponent does not properly reference the identity of those who conveyed hearsay evidence to him and, most importantly, he does not attach any confirmatory affidavits by such persons to the answering papers.

43. This omission was seized upon in the replying affidavit deposed to on 13 February 2024. In an attempt to salvage the situation, the Department produced confirmatory affidavits from Messer’s Arendse, Brand, and Hendriks deposed to 19 February 2024. These were never filed locally in the George Circuit Court but a filing sheet dated 21 January 2024 bears the date stamp of the Registrar of the Western Cape High Court, Cape Town. There is no affidavit explaining the delay nor asking for the affidavits to be received into evidence. When the point was raised by Mr. King during argument Ms. Nyman sought to hand the set of affidavits up from the Bar, once again *sans* any explanatory affidavit. Mr. King understandably objected and the Court declined to receive same as evidence.

44. Against that background, it is difficult to understand the bald allegation in the introductory part of the answering affidavit regarding prejudice.

“29. Moreover, the Defendant was unreasonably prejudiced by the failure to comply with the notice requirement.

30. Given the lengthy period of delay, it has been difficult to obtain copies of all the relevant documents and communications. The witnesses’ memories have faded due to the excessive period of delay.”

45. The Department does not identify which witnesses’ memories have faded and, it might be mentioned, there is only a limited number of them who are likely to be required to give evidence in the matter. Moreover, there is a well-documented trail of correspondence which should be of use in refreshing any ailing memories.

46. Further, there is Mr. Hindley’s reply, in para 57 of the answering affidavit, to para 34 in the founding affidavit referred to above.

“I deny the contents of this paragraph and put the Plaintiff proof thereof. In amplification of this denial, I state the Plaintiff has neither been open or transparent. The Plaintiff has failed to disclose the contents of its negotiations with SASSA, neither has it given the correct factual situation. I stand by my contention that the Plaintiff has brought about improvements to the building and that no repairs needed to be done. It cannot be placed in dispute that the Defendant has spent a considerable amount of money bringing about improvements, maintenance and repairs as shown in “PL 1” to “PL 12” of the Plea.”

It will be noted that the Department has not alleged that it will suffer any prejudice (let alone unreasonable prejudice) if condonation is granted in this matter. Rather it has chosen to address the merits of the claim, which will of course be tested if the matter goes to trial.

47. In matters such as these, in the determination of unreasonable prejudice (and I stress the word “unreasonable”) the enquiry shifts from the allegations which can be made by an applicant on the facts within its knowledge, to consideration of the

allegations made by a respondent which will ultimately be far better placed to describe its prejudice. In Madinda⁷ the SCA put it thus.

“[21] The third leg of s 3(4)(b) required the appellant to satisfy the court that the respondent had not been unreasonably prejudiced by the failure to serve the notice timeously. 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, an aspect which the judgment of the court a quo blurs) 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.”

48. When the matter is considered overall, I am unable to discern any unreasonable prejudice which the Department will suffer if the matter goes to trial. In fact, the allegations made in para 57 of Mr. Hindley’s affidavit suggest that the Department is ready and able to challenge the allegations made in the particulars of claim and that its witnesses are available to testify in that regard. I accordingly find that the applicant has established the third criterion for consideration in this application.

CONCLUSION

49. At the end of the enquiry, the Court is required to consider all of the evidential material before it and have regard to “*the overall impression...which brings a fair mind to the facts set up by the parties.*”⁸ In so doing a court must have regard to a plaintiff’s fundamental right to have its claim decided fairly and in accordance with the dictates of justice.⁹

⁷ Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA). See also Rance at [38] & [39]

⁸ Madinda at [13]

⁹ Malindi at [29]

50. The applicant's claim is substantial – just short of R7m – and it informed the Department of its intention to hold it to the terms of the lease at an early stage after the termination thereof. The main problem which then confronted the applicant before it could properly calculate the extent of its claim – how to deal with SASSA's continued occupation of the premises – was largely not of its own making, given that the Department had allowed SASSA to occupy part of the premises. In my considered view, it would be unconscionable in these circumstances to preclude the applicant from advancing its claim further. As the Constitutional Court put it in Van Wyk, this would not be in the interests of justice.

COSTS

53. Ordinarily, costs should follow the result but Ms Nyman contended that, since the applicant was asking the Court for an indulgence, the Department should not have to bear the applicant's costs. While there is merit in that submission, I am guided in this matter by the approach of the SCA in Lakay¹⁰.

"[25]...Ordinarily, in applications for condonation for non-observance of court procedure, a litigant is obliged to seek the indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter's costs if it does oppose, unless the opposition was unreasonable. I doubt that this is the correct approach in matters such as the present, as an application for condonation under the 2002 Act has nothing to do with non-observance of court procedure, but is for permission to enforce a right, which permission may be granted within prescribed statutory parameters; and such an application is (in terms of s 3(4)) only necessary if the organ of state relies on a creditor's failure to serve a notice. In the circumstances there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result..."

¹⁰ Premier, Western Cape v Lakay 2012 92) SA 1 (SCA) at [25]

ORDER OF COURT

The following order is made:

- A. The Applicant's non-compliance with the six-month period stipulated in section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2000 (the Act) and its late compliance with the remainder of the provisions of section 3(2) of the Act, are condoned as provided for in sections 3(4)(a) and (b) of the Act.
- B. The applicant is granted leave to proceed with the action instituted by it against the Respondent in this Court under the above case number, as provided for in section 3(4)(c) of the Act.
- C. The respondent is ordered to pay the applicant's costs of suit herein.

GAMBLE, J

APPEARANCES**For the applicant:**

Mr. W. King SC

Instructed by Van der Merwe & Van der Merwe Attorneys

George

For the respondent:

Ms. R. Nyman SC

Instructed by The State Attorney

Cape Town