IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

REPORTABLE

CASE NO: 1022/06

In the matter between:

NTOMBIZANELE BUZA **1st Plaintiff/Applicant**

NDAZILE LIVINGSTONE BUZA **2nd Plaintiff/Applicant**

and

THE MINISTER OF SAFETY AND SECURITY **Defendant/Respondent**

Summary: Application for condonation in terms of section 3(4) of Act 40 of 2002 - Whether creditor required to show good cause and lack of prejudice in respect of post-notice delay in prosecuting the application - interpretation of the wording of the section.

JUDGMENT

STRETCH J.:

[1] The plaintiffs issued summons out of this court on 27 September 2006, claiming damages from the defendant flowing from the death of Ayanda Buza ("the deceased"), who died on 12 December 2005 after having been shot by one Constable Xabendlini at Mdantsane on 11 November 2005. The plaintiffs allege that they are the natural parents of the deceased, and that they were his dependants when he died. They also claim on behalf of a child who was born after the deceased died, alleging that the deceased fathered this child whom the plaintiffs are now supporting. It is averred that the shooting was wrongful and unlawful, and that the defendant, who was Xabendlini's employer at the time, is vicariously liable for his conduct and the sequelae thereto.

[2] The defendant has raised altogether 12 special pleas to the plaintiffs' claim. They are:

2.1 prescription
2.2 *res iudicata*
2.3 non-compliance with Act 40 of 2002 relating to notice
2.4 lack of jurisdiction
2.5 failure to join the National Director of Public Prosecutions (this plea has thankfully been abandoned)
2.6 lack of *locus standi* in respect of the child's claim
2.7 denial that the deceased fathered the child
2.8 non application of the *nasciturus* rule
2.9 non-compliance with Act 40 of 2002 relating to notice in respect of the child's claim
2.10 improper consolidation of claims
2.11 *res iudicata* and lack of jurisdiction in respect of the child's claim
2.12 non-joinder of the Minister of Justice and Constitutional Development.

[3] Two years ago I issued a detailed case flow management directive, *inter alia* inviting the parties to traverse the issues raised in these special pleas at a conference before a judge in chambers. Despite this matter having been "managed" on a regular basis, it appears from the court file that this elephant in the room has largely been ignored.

[4] In March 2018 the plaintiffs managed to file a motion for condonation in terms of section 3(4)(a) of The Institution of Legal Proceedings against Certain Organs of State Act no. 40 of 2002 ("the Act"), with respect to the special plea of failure to give notice of intended legal proceedings within the six month period stipulated in section 3(2)(a) of the Act. The application is opposed, and was argued before me. The purpose of this judgment then, is to dispose of the third special plea raised by the defendant.

[5] Section 3 of the Act reads as follows:

3. 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 (*sic)* 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.[1]

(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.

[6] It is common cause that a notification (which neither of the parties is able to locate) dated 26 June 2006 was delivered to the defendant on 5 July 2006, whereafter the defendant repudiated the claim in writing. The letter of repudiation, dated 7 August 2006 and date-stamped 16 August 2006, reads as follows:

'Mzimba, Jubase & Co Attorneys
PO Box 1148
EAST LONDON
5200

Dear Sir/Madam

YOUR CLIENT: L BUZA

[1] "Fixed date" is defined as the date of the commencement of the Act, being 28 November 2002.

Receipt of your letter **MR MVAPANTSI/tb/B81** dated **2006-06-26** received in the office of the Minister on **2006-07-05** is hereby acknowledged.

On **2006-07-19** the Legal Official **Capt Groenewald** determined that your letter is not accepted as a proper notice in terms of the relevant provisions of the Institution of Legal Proceedings against Certain Organs of State Act, 2002 (Act no. 40 of 2002), due to the fact that the notice does not provide sufficient facts and particulars in respect of the debt to enable the SA Police Service to conduct a proper investigation (Ie. the exact date on which the cause of action arose is unknown / The **exact place** (suburb/city/town/province where the incident occurred is unknown). (Section 3(2)(b) of the Act.)

This matter is therefore regarded as finalized.

Yours faithfully

Sgd

NATIONAL COMMISSIONER: SA POLICE SERVICE'

[7] In the absence of the document referred to, the plaintiffs (and this court for that matter) are constrained to accept that the notice which their attorney sent to the defendant, failed to adequately furnish the particularity required in terms of the provisions of section 3(2)(b) of the Act. It is significant however, that the defendant did not reject the notice on the basis that it was delivered outside of the six month period stipulated in section 3(2)(a) of the Act.[2]

[8] After summons was issued, reflecting both the dates when the deceased was shot and when he died, the defendant pleaded that the debt became due on 11 or 12 December 2005, averring that these were the dates when the plaintiff acquired knowledge of the facts giving rise to the claim and of the identity of the debtor. The defendant has not disputed that the deceased died on 12 December 2005. In the premises I accept that the due date upon which the defendant is placing reliance, is the date on which the deceased died. For all intents and purposes, I also accept that

[2] The reason for this could be that the notice was vague around the question of when the debt arose.

this was the date upon which the debt became due. I say this because it has not been contended otherwise. It has also not been contended that the deceased's entire family, who were apparently witnesses to what is described as a wrongful and unlawful shooting, did not know that the shooter was a policeman. Indeed, they were aware of his rank and they knew his name. This much is borne out by the original claim dated 14 September 2006.

[9] In terms the defendant's own computation, the notice ought to have been delivered by no later than 12 June 2006 (and not 11 or 12 May 2006 as pleaded by the defendant). Based on the defendant's calculations then, the notice, which was received on 5 July 2006, was received 22 days late.

[10] I am satisfied that the debt has not been extinguished by prescription. The pre-summons notice was received on the defendant's behalf on 5 July 2006. In terms of s 15 of the Prescription Act 68 of 1969, prescription is interrupted by service on the debtor of any process whereby the creditor claims payment of the debt. The acknowledgment of receipt incorporating a rejection of the claim does not state that there is no claim for payment of the debt. Indeed, it admits that a debt has been claimed, but appears to repudiate it on grounds of vagueness as to time and place, rather than quantum.

[11] The remaining issues for determination are accordingly whether good cause exists for the plaintiffs not to have ensured that the defendant received their notice by 12 June 2006, and whether the defendant was unreasonably prejudiced by the three week delay.

[12] The plaintiffs allege that Xabendlini, "with the assistance of other members of the South African Police Services" shot the deceased in the abdomen in full view of their entire family, as a result of which he died a month later. They go on to say that the deceased, who was a taxi driver, used to provide for them financially, as they were both unemployed. After he died, they approached Mr Mvaphantsi from attorneys Mzimba Jubase and Company regarding a claim for loss of support. This was during February 2006. They were told to be patient as an investigation had to be

conducted first. During June that same year, the attorneys advised that they had sent the notice which forms the subject matter of this application, to the respondent.

[13] The correct approach to the issue of condonation in matters of this nature was set out by Heher JA in *Madinda v Minister of Safety and Security.*[3] Firstly, the test does not involve proof on a balance of probabilities but 'the overall impression made on a court which brings a fair mind to the facts set up by the parties.'

[14] Secondly, the 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* (emphasis added) 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.'[4]

[15] Thirdly, good cause for a delay, Heher JA held, is not 'simply a mechanical matter of cause and effect' but involves the court in deciding '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'; and in this process, '[s]trong merits may mitigate fault; no merits may render mitigation pointless.'[5]

[16] Fourthly, Heher JA highlighted the interests involved when he said:

> '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 failing to satisfy the court of the existence of good cause

[3] 2008 (4) SA 312 (SCA)
[4] Paras 8 and 10
[5] Para 12

> precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could 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.'

[17] Fifthly, it is particularly important that the circumstances relevant to just cause 'be assessed in a balanced fashion' so that 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.'

[18] Sixth, and most importantly, it must be borne in mind that the concept of good cause is not self-standing but is linked to the delay. As a result, 'subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms.' This does not mean that such delays are irrelevant: while they are not part of the 'good cause' enquiry, they nonetheless are 'part of the exercise of the discretion to condone in terms of s3(4)'.

[19] Finally, unlike the position in other legislation or that where there has been non-compliance with the rules of court, a clear distinction is drawn in s 3(4) of the Act between good cause, on the one hand, and the absence of prejudice, on the other. The purpose of the distinction, Heher JA held, is to 'emphasise the need to give due weight to both the individual's right of access to justice and the protection of the interests of the state in receiving timeous and adequate notice.'[6]

[20] This brings me to the relevance of the delay between issuing the notice and prosecuting the application for condonation. The plaintiffs' original summons, dated 14 September 2006, was issued out of this court on 18 September 2006. On 27

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[6] Paras 12, 13, 14 and 15 as referred to in the unreported judgment of Plasket J in *Maguga v Minister of Police* (case no. CA342/2017) handed down in the Eastern Cape Division, Grahamstown, on 4 September 2018 (pars 22 to 28).

September it was served on Ms Gogela, at the office of the State Attorney (care of the senior legal advisor) in King Williams Town. According to the return of service, Ms Gogela accepted service on behalf of the defendant herein.

[21] Ten years went by. According to the court file, nothing happened during that period. According to the plaintiffs, during that period they did not hear anything from their attorney Mr Mvaphantsi after they were told that the defendant had acknowledged receipt of the notice on 8 August 2006. Whenever the second defendant tried to get feedback, this attorney's offices were closed. When he learnt from the neighbouring offices that Mvaphantsi had moved out, he tried to visit him at home. Mvaphantsi was also not at home. Eventually a lady from Mvaphantsi's home gave him a file which he took to the police in East London in an attempt to follow up on the notice which was issued in June 2006. This is confirmed by the defendant's Tracy van Rooyen who acknowledges that on or about 17 November 2015 the second plaintiff attended the defendant's offices at Chiselhurst in order to enquire about his civil claim against the police. According to Van Rooyen the second plaintiff was armed with a combined summons, particulars of claim, the sheriff's return of service and the letter of acknowledgment from the National Commissioner. According to the answering affidavit of Lt Col James, enquiries revealed that neither the State Attorney nor the defendant's offices had any record of the matter. The police immediately acknowledged receipt of the summons and did the necessary to process the claim as the Office of the National Commissioner, despite having acknowledged receipt of the claim, also did not have it registered on the system. To this end a notice of appearance to defend was filed in January, and a plea in February 2016.

[22] I return to the second plaintiff's narrative. He continued to explain that he was unemployed and could not engage an attorney to take the matter further. He was unaware of contingency litigation until he instructed his present attorneys during February 2016. According to the plaintiffs then, they verily believed that their notice had been served timeously until they approached their present attorneys in February 2016, who told them that the notice had been served three weeks late.

[23] The current attorneys placed themselves on record on 17 February 2016. The defendant promptly pleaded to the merits of the claim and threw in five special pleas on 25 February 2016. In spite of this, the plaintiffs' attorneys delivered a notice of bar on 12 April 2016, which they thankfully withdrew two days later. Sadly, that was not yet the end of the matter as far as pleadings were concerned.

[24] On 14 September 2016 the plaintiffs' attorneys delivered a notice that they intended amending the summons issued ten years before, by substituting the Minister of Safety and Security with the Minister of Police and by introducing a second claim on behalf of a child who was unborn when the deceased died (which date they incorrectly cited as 11 November 2005 as opposed to 12 December 2005), thereby increasing the quantum of the plaintiffs' claim from R400 000 to R500 000. Curiously, it appears that there was no objection to this, as a result of which the plaintiffs delivered amended particulars of claim on 12 October 2016.[7]

[25] As I have said, in response to these particulars the respondent raised no less than 12 special pleas (bar one), on 10 November 2016. One of these is the issue of non-compliance with the six month notice period in the Act. Thereafter pre-trial procedures appear to have been followed without too much delay, and the court file was eventually submitted to me for case management on 24 August 2017. On that occasion I issued the detailed directive which I have already mentioned. Because the defendant has contended not only that the notice was out of time but that the plaintiffs have unduly delayed the prosecution of this application for condonation, I deem it necessary to set out the contents of the directive which I deem to be relative to this question. It says this:

1. The court file is in a mess. The papers must be bundled, indexed and paginated.

2. Pars 2.6 to 2.8 of the draft case flow management order are nonsensical. If they were to be adhered to, the experts would meet on the first day of trial, and par 2.8 would kick in four days after trial commencement. The parties must file a draft case management order that serves some purpose and addresses the *crisp issues for adjudication in the special pleas* (emphasis added).

[7] Notwithstanding which the parties persist in referring in the citation of this case in various documents to the defendant as the Minister of Safety and Security.

3. The defendant has filed a 43-question request for further particulars (on the merits of the main trial) which contains questions which are incapable of comprehension or interpretation in the language intended to be used. Most of the answers sought are, in any event, not strictly necessary for trial preparation as envisaged in rule 21. This is particularly so in that the defendant has raised no less than 11 special pleas (plea "E" having been abandoned) which should be dealt with first to determine whether the parties will enter the main trial. As such, requests for main trial particulars should be held in abeyance.

4. The second draft case management order must be filed by 6 October 2017.

5. A conference will be held before a judge in chambers on 20 October 2017 at 09.30. *The parties must prepare to traverse the forward management of the special pleas at this conference* (emphasis added), as referred to at par. 2 of this directive.

[26] Notwithstanding this, the matter was judicially certified ready for trial on 20 October 2017, with no reference to the issue of the special pleas, and was set down to proceed to trial on 22 March 2018. For obvious reasons the trial on the merits, still anchored by the special pleas, did not get off the ground. The plaintiffs filed their notice of motion and founding papers (a brief eight-page affidavit with essential annexures) in this application for condonation on the same day. On 26 April 2018 Lieutenant Colonel Garth Lester James, attached to the respondent's legal services, filed answering papers, comprising of his own 39 page affidavit and a confirmatory affidavit. The plaintiffs did not deliver a reply within the ten day period provided for in Uniform Rule 6(5)(e), and the application ought to have been considered ripe for hearing as at 10 May 2018. To my mind, no further judicial management was necessary. Nor was it sought.

[27] For reasons which are not clear, the file was again thereafter submitted for case flow management and for yet another conference before a judge in chambers. (I can only surmise that this time it was for a relatively simple application which was ripe for hearing, to be case managed as well). This resulted in the issuing of a further directive inviting the plaintiffs to deliver a reply (for which, by all accounts, condonation had not been sought) whereafter a date on the opposed roll could be

allocated. About three months later, and on 8 August 2018 the plaintiffs, by all accounts now feeling somewhat obliged to respond to the defendant's vitriolic answer (which, by virtue of its contents they had, by all accounts done well to avoid) filed an 18 page reply, annexing thereto the judge's general directive requiring them to paginate and index the papers, file their replying affidavit if any, and file their heads of argument in order to secure a date on the opposed roll.

[28] For some reason the matter was further enrolled for a fourth pre-trial conference before a judge to be heard on 19 October 2018, on which day it was recorded that the defendant intended launching interlocutory applications for the delivery of the reply to be declared an irregular step and for the judicial directive in that respect, to be "reviewed" and set aside.

[29] True to his word, the defendant delivered the threatened applications, purportedly in terms of Uniform Rules 30 and 53, on 3 April 2019. The notice of motion suggests that the threatened application for a "review" of the judge's directive had in the interim been abandoned, and to that end, the resultant conundrum had hopefully been resolved.

[30] On 25 April 2019 Tokota J dismissed the rule 30 application with costs, granted leave for the delivery of a fourth set of affidavits in the matter before me, and adjourned it *sine die.* The defendant took full advantage of the leave, with Lt Col James further taking up the cudgels as the defendant's legal man, with a replication to the plaintiffs' reply spanning some 14 pages, on 22 May 2019.

[31] It is against the backdrop of this series of unfortunate events, that the defendant prevails on me to dismiss the application, not so much because the notice was three weeks out of time, but because it is contended that the defendant has suffered undue prejudice as a result of the inordinate delay in the prosecution thereof.

[32] During the period which spans the time between the giving of notice in 2006 and the receipt of the summons in 2015, many things happened. Xabendlini was tried in the Mdantsane regional court for the deceased's murder. He was acquitted, according to James, during 2008. During 2014 he left the police. He died on 1

November 2015, shortly before the second plaintiff visited the police armed with the 2006 civil claim. The police witness to whom Xabendlini had made his first report about what had transpired, apparently also left the police some time in 2008 and cannot be traced. The defendant accordingly claims that due to the delay in prosecuting the application, the main witness for the police has died and the respondent has not been placed in a position where the police can adequately garner and preserve evidence and identify witnesses.

[33] In distinguishing between the extremely short delay which preceded the giving of notice, and the inordinately long one before the application for condonation was prosecuted, I am reminded by Heher JA, that it must be borne in mind that the concept of good cause is not self-standing but is linked to the delay. It is trite that the primary rule for the interpretation of statutes is that if the meaning conveyed by the wording of the statute is clear, it should be put into effect; it must be equated with the legislator's intention. If the plain meaning is ambiguous, vague or misleading, or a strict literal interpretation would lead to absurd results, then the court may deviate from the literal meaning to avoid such absurdity.

[34] To my mind the meaning of section 3(4) of the Act is abundantly clear and its literal meaning should be strictly interpreted and applied. The literal meaning is simply this: If the organ of state relies on the creditor's failure to serve a notice within six months from the time when the debt became due (which notice is peremptory)[8], the creditor may apply for condonation for its *notice* (my emphasis) being out of time and the court *may* (my emphasis) condone this delay (which was occasioned before filing the notice) if the debt has not been extinguished by prescription, if good cause exists for the late giving of the notice, and if the organ of state was not unreasonably prejudiced by the creditor's failure to give notice within the aforesaid six month period.

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[8] See JR de Ville: Constitutional and Statutory Interpretation, where the learned author says the following: "Where a provision is couched in peremptory terms (with words such as 'shall' or 'shall not' or 'must' or 'only') it is usually an indication that the provision is peremptory. Non-compliance would, in the absence of contrary indications, lead to invalidity … Where the provision is vague or indefinite language is used as to the requirements to be complied with, it will give an indication that non-compliance will not lead to invalidity."
See *Mohamed and Others NNO v Ally* 1999 (2) SA 42 (SCA) 48; *Sutter v Scheepers* 1932 AD 165 at 173-174; *Leibbrandt v South African Railways* 1941 AD 9 at 13; *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) 644-645.

[35] In the circumstances it is clear that post-notice delay in bringing the actual application for condonation is irrelevant when the court is considering whether the three requisites in section 3(4)(b) have been satisfied. If they have, the court is at liberty to grant the application, but it is not compelled to do so. The inclusion of the phrase ‘may grant’ as opposed to ‘must grant’ simply means that a strict literal interpretation of the section is not likely to lead to absurd results. This is so because the court, having satisfied itself that the creditor qualifies in terms of the triad of requisites applicable at the time that notice was given, and due to the insertion of the word ‘may’, has the discretion to nevertheless refuse the application based on the particular circumstances of the case (which may or may not include factors such as post-notice delay), and having due regard to the requirement for a fair-minded approach to be taken to all public hearings including those where organs of state are involved. In the circumstances I agree with Heher JA. Post-notice delays are not irrelevant. They simply do not form part of the ‘good cause’ enquiry. Indeed, to my mind they do not form part of the enquiry into any of the elements of the aforesaid triad.

[36] With regard to the particular circumstances of this case, I do not intend dwelling protractedly on the question of pre-notice delay. It is alleged that the plaintiffs laid criminal charges against Cst Xabendlini on the same day that the deceased was shot. Within two months of the deceased’s death, they had already taken steps to approach their erstwhile attorney regarding a civil claim. This was long before Xabendlini was acquitted on the criminal charge. I have no reason to doubt their version that when they approached their erstwhile attorney, he advised them to be patient as an investigation would ensue. Less than four months later the attorney advised them that he had issued the requisite notice (dated 26 June 2006), whereafter summons was issued less than three months later, after the attorney had advised them that the police had acknowledged receipt of the notice. In the circumstances there was no reason for the plaintiffs to have enquired from their attorney whether the six month notice period had been complied with. The defendant, in his answering affidavit, has criticised the plaintiffs for not having delivered a confirmatory affidavit from their erstwhile attorney. The defendant may well have a point. Having said that, the defendant’s answering affidavit fails to admit

or deny, or confess and avoid the essential averments reflected in the plaintiffs' founding papers. That being the position, I am constrained, for purposes of the application, to accept the correctness of the plaintiffs' version.[9] This is particularly so when the defendant's affidavits are dismissive, high-handed, dictatorial and riddled with 'indignant argument and expostulation'.[10]

[37] The plaintiffs say that they made their best endeavours to expedite the matter. They also say that they believed that the requisite notice had been issued timeously when advised of this by their erstwhile attorney, and that they heard for the first time that the notice was out of time (and the implications which flowed from this) from their present attorney. I have no reason to doubt this explanation, particularly in the light of pre-notice delay the extent of which is largely insignificant. In the circumstances I am of the view that the plaintiffs have shown good cause for the pre-notice delay.

[38] The same applies to the question of whether the defendant has been unreasonably prejudiced by the pre-notice delay. In my view the defendant was not prejudiced at all. An organ of state, which points out easily curable shortcomings in response to a notice, and then uses those same shortcomings to unilaterally close the door on potential creditors, rather than invite specifics or obtain the information itself (particularly when the complaint involves an extremely serious allegation such as murder), is hardly in a position to complain of prejudice because the notice was three weeks out of time to begin with. Any prejudice which the defendant complains of cannot, by any stretch of the imagination, be causally linked to the three week delay, nor has the defendant seriously contended that it does. Relying upon failure to give timeous notice when such failure has not caused prejudice does not redound to the credit of the defendant.[11]

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[9] See *Moosa v Knox* 1949 (3) SA 327 (N) at 331

[10] By way of example, in *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* 1996 (1) SA 847 (ZSC) the Zimbabwe Supreme Court disallowed half of the costs in respect of the preparation of a 'voluminous answering affidavit which contained much irrelevant, unnecessarily disparaging and argumentative matter' (at 867H)

[11] See MEC for Education, Kwazulu-Natal v Shange 2012 (5) SA 313 (SCA) pars 17-11; *Mothupu v MEC, Department of Health Free State* (20598/2014 [2016] ZASCA 27 (22 March 2016) (neutral citation).

[39] The defendant's principle contention is that there has been a delay of almost 12 years from the time that the plaintiffs gave "defective" notice up until the filing of their application for condonation, and that the respondent has suffered undue prejudice, mainly in the form of essential witnesses having died or having left the respondent's service.[12] In traversing the post-notice delay, the defendant alleges that the plaintiffs have failed to show good cause.

[40] In my view, the defendant's reliance on good cause in relation to post-notice delay is misplaced. Indeed, the same view taken by the lower court was described by Heher JA in *Madinda* as an error and as 'wrong':

> 'Whether a proper explanation is furnished for delays that did not contribute to the failure [to act timeously] is part of the exercise of the discretion to condone in terms of s 3(4), but it is not, in this statutory context, an element of 'good cause'. This is a distinction which the learned judge did not draw or maintain and I think he was wrong not to do so. … As I have earlier pointed out, the unexplained delay which relates to the period after the notice was *de facto* given will ordinarily relate not to the establishment of good cause but to condonation. The learned judge erred in his approach in this regard. Nor do I think that such a delay can fairly be ascribed to a disinterest in the appellant's part.'[13]

[41] The post-notice delay in the matter before me has been particularly long. Whether things would have turned out differently if the defendant had invited the plaintiffs' erstwhile attorney to be more specific about dates and places instead of unilaterally dismissing the claim, is a matter for speculation.

[42] What is significant however, is that the plaintiffs' erstwhile attorney was not deterred by this dismissive approach on behalf of an organ of state. No. He proceeded to issue summons in any event. The summons, dated 14 September 2006 was acknowledged by the registrar of the Bisho High Court on 18 September 2006, a month after the National Commissioner of Police had regarded the matter as

[12] It is difficult to understand the precise nature of the resistance to condonation. On the one hand the defendant says that he has been deprived from assessing his position, identifying witnesses and garnering and preserving evidence. On the other hand it is contended that he nevertheless has strong prospects of success in the main case. The defendant appears to be both approbating and reprobating in his opposition.
[13] At [14] and [20]

"finalized". Thereafter the summons was served on the State Attorney's senior legal advisor on 27 September 2006, despite the Commissioner having rejected the plaintiffs' notice some six weeks previously. What is of further significance is that the properly delivered summons served to make good the two defects complained of in the defendant's letter of repudiation: It specified the exact date and the place of the shooting as well as the exact date on which the deceased died. What is more – it provided the initials, last name and rank of the shooter. This begs the question: what more did the defendant need to deliver a plea, and if he still felt compelled to do so, a special plea of no notice; alternatively inadequate notice; alternatively, late notice, there and then?

[43] This however, did not happen. By all accounts the plaintiffs' summons was simply ignored. While the summons was being ignored by the attorneys of an organ of state, the lay plaintiffs on the other hand, thought all was hunky dory, having left their concerns in the seemingly capable hands of their attorney, who had not only given notice but who had also issued summons relatively soon thereafter. It was only after not having received feedback from this attorney "for a while", that the plaintiffs started frequenting his offices and his home, but were not able to source him, and apparently for good reason.[14] When they eventually managed to lay their hands on some documents from this attorney's home, they immediately approached the police.

[44] To my mind, the defendant's election to defend the claim after having been shown documents which were served on him a decade before, evidences, to some extent, the defendant's acceptance of liability for having failed to file a plea when he should have, and, for whatever reason.[15] The defendant contends that the plaintiffs ought, in the light of the defendant's failure to have entered an appearance to defend or to have pleaded within the time limits prescribed by the Uniform Rules of this Court, have taken advantage of the redress provided by the rules, and ought to have taken default judgment against the defendant. To my mind the contention is

[14] The attorney, who appears to have practised as a sole proprietor, was interdicted from practising inter alia on 30 May 2011 (see *Law Society of the Cape of Good Hope v Mvaphantsi* (223/2011) [2011] ZAECGHC 19 (30 May 2011) (neutral citation)).

[15] According to the defendant's deponent, and despite diligent enquiries having been made, the State Attorney and the Office of the National Commissioner denied knowledge of both the notice and the claim, over and above which the "system failed to recognise" it, despite documentary evidence dated ten years before, that the Commissioner had received the notice and that the State Attorney's legal department had acknowledged the summons and the particulars of claim.

disingenuous. The defendant is prevailing upon me to dismiss an application for condonation because the applicant (as a layperson) failed to take default judgment against him ten years ago at a time when he was to some extent, if not equally, to blame for the circumstances in which the individual parties found themselves.

[45] What then of the delay which transpired from the time when the defendant eventually delivered its 12 special pleas on 25 February 2016 until the time it finally lodged its application for condonation on 22 March 2018, some two years later? In this regard the record speaks for itself. The plaintiffs, their present attorneys having come on board on 17 February 2016, appear to have been frustrated by further delays occasioned by the approach at the time, to the judicial application of case flow management.

[46] It suffices to say that any argument that the plaintiffs were substantially responsible for further delays after their case had been escalated for participation in the trials, errors, experimentations, sometimes overly zealous judicial application and perhaps even mismanagement from time to time of a case flow management project in its infancy, is to ignore the realities thereof. I have already dealt with directives which may well have opened new cans of worms, and knee jerk reactions to these which ought best to have been avoided.

[47] Before me is not only the classic situation of the pot calling the kettle black. In the midst of it all, there also appears to have featured a judicial dish which seems to have run away with an unruly spoon.

[48] All in all, I am satisfied that the plaintiffs have met the statutory requirements for condonation regarding pre-notice delay. As for the post-notice delay and the fact that the plaintiffs are by no means the only role players in the creation of the overall impression left with this court, I am of the view that fairness and justice dictates that the application for condonation must be upheld, notwithstanding the fact that it has taken a long time for the parties to have made it to this hearing.

[49] The plaintiffs, in praying for condonation, are seeking an indulgence. Both parties have, from time to time during the period leading up to the hearing of this

application, dragged their feet. The respondent has mulcted the application papers in affidavits which wax lyrical and are inappropriately worded. In the premises I do not intend making a costs order either way.

ORDER:

The plaintiffs'/applicants' failure to have served notice on the defendant/ respondent in compliance with section 3(2)(a) of Act 40 of 2002 is condoned.

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I.T. STRETCH

JUDGE OF THE HIGH COURT

Counsel for the plaintiffs/applicants:

Mr Mapoma instructed by Magqabi Seth Zitha Attorneys, East London

Counsel for the defendant/respondent:

Mr Dukada instructed by The State Attorney, East London

Date heard: 1 August 2019

Judgment handed down: 20 August 2019