

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 43181/2016

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

[Signature] 21/5/2019

In the matter between:

CERVANTIES TRADING CC

Applicant

v

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

AC BASSON, J

Parties

[1] The applicant (plaintiff) is Cervanties Trading CC and the respondent the City of Tshwane Metropolitan Municipality (defendant).

Nature of the application

[2] This is an application to condone the applicant's failure to comply with the provisions of section 3(1)(a)¹ of the Institution of Legal Proceedings against Certain Organs of State Act (the Act).² The applicant also asks for a punitive costs order against the respondent in the event of its opposition.

Brief exposition of the relevant facts

[3] The applicant sets out two claims in the Particulars of Claim: In "Claim A" the

¹ "Notice of intended legal proceedings to be given to organ of state

- (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-
- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or (b) the organ of state in question has consented in writing to the institution of that legal proceedings-
 - (i) without such notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).
 - (2) A notice must-
 - (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and
 - (b) briefly set out-
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor.
 - (3) For purposes of subsection (2) (a)-
 - (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
 - (b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.
 - (4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.
 - (b) The court may grant an application referred to in paragraph (a) if it is satisfied that-
 - (i) the debt has not been extinguished by prescription;
 - (ii) good cause exists for the failure by the creditor; and
 - (iii) the organ of state was not unreasonably prejudiced by the failure.
 - (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

² Act 40 of 2002.

applicant claims an amount of R 6 002 292.00 (six million two thousand two hundred and ninety two rand) (together with interests) and in "Claim B" an amount of R 8 007 350.00 (eight million seven thousand three hundred and fifty rand) (with interests).

[4] The claim in "Claim A" is in respect of refuse bins allegedly sold and delivered by the applicant to the respondent. In essence claim A is for specific performance i.e. for the payment of an invoice and therefore does not constitute a debt as contemplated in section 1 of the Act. The applicant is therefore in law, not required to deliver a notice in terms of section 3(1)(a) of the Act before instituting the claim.

[5] The claim in "Claim B" is for damages allegedly suffered by the applicant as a result of an alleged breach of an alleged agreement between the applicant and the respondent. As the claim in "Claim B" is for damages, it constitutes a debt as contemplated in section 1 of the Act and the applicant was therefore in law required to deliver a notice in terms of section 3(1)(a) of the Act before instituting the claim.

[6] This application relates to the applicant's failure to deliver the notice in terms of section 3(1)(a) of the Act in respect of "Claim B". It is common cause that the applicant did not deliver such a notice and that it has, until this application, made no attempt to deliver such a notice. There exists no dispute between the parties that the applicant ought to have delivered a notice in terms of section 3(1)(a) of the Act before instituting "Claim B". This application concerns condonation for its failure to do so.

Legal Proceedings against Certain Organs of State Act

[7] In terms of section 3(1)(a) of the Act, no legal proceedings for the recovery of a debt may be instituted against an organ of the State unless the creditor has given the relevant organ of State, notice in writing of its intention to institute the legal proceedings in question. Section 3(2) of the Act provides that the notice contemplated in section 3(1)(a) of the Act must be delivered or served upon the organ of State in question "within six months from the date on which the debt became due".

[8] In addition, the notice must briefly set out “the facts giving rise to the debt” and “such particulars of such debt as are within the knowledge of the creditor”.³

[9] The rationale for the requirement of a notification of intention to sue organs of State is clear:

“[13] ... The conventional explanation for demanding prior notification of intention to sue organs of State is that, 'with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them'”⁴

Condonation

[10] Where a person has failed to deliver the notice contemplated in section 3(1)(a) of the Act, section 3(4)(a) of the Act provides that such a person may apply for condonation of such failure.

[11] Section 3(4)(b) of the Act provides that the court may grant condonation if it is satisfied that:

- (i) the debt has not been extinguished by prescription;⁵
- (ii) good cause exists for the failure by the creditor; and
- (iii) the organ of State was not unreasonably prejudiced by the failure to comply with the provisions of section 3.

[12] The court must be satisfied that the applicant has satisfied *all three* requirements or, as the court in *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* put it:⁶

³ Section 3(2)(b)(i) and (ii) of the Act.

⁴ *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at para [13].

⁵ The respondent in this matter does not rely on prescription.

⁶ 2010 (4) SA 109 (SCA).

"[11]...These requirements are conjunctive and must be established by the applicant for condonation."

See also: *Madinda v Minister of Safety and Security*:⁷

"[16] The structure of s 3(4) is now such that the court must be satisfied that all three requirements have been met. Once it is so satisfied the discretion to condone operates according to the established principles in such matters, as to which see eg *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E - G."

A similar view was expressed in *Minister of Safety and Security v De Witt*:⁸

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

The requirement of good cause

[13] In the matter of *Madinda*, the Supreme Court of Appeals, relying on *Silber v Ozen Wholesalers (Pty) Ltd*,⁹ pointed out that the applicant is required to 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. That court explained what is meant by "good cause":

"[10] 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

⁷ 2008 (4) SA 312 (SCA).

⁸ 2009 (1) SA 457 (SCA).

⁹ 1954 (2) SA 345 (A).

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.*¹⁰

[11] In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) Schreiner JA said (at 352H - 353A):

"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.

Although this passage relates to a different legislative context (viz rule 46(5) of the magistrates' courts rules), I am of the view that it holds good for the interpretation of s 3(4)(b)(ii)."

[14] The court thus emphasised that the determination of "good cause" entails a consideration of all factors which have a bearing on the fairness of granting the relief affecting the proper administration of justice. These factors 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. The standard of proof is not one on a balance of probabilities but rather the "overall impression made on a court which brings a fair mind to the facts set up by the parties".¹¹

¹⁰ My emphasis.

¹¹ *Madinda* at para [8].

[15] The plaintiff 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”.¹²

[16] Good cause also involves a consideration of the prospects of success on the merits of the case. This consideration requires a balancing act between the explanation of the delay and the prospects of success. Strong merits may mitigate any fault on the part of the applicant in serving the required notice. The Supreme Court of Appeal in *Madinda* explains:

“[12] 'Good cause' usually comprehends the prospects of success on the merits of a case, for obvious reasons: *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765D - E. But, as counsel for the respondent stressed, whether that is the case must depend on the terms of the statute in which it is found. In s 3(4)(b)(ii), there is a specific link created between the delay and the 'good cause'. According to counsel's submission, no matter how strong an applicant's case on the merits that consideration cannot be causally tied to the reasons for the delay; the effect is that the merits can be taken into account only if and when the court has been satisfied and comes to exercising the discretion to condone. I do not agree. 'Good cause for the delay' is not simply a mechanical matter of cause and effect. 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. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two main elements at play in s 4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could

¹² *Ibid* at para [11].

hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, 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. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration. The learned judge *a quo* misdirected himself in ignoring them.

[13] The relevant circumstances must be assessed in a balanced fashion. The fact that the applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved.”

[17] Any subsequent delay (or as the court in *Madinda* put it: “post –notification” delays”) in bringing the application for condonation will not form part of the statutory context within which the element of good cause is considered.¹³

The requirement of prejudice

[18] The legislature specifically requires that a court must consider whether the organ of State is not unreasonably prejudiced by the failure to comply with the provisions of section 3. This exercise requires a court to balance the right to access to justice and the protection of the interest of the state in receiving timeous notice of intended action.¹⁴

[19] Before the amendment to the Act, the absence of prejudice had been regarded as an element of good cause.¹⁵ The position has changed after the amendment to section 3. The requirement to establish that the organ of State will not be unreasonably prejudiced by the failure to comply with the provisions of section 3 now constitutes an independent ground to be considered. The Supreme Court of Appeal in *Madinda* explains:

¹³ *Ibid* at para [14].

¹⁴ *Ibid* at para [15].

¹⁵ *Ibid* at para [15].

"[15] ...But in this Act the legislature has deemed it appropriate to treat absence of *unreasonable* prejudice as a specific factor of which an applicant must satisfy the court. The identification of separate requirements of good cause and absence of unreasonable prejudice may be intended to emphasise the need to give due weight to both the individual's right of access to justice and the protection of state interest in receiving timeous and adequate notice."

[20] It is for the applicant to lay a basis for the claim of prejudice. It is not for the court to assume prejudice on behalf of the applicant:

"[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."¹⁶

Consideration of the merits

Good cause

[21] Does the plaintiff give a full and reasonable explanation to excuse the non-compliance or, to use the words of the court in *Madinda*: does the applicant produce "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"?¹⁷ And, are there prospects of success?

¹⁶ *Ibid* at para [21].

¹⁷ *Ibid* at para [12].

[22] The applicant explains that it intends relying on a report submitted by Funduzi Forensic Services. This report recommended, *inter alia*, that disciplinary action be taken against certain officials pursuant to a finding that the tender process followed by the respondent was “flawed”. The respondent does not dispute the appointment of Funduzi or the accuracy of the quoted paragraphs. The respondent, did however, contend that the quoted paragraphs are irrelevant as the respondent was not bound by the recommendations. It further submitted that the report further constitutes hearsay evidence and that no case has been made out as to why the court should admit hearsay evidence in this application. It further contended that even if it is assumed that the respondent was aware of the alleged fraud, such knowledge did not translate into knowledge of the fact that the applicant intended to sue it for damages.

[23] Other than quoting the report and the recommendations contained therein regarding the process that was followed, the applicant fails to explain why it has prospects of success. The only allegation that the applicant makes is that it is clear from the report that “there was blatantly fraudulent conduct on the part of the respondent”.

[24] Moreover, the founding affidavit does not place any facts before the court as to why it dragged its feet all these years. There is simply no explanation as to why the section 3(1) notice has not been delivered at the time. More importantly, there is no explanation as to why such a notice was not delivered at all even though the notice would have been late. In argument the applicant tried to argue that the letter addressed to the respondent dated 8 May 2013, somehow could be read as also informing the respondent of Claim B. Firstly, no such a case is made out in the founding affidavit, and secondly, having regard to the notice, it cannot be interpreted as incorporating “the facts giving rise to the debt” and “such particulars of such debt as are within the knowledge of the creditor”.¹⁸

[25] I am not persuaded in light of the paucity of facts provided in respect of the prospects of success and the absence of a proper explanation as to why the notice has not been

¹⁸ Section 3(2)(b)(i) and (ii) of the Act.

delivered (even after it had been alerted to the fact that such a notice is required). In light of the foregoing, I am not persuaded that the applicant established compliance with the requirement of "good cause".

[26] In addition to the foregoing, and conjointly thereto, I am not persuaded that the applicant has established that the organ of state was not unreasonably prejudiced by its failure to serve the notice in terms of section 3(1) of the Act.

Prejudice

[27] As already pointed out, the absence of unreasonable prejudice must be established by the applicant as a separate or self-standing requirement. The onus rests on the applicant to set out in some detail that the respondent would not suffer any unreasonable prejudice as a result of the delay.

[28] The applicant has not placed any facts before the court in its founding affidavit as to why the respondent would not be unreasonably prejudiced by its failure.

[29] It was only in argument that the applicant endeavoured to make out a case that the respondent will not suffer any prejudice and to make out a case that, because the tender documents are available, it would not be difficult to deal with the alleged unlawfulness. Unfortunately, no such case has been made out in the founding affidavit. Essentially what the applicant is asking this court is to assume that there will be no prejudice without having made out such a case in their papers.

[30] The respondent, on the other hand, contended that it will indeed suffer prejudice if condonation is granted: Employees who were directly involved in the applicant's appointment are no longer readily available to assist in defending the applicant's claim. A period of more than five years has passed since the events giving rise to the applicant's alleged claim for damages. It further contended that the administration of justice has also been negatively affected by the applicant's failure to serve the notice timeously. It further contended that the applicant has, in any event, not established that it will be prejudiced,

if condonation is not granted: A court cannot assume that the applicant will suffer prejudice if condonation is not granted in circumstances where the applicant has not alleged it.

[31] I am in agreement with the respondent's submissions. The respondent is contending precisely what the Constitutional Court in *Mohlomi v Minister of Defence* warned against¹⁹:

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

They thus serve a purpose to which no exception in principle can cogently be taken."²⁰

Conclusion

[32] In conclusion: I am not persuaded that the applicant has made out a proper case for condonation in terms of section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act and the application therefore falls to be dismissed.

Costs

¹⁹ 1997 (1) SA 124 (CC).

²⁰ *Mohlomi* ad para [12]. The Constitutional Court did, however, qualify this statement by pointing out that there is no hard and fast rule in determining what constitutes an inordinate delay and that the facts of each matter must be considered.

[33] The applicant asks for costs on a punitive scale in the event of opposition. The respondent did not insist on a costs order on a punitive scale. The application is therefore dismissed with costs including the costs consequent upon the employment of two counsel.

Application for the late filing of the replication

[34] The applicant also brought an application that the late filing of the replication be condoned. This application was argued together with the first application for condonation.

[35] Despite the fact that an application for condonation for the late filing of the replication served before this court, the applicant in argument (and in the further Heads of Argument filed on behalf of the applicant, changed tack. It now argued that the replication is in fact an amendment after pleadings closed and should be considered as such. Although the principles applicable to amendments are trite²¹ no formal application to amend, served before the court. All that served before the court was an application to condone the late filing of the applicant's replication.

[36] I have already dismissed the application for condonation in terms of section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act. The latter application only has bearing on Claim A and not Claim B of the Particulars of Claim.

[37] The applicant explains in its affidavit in support of condonation the reasons for the late filing of its replication. According to the applicant, it requested Advocate Snyman to consider whether it was necessary to file a replication in light of the respondent's (the defendant's) plea. Advocate Snyman failed to act and his mandate was terminated. New counsel was briefed and the applicant was advised that it was indeed necessary to file a replication. The replication was filed on 18 June 2018.

²¹ See in this regard *Randa v Radopile Projects* CC 2012 (6) 128 (GSJ) at [37]; *Rustenburg Platinum Mines Ltd v Industrial Maintenance Painting Services* CC 2008 JDR 1203 (SCA), 2008 ZASCA 108 at para [21] and *Benjamin v Sobac South African Building and Construction (Pty) Limited* 1989 (4) SA 940 (C) at 958B.

[38] The applicant submitted that it will not be able to proceed with Claim B if the defence raised by the defendant in paragraph 3.2 and 3.3 (of the defendant's plea) succeed. Having decided that condonation is not granted for the late filing of the notice in terms of section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act it is, in my view, now academic to decide the condonation application for the late filing of the replication in light of the applicant's submission that it will not be able to proceed with Claim B, if the defence raised by the defendant is allowed to stand.

[39] I am, in any event, apart from the fact that the replication is rendered moot by this court's order, not persuaded that a proper case for condonation has been made out. The respondent delivered its plea on 15 August 2016. The applicant had until 29 August 2016, to deliver a replication if so advised. Despite the fact that Advocate Snyman has failed to draft a replication, the applicant waited almost two years before it appointed new counsel (on 15 May 2018). There is simply no explanation for the complete inaction for the period between August 2016 and June 2018 when the replication was ultimately filed, apart from blaming counsel for dragging his heels. Moreover, Advocate Snyman presided over a pre-trial conference which was held on 17 May 2017 – almost a year from the date on which the replication was required to have been delivered. No mention was made regarding the necessity to file a replication.

[40] Apart from the fact that there is no proper explanation for the delay, the delay is excessive. The applicant has also not addressed any prejudice that the respondent may suffer as a result of the delay. All it states is that it (the applicant) will suffer prejudice if the replication is not allowed.

[41] In respect of the prejudice that it will suffer if condonation is granted, the applicant bases its claim on a valid agreement between the parties although it admits that the suspensive conditions subject to which it was appointed were not fulfilled. In the replication, the applicant now seeks to introduce an alleged waiver of these suspensive conditions based on the conduct of the respondent's employees whose identities are not stated in the replication. This, the respondent submitted, is prejudicial as several of its

employees dealt with the matter.. Further, the replication also seeks to widen the scope of the applicant's case by relying on an alleged representation by conduct without identifying the people whose conduct the applicant seeks to rely upon for the alleged representation. The respondent submitted that it should further be taken into account that a long period of time has passed since the suspensive conditions were required to have been fulfilled and that it would be difficult for the respondent to locate the witnesses who may still have a reliable recollection of what happened many years ago.

[42] Are there reasonable prospects of success? It is difficult to assess prospects in light of the fact that the applicant has significantly expanded the ambit of its case in the replication. However, it cannot be ignored that the applicant has not, for example, laid out a factual basis for the claim that the respondent has waived its rights to require of the applicant to comply with the requirements set in the contract: There is a presumption against waiver of rights. This presumption places an onerous onus on the applicant to prove that a party to the contract had waived its contractual rights.²² I am thus not persuaded that there are reasonable prospects of success. Lastly I am not persuaded that the applicant has established that it would be in the interest of justice to grant the condonation.

[43] In the event, the application for condonation for the late filing of the replication is dismissed with costs including the costs consequent upon the employment of two counsel.

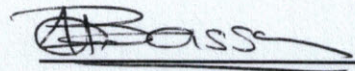
²² As the Court in *Le Roux v Odendaal and Others* 1954 (4) SA 432 (N) at 441C - E pointed out: "A consideration of the evidence in the light of the above factors satisfies me that the defence of waiver has not been established. The *onus* of course lies upon second respondents. In the case of *Kannemeyer v Gloriosa*, 1953 (1) SA 580 at p. 585 (W), ROPER, J., collected the authorities and came to the conclusion that, while such an *onus* could be discharged on a balance of probabilities,

'the Court must take into account the unlikelihood, the strong improbability, that a man will lightly waive a right conferred upon him by law'.

That *dictum*, which I respectfully accept, is no less applicable to a right conferred by contract. So we start here with the strong improbability that applicant would give up her right of pre-emption."

[44] In the event the following order is made:

1. The application for condonation in terms of section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act is dismissed with costs including the costs consequent upon the employment of two counsel.
2. The application for condonation for the late filing of the replication is dismissed with costs including the costs consequent upon the employment of two counsel.



AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv A Vorster

Instructed by: Albert Hibbert Attorneys

For the respondent: Adv W R Mokhari SC / Adv K Magano

Instructed by: Gildenhuys Malatji Inc