THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 4359 / 2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

10 June 2022 ....
DATE SIGNATURE

In the matter between:

AVENIR HOLDING (PTY) LTD **APPLICANT**
(Registration No. 2014/0-59543/07)

and

DEPARTMENT OF PUBLIC WORKS, **1ST RESPONDENT**
ROADS AND TRANSPORT,
MPUMALANGAPROVINCIAL GOVERNMENT

MEC FOR THE DEPARTMENT OF PUBLIC **2ND RESPONDENT**
WORKS, ROADS AND TRANSPORT,
MPUMALANGAPROVINCIAL GOVERNMENT

NTSANGALALA HOLDING (PTY) LTD **3RD RESPONDENT**
(Registration No. 2012/053841/07)

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 10 June 2022.

J U D G M E N T

RATSHIBVUMO J:

[1] In this application, the Applicant seeks condonation over its failure to issue a notice of its intention to institute legal proceedings against the First and the Second Respondents (the Respondents), as stipulated in section 3(1)(a) and 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 (the Act). The application is opposed by the Respondents. According to the Applicant, the cause of action against the respondents emanates from a cession agreement entered into between the Applicant and the Third Respondent which came into force on 03 December 2018.

[2] The background leading to a cession agreement is that in 2018, the First Respondent and the Third Respondent had entered into a contract to repair the flood damaged bridge or Road D2968 between Numbi and Makoko in Enhlazeni Region. When the Third Respondent encountered difficulties in honouring its obligations, it entered into cession agreement with the Applicant in terms of which the Applicant would do the work and the payments from the First Responded were ceded to it. There is dispute as to the duration of this cessation or when it lapsed. However, the Applicant claims to have performed

the work over the period during which it is disputed if the cession was still intact or it had lapsed. Payments from the First Respondent during the undisputed cession period were honoured. It is the payments during the period in disputed which the First Respondent claims to have paid directly to the Third Respondent which gave rise to the cause of action.

[3] The facts surrounding the cession agreement, its extension and/or its termination are relevant regarding the prospects of success of the claim against the Respondents. This has to be considered for purposes of condonation application. It is therefore apposite to unpack the factual matrix before determining the issues in dispute.

[4] According to the applicant, the Third Respondent approached the First Respondent to acquire consent to have the contract ceded to it. When this was acceded to, the Applicant entered into a cession agreement with the Third Respondent and the First Respondent on 27 November 2018. To this extent, the Applicant attached a document marked as MM2 which it referred to as the cession agreement. The cession came into operation on 03 December 2018. The Applicant commenced with the work on 12 December 2018. According to the Applicant, all the parties agreed to extend the cession agreement on 08 April 2019.

[5] On 07 December 2019, the Applicant received a letter from the Third Respondent informing it that its services will no longer be required at the site. This letter was interpreted by the Applicant as an attempt to terminate the cession agreement. The Applicant's attorneys wrote back to the Third Respondent questioning the lawfulness of its termination of the cession. On 22 January 2020, another letter was sent to the First Respondent by the Applicant's attorneys in which they demanded from it payment of R379 232.82 for work performed but not yet paid for, R6 330 791.46 in

damages and R3 159 620.47 for loss of profit. For this reason, that the Applicant asserts that the cause of action arose on 22 January 2020 and that it should have sent a notice of the intention to institute legal proceedings in terms of the Act, within six months from this date. From 22 January 2020 to the date on which this application was launched is about 21 months, which by far exceeds the six months stipulated in terms of the Act.

[6] The Respondents dispute much of the factual disposition by the Applicant. An affidavit was deposed by a Chief Director working for the First Respondent in opposing this application, on behalf of the Respondents. From this affidavit it is apparent that the document referred to in the founding affidavit as the cession agreement, is actually an internal memo within the Department of Public Works, Roads and Transport. The Applicant is not even a signatory in this memo. According to the Respondents, the contract between the First Respondent and the Third Respondent was entered into in 2016 and not 2018 as alleged by the Applicant.

[7] At the Third Respondent's behest, the First Respondent acceded to the request to cede the contractual rights and obligations to the Applicant. This was after the Third Respondent ran into cash flow problems. A cession agreement signed by the Applicant, the First and the Third Respondent was attached to the affidavit deposed to on behalf of the Respondents.[1] According to it, the Third Respondent ceded only a portion of the work the monetary value of was R3 884 046.70. This value is also reflected in a sub-contract entered into between the Applicant and the Third Respondent.[2] Then Respondents aver that the cession ceased to exist when the scope of work was completed by the Applicant and payment was made by the First Respondent. A total of R5 158 587.71 was paid to the Applicant. The reason why more money than

[1] See p. 78-82 of the paginated bundle.
[2] See p.83 of the paginated bundle.

what was agreed in the cession agreement was paid is that the Applicant performed further work at the request of the Third Respondent, and the latter consented that direct payment, be made to the Applicant for the extra work performed, that fell outside the cession agreement.

[8] It is the version by the Respondents that once work was done and the payment was honoured, the cession was extinguished all the rights that the Applicant had against the First Respondent reverted back to the Third Respondent. For that reason, the First Respondent continued to pay the Third Respondent directly, once it received the payment certificate from the Consulting Engineer. The Respondents aver therefore that they have no financial obligations towards the Applicant. They aver further that the Applicant lacks *locus standi* to institute legal proceedings against them.

[9] The law

Relevant parts of section 3 of the Act are quoted hereunder.

> 3 (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-
>
> …
>
> (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
>
> …
>
> (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.

[10] In the heads of arguments filed for the Applicant, the court was referred to the judgment of *Minister of Public Works v Roux Properties*[3] where the Supreme Court of Appeal (the SCA) said the following,

"The second requirement of 'good cause' involves an examination of 'all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice', and may include, depending on the circumstances, '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] In this judgment, the SCA quoted with approval from its earlier decision of *Madinda v Minister of Safety and Security*[4] where it held,

"The second requirement is a variant of one well known in cases of procedural non-compliance. See *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 227I - 228F and the cases there cited. '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."

[3] (779/2019) [2020] ZASCA 119 (1 October 2020) at para 18
[4] [2008] ZASCA 34; 2008 (4) SA 312 (SCA) at para 8.

[12] In an attempt to show good cause over the delay, the Applicant explains that the debt became due on 22 January 2020. The country was placed under Level five lockdown under the Disaster Management Act, No. 57 of 2002 on 26 March 2020, due to Covid-19 pandemic. The Applicant stopped operating until August 2020 when the country was placed under Level three lockdown. By the end of 2020, the Applicant terminated its attorneys mandate due to lack of finances. In March 2021, the Applicant instructed the debt collectors to recover this debt, with no success. It was only in August 2021 that the Applicant appointed its current attorneys.

[13] The court is called upon to decide if there is good cause both on terms of the explanation regarding the failure to give the notice to the Respondents and also the prospects of success. In order to determine if there is a reasonable explanation for the delay or failure to send out a notice, it is necessary to determine the period that lapsed from the date the debt became due. It is difficult to comprehend how the Applicant concluded that the debt became due and payable on 22 January 2020. The only occurrence on that date is that the Applicant's attorneys wrote a letter of demand to the First Respondent. I do not understand how the writing of such a letter can be determinative of the debt being due. I am of the view that the date the Applicant received a letter from the Third Respondent informing it to stop all the work and vacate the site is the date on which the debt became due and payable. This is because according to the Applicant, the Third Respondent was repudiating its contractual obligations through the contents of the letter. That date is 07 December 2019.

[14] From the Applicant's explanation, it is suggested that due to lockdown regulations, the Applicant was closed down and not operational and as such, could not have sent the notice to the Respondents as envisaged in the Act. It is

however common cause that even under Level five lockdown, various institutions were operating virtually and through email correspondence. The Applicant was also writing and sending letters during the period it claims to have not been operational.[5] There is no explanation on why the said notice was not dispatched via email. Further to this, there is no explanation as to why the notice was not sent from August 2020 when the Applicant resumed operations until more than a year later when this application was launched. With no further explanation, I cannot find that there is a good cause for not sending out the required notice.

[15] The second leg requirement on the good cause is a fatal blow to the Applicant's case in that there are no prospects of success even if the condonation was to be allowed. The Respondents exposed the Applicant's case as stillborn in that the affidavit does not disclose any cause of action as the cession agreement which forms the backbone of its case was not attached to it. Without a cession agreement, the Applicant lacks the *locus standi* to institute any action against the Respondents as the valid contract at the time of the cause of action was only between the Third and First Respondent. It is the Respondents who came up with a cession agreement in the answering affidavit, which disproves most of the Applicant's averments in that contrary to the Applicant's assertions, the cession agreement was limited in terms of the scope and value of the work.

[16] The Applicant also failed to attach the extension of the cession agreement. The Respondents dispute that there was any such extension. Realising that there was no case made out to show that there were prospects of success, the Applicant argued that this should be left for the trial court to determine. In the same vein the Applicant agrees that it has a duty to show that there were prospects of success before condonation can be granted. In my view, the test

[5] See letters on p. 33, 34, 35, 36 & 38 which were all penned down in June 2020 while the Applicant claims to have resumed operation in August 2020.

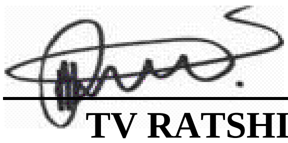
is similar to the one applied when leave to institute proceedings is sought against a company under business rescue in terms of section 133 of the Companies Act, No. 71 of 2008. As it was held in *BP Southern Africa (Pty) Ltd v Intertrans OilSA (Pty) Ltd,*[6] if the prospects of success were weak, meaning, the merits of the main relief sought were bad, the prayer for leave to institute the legal proceedings should be refused.

[17] In this case, the Applicant had no contractual agreement in force when the cause of action arose. The only agreement that existed is the cession agreement which from its wording, clearly exhibits that it lapsed with the performance of the work and the payment of the amount stipulated therein. If the Applicant has a case from the facts it presented, it would be against the Third Respondent. There is therefore clearly no good cause shown, both in respect of the delay and the prospects of success. For that reason, the application stands to be dismissed.

[18] For these reasons set out above, I make the following order.

[18.1] The application is dismissed.

[18.2] The Applicant is ordered to pay the costs of this application.



TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

[6] 2017 (4) SA 592 (GJ) At 598I–599C.

FOR THE APPLICANT:	**: ADV IN KRUGER**
INSTRUCTED BY	**: STEGMANNS INC**
	: NELSPRUIT
FOR THE RESPONDENT	**: ADV. T NGWENYA**
INSTRUCTED BY	**: STATE ATTORNEY**
	MBOMBELA
DATE HEARD	**: 26 MAY 2022**
JUDGMENT DELIVERED	**: 10 JUNE 2022**