



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No:	244/2021
Heard:	27 / 08 / 2021
Delivered:	03 / 09 / 2021

In the matter between:

DON DANIEL SOLOMON

Applicant

and

SOL PLAATJE MUNICIPALITY

Respondent

JUDGMENT

Moses AJ

INTRODUCTION

1. This is an application for condonation in terms of section 3(4) of the Institution of Legal Proceedings Against Certain of State, Act 40 of 2002 ("Act 40 of 2002").
2. The salient facts and background of this application can be summarised as set out herein below.

3. An accident happened on or about 27 August 2019, in which the Applicant sustained serious injuries. His medical doctor then advised him about the possibility of a claim for such injuries. He then decided to get legal advice.
4. The Applicant consulted with his attorney on 01 June 2020¹.
5. The Applicant's attorney of record thereafter sent a letter, the Required Statutory Notice in terms of Section 3 of ILPACOSA 40 of 2002, dated 18 June 2020, to the Municipality on 24 June 2020 per registered post².
6. The Municipality's Insurer, Guardrisk, then responded to this Statutory Notice, on behalf of the Municipality, by way of two letters, both dated 27 August 2020:
 - 6.1 in their first letter³, they repudiated the claim on the basis that "*your claim is not recoverable under our insured's policy and we are unable to accept liability in this matter*". That was their initial, and first ground for repudiating the claim.
 - 6.2 in their second letter, the insurance company then added a second ground for repudiating the said claim, namely, the Applicant's non-compliance with section 3(2) of Act 40 of 2002, in that the required Statutory Notice was NOT given (to the Municipality) within six (6) months after the accident had happened – i.e. when the debt became due⁴.
7. The Applicant then requested the Insurance Company via a letter dated 7 September 2020⁵, in which the Municipality was copied, for condonation i.e. their written consent to institute the proceedings despite the said Notice having been given out of time, later than 6 months after the accident. This is permissible in terms of Section 3(1)(b) of Act 40 of 2002.

¹ Record, p. 12

² Annexure 'DDS2', p. 12

³ 'DDS3', p. 29

⁴ Record, p. 30

⁵ 'DDS4', p. 34

8. No such written consent was forthcoming from either the Municipality and/or the insurance company, Guardrisk, to date hereof, despite the said letter of request by, and on behalf of the Applicant.
9. In the circumstances, the Applicant was left with no other alternative than to apply to this Court for condonation in terms of section 3(4)(a) of Act 40 of 2002, which he was and is entitled to do.

The Legal Requirements and Finding

10. The Court seized with such an application then has the discretionary power to grant such condonation application, provided that the Court is satisfied that:
 - a) the debt has not been extinguished by prescription. It has not, since the accident happened, as alleged, on or about 27 August 2019, less than three years ago;
 - b) good cause exists for the failure by the creditor. The Applicant received advice from his medical practitioner about the possibility of a claim in such circumstances. He then sought legal advice, on 1 June 2020, and pursuant thereto, on 24 June 2020, the required statutory Notice was sent to the Municipality. This is, in any event within six (6) months of the Applicant being made aware, through legal advice, that he has a claim which he could pursue against the Municipality;

AND

- c) the Organ of State was not unreasonably prejudiced by the failure.
11. No unreasonable prejudice has been shown or demonstrated that the Municipality, might suffer because of this late, out of time, Statutory Notice. The Applicant has also furnished the Municipality/Respondent with a comprehensive explanation of the circumstances surrounding the incident, and hence the claim, including clear colour pictures together with coordinates of the scene of the accident. In fact, on the Respondent's papers, it is not clear whether or not they indeed object to condonation being granted and/or what

their basis is for not having given their written consent in terms of section 3(1)(b) of Act 40 of 2002.

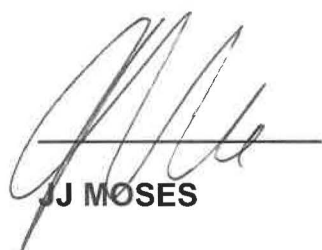
12. The Respondent's case seems to be that the Applicant must first issue and serve Summons, and only then, or thereafter, can the issue of compliance with section 3(1)(a) of the Act and condonation then be considered and dealt with. This is clearly wrong. The Applicant has done exactly what was required of him in the circumstances of this case: he submitted and sent the Statutory Notice to the Municipality (Respondent); he requested their written consent and condonation for the late filing/serving of the said Notice, which to date, they have not given and/or refused to give, and was then left with no option other than to apply to this Court for condonation in terms of section 3(4) of the Act.
13. Mr Pillay, on behalf of the Respondent, persisted with the argument that the Applicant should first have issued Summons and only at that stage, and if the Respondent/Municipality relies on the failure of the Applicant to serve the Notice within six (6) months after the incident (when the debt became due) in terms of section 3(2) of Act 40 of 2002, can and/or should he apply to Court for condonation. Accordingly, so he argued, this application is premature in as much as the Respondent had never indicated, even to date, that it would rely on the said failure of the Applicant to serve the section 3 Notice timeously.
14. This argument falls to be rejected as at least two (2) grounds:

Firstly, on its own papers⁶, the Respondent made common cause with its insurance company, by agreeing that the Applicant had served the said notice out of time and relying on the said failure in rejecting the Applicant's claims. Secondly, the provisions of section 3(3) of Act 40 of 2002 are abundantly clear that "... no legal proceedings for the recovery of a debt may be instituted against an organ of state..." if such notice had not been given within the prescribed six (6) months period, unless the organ of state has consented in writing thereto, or unless the Court, on application, has granted condonation for such late notice.

⁶ Para 27, Record p. 55

15. The Respondent has also raised a technical objection regarding the founding affidavit of the Applicant, which it alleges was/is totally defective. I disagree. The Applicant has in any event cured any deficiencies that there might have been – which was merely an omission by the Commissioner of Oaths, who subsequently confirmed that it was a duly sworn and commissioned affidavit.
16. In the circumstances, the following order is made:

**THE APPLICATION FOR CONDONATION IN TERMS OF SECTION 3(4) OF
ACT 40 OF 200 IS GRANTED WITH COSTS.**



JJ MOSES

**ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the Applicant: Adv. D.C. Jankowitz
Instructed by: Stefan Greyling Inc.

For the Respondent: Mr. J. Pillay
Instructed by: Pillay Attorneys