IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	YES
Circulate to Magistrates:	NO

Case No: 5745/2015

In the matter of:

MADELEINE SHANNON Applicant

and

MASILONYANA LOCAL MUNICIPALITY Respondent

CORAM: DAFFUE, J

JUDGMENT BY: DAFFUE, J

HEARD ON: 7 SEPTEMBER 2017

DELIVERED ON: 7 SEPTEMBER 2017

I INTRODUCTION

[1] First applicant is Madeleine Shannon, a widow residing in Klerksdorp, North West Province. Second applicant is Jessica Shannon, the daughter of first applicant. Applicants are the plaintiffs under the above case number ("the main action"). The Masilonyana Local Municipality is the defendant in the main action and the respondent in this application. I shall refer to the parties as cited in this application.

[2] In the main action applicants sue for their alleged loss of support following upon the death of Mr Gary Shannon ("the deceased"), first applicant's deceased husband and second applicant's father. It is alleged that on 27 July 2013 the deceased travelled with his motor cycle in the small town of Theunissen, Free State Province and that he was thrown off the motor cycle after driving through a pothole/potholes, alternatively a deep drainage furrow/ditch in the road at the intersection of Jan van Riebeeck and Pienaar Streets. The deceased passed on a few days later as a result of injuries sustained. For sake of clarity it is recorded to be common cause that Theunissen is situated within the jurisdiction of the respondent municipality.

[3] Respondent filed a special plea, claiming that the claims should be dismissed in that applicants failed to give the required notice in terms of s 3(2) read with s 3(4) and s 4 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 ("Act

40 of 2002"), alternatively, that such notice was not given within the stipulated period of six months.

[4] Applicants now seek condonation for failing to serve the required notice within the period laid down in s 3(2)(a) of Act 40 of 2002. They were prepared to accept responsibility for the costs of the application in the event of it being unopposed, but not anymore as a costs order is now sought against respondent. Respondent decided to oppose the application and the matter is now ripe for hearing. Respondent failed to submit heads of argument in accordance with the directives set out in the Rules of Practice of this Division. Its attorney, Mr Rampai, attended the proceedings, without being robed. At my request he indicated that he had no instructions to instruct counsel to argue the application and the same applied to him. However, the opposition of the application was not withdrawn and consequently a judgment by the court was required.

II UNDISPUTED FACTS

[5] The undisputed facts can be summarised as follows:

(i) On 27 July 2013 the deceased, the driver of a motor cycle, fell off his bike at the intersection of Jan van Riebeeck and Pienaar Streets, Theunissen and sustained serious injuries ("the incident"). He died on 31 August 2013, although causation is apparently still in dispute.

(ii) Messrs Podbielski Inc sent a letter of demand dated 29 May 2014 per registered post to respondent in terms of s 3 of Act 40 of 2002. There is a dispute as to when the respondent received the letter. It blames the general postal strike for late receipt thereof.

(iii) The letter of demand was not served timeously, and at best for applicants, at least about four months after expiry of the six months' period stipulated in Act 40 of 2002.

(iv) The South African Police Service ("SAPS") investigated the incident and the customary Accident Report ("AR") form was completed. Applicants' attorneys corresponded with SAPS since November 2013 to obtain copies of the case docket which they only received in February 2014. Although respondent's deponent avers that he has no knowledge of this and therefore denies same, such denial does not hold any water bearing in mind the test laid down in *Plascon-Evans* and *Wightman* referred to *infra*.

(v) Applicants' attorneys also applied for copies of the record of the inquest proceedings which they eventually received, although after expiry of the six months' period.

(vi) Summons was served upon respondent in December 2015, some sixteen months after the claims had arisen.

Respondent's plea, including its aforesaid special plea, was filed on 25 February 2016.

(vii) On 25 August 2016 a rule 37 conference was held. It was agreed that the court should be approached for a separation of the issues, in particular that the merits – paragraphs 1 to 6 and 9 of the particulars of claim, read with the special plea and other corresponding paragraphs of the plea - be heard and adjudicated first, *quantum* to stand over. During a rule 37(8) conference held on 28 November 2016 Murray AJ issued an order of separation of issues as agreed upon. On 12 June 2017 a further rule 37 conference was held, this time attended to by counsel of both sides. In paragraph 7 of the minutes the parties agreed that applicants would bring their condonation application "in due course" for it to be heard at the forthcoming trial.

(viii) The main action was set down for hearing, but on 28 June 2017 it was postponed to 24, 25 and 27 October 2017, the reason being that a belated condonation application in terms of Act 40 of 2002 was brought by applicants at the eleventh hour. The idea was to move the application on 27 June 2017, being the first day of the trial. However, the application was served on respondent on the 27^{th} only, leaving no opportunity for it to respond meaningfully. The costs occasioned by the postponement were reserved.

(ix) The condonation application was set down for 10 August 2017, but again postponed to 7 September 2017, costs to be costs in the cause, the reason being that respondent's answering affidavit was filed on 8 August 2017 only.

(x) Applicants' claims have not become prescribed and the first requirement of s 3(4)(b) of Act 40 of 2002 has been met. It needs to be considered whether the second and third requirements of the sub-section to which I shall refer *infra* have been met.

(xi) As mentioned the application for condonation was issued and served on 27 June 2017, thus approximately sixteen months after receipt of respondent's special plea.

III THE DISPUTE

[6] Respondent opposes the application by averring firstly, that applicants have not shown good cause why their failure to serve the required notice timeously should be condoned and secondly, that applicants failed to show that it was not unreasonably prejudiced.

[7] It is not specifically averred in the answering affidavit that the application should be dismissed insofar as it was brought at such a late stage of the proceedings and about sixteen months after filing of the special plea. This may be seen as an inexplicable

delay, bearing in mind the considerations applicable in adjudicating applications for condonation in general, and I shall consider this *infra*.

IV **APPLICABLE LAW**

[8] In the pre-constitutional era of our country several statutes existed from time to time which placed serious limitations on claimants to have their disputes with organs of state adjudicated by courts of law. It is apposite to refer to just two such provisions, to wit s 113(1) of the Defence Act, 44 of 1957 and s 32 of the Police Act, 7 of 1958. These sections contained similar provisions and I merely quote ss 113(1):

> "No civil action shall be capable of being instituted against the state or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months … has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

The effect hereof is that a written demand had to be given within five months from the cause of action and the summons had to be instituted within six months from the date of the cause of action, failing which the claimant was non-suited. These Acts conferred no discretion upon courts to grant condonation for non-compliance.

[9] Not surprisingly, s 113(1) of the Defence Act was declared inconsistent with s 22 of the *interim* Constitution and invalid in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at 136 B.

During or about the time that *Mohlomi* was referred to the Constitutional Court and/or adjudicated by that court, the legislature found it necessary to repeal the Police Act of 1958 and replace same with the South African Police Service Act, 68 of 1995. Section 57 of this Act replaced s 32 of the previous Act. The new Act made provision for condonation in the event of non-compliance with the demand requirements of this section.

[10] Since the beginning of the previous century several eminent judges questioned the adverse effects on the rights of claimants of similar statutory provisions to those found in the aforesaid two Acts. In *Benning v Union Government (Minister of Finance)* 1914 AD 180 Innes JA described these limitations at 185 as:

> "(c)onditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law."

Botha JA mentioned in *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A) at 621 F – G the following: "Hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts sec. 254(2) must be restrictively interpreted….." More recently Corbett CJ echoed these comments in *Administrator Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 764 E, stating that the provision in that matter "undoubtedly hampers the ordinary rights of an aggrieved person to seek the assistance of the court." However, as stated by Majiedt AJA (as he then was) in *Minister of Agricultural and Land Affairs v C J Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at para [13], relying on *Mohlomi supra,* the legitimacy and constitutionality of insistence on a notice in terms of s 3 of Act 40 of 2002 (or similar provisions in the past) are not in issue.

[11] Act 40 of 2002 was promulgated as there was a need to harmonise and create uniformity in respect of the different expiry periods contained in the different laws, but more importantly to give effect to our Bill of Rights. I quote the following from the preamble of the Act:

> "And bearing in mind that - …
>
> - the Bill of Rights is the cornerstone of democracy in South Africa and that the state must respect, protect, promote and fulfil the rights in the Bill of Rights;
> - section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum;
> - the right to access to courts may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;"

Act 40 of 2002 does not give *carte blanche* to litigants to ignore the provisions of the Act in a reckless manner. Courts of law shall not condone the actions of such litigants, bearing in mind the requirements of s 3(4)(b) of the Act which subsection reads as follows:

> "3(4)(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."

As indicated *supra* the first requirement is not in dispute and therefore it is only necessary to concentrate on the second and third requirements, i.e. good cause for failing to comply with the requirements of s 3 and prejudice.

[12] The *locus classicus* is *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA). In this regard Heher JA remarked as follows at para [10]:

> "[10] The second requirement is a variant of one well known in cases of procedural non-compliance. … '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 of other persons or parties to the delay and the applicant's responsibility therefor."

In para [12] at 317 C the learned judge continued as follows:

> "[12] … '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. <u>There are two main elements at play in s 4(b)</u> (sic – it should read s 3(4)(b))<u>, 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</u> beyond the statutorily prescribed limit for the giving of notice." (emphasis added)

I must also consider the delay in bringing the application for condonation as it might be relevant in adjudicating whether applicants are entitled to relief. Heher JA dealt with this issue in *Madinda supra* in a matter where the plaintiff brought the application for condonation nine months after the letter of demand was rejected by the Minister of Safety and Security. The following passages are quoted to emphasise the viewpoint of the Supreme Court of Appeal:

> "[14] One other factor in connection with 'good cause' in s 3(4)(b)(ii) is this: it is linked to the failure to act timeously. Therefore subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms. <u>Whether a proper explanation is furnished for delays that did not contribute to the failure 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'</u>. …
>
> [20] It is also true that, although her attorney received the rejection of the notice in the middle of October 2005, the appellant did not commence proceedings for condonation until July 2006. As I have earlier pointed out, <u>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</u>. ...
>
> …

> [28] … But when he received that reply it must have been clear that all hope of concession was past. It was the delay thereafter until July 2006 which he should have explained but did not. Applications for condonation should in general be brought as soon after the default as possible. Thereby possible further prejudice to the other party and misconception as to the intentions and bona fides of the applicant can be lessened. A delay in making the application should be fully explained. The failure to do so may adversely affect condonation or it may merely be a reason to censure the applicant or his or her legal advisers without lessening the force of the application. I think that the latter is the correct attitude to take in the present matter in relation to the evaluation of whether condonation should be granted. Under the present statutory dispensation there is no time limitation on the institution of action and the appellant had until September 2007 (when her claim would have prescribed) to issue summons. The matter was clearly very much alive during the first half of 2006 and the State had no reason to think otherwise. Nor has the respondent suggested that it was prejudiced or misled by the additional delay." (emphasis added)

[13] In *C J Rance supra* the general principles pertaining to the issues *in casu* were merely restated. In that matter almost two and a half years lapsed before the plaintiff served a notice of its intention to institute proceedings on the Minister. The delay was not explained. The court referred at para [13] to the so-called conventional explanation for demanding prior notification of intention to sue organs of state mentioned in *Mohlomi supra* to the effect 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."

In *C J Rance* the organ of state clearly demonstrated that it would be prejudiced if the late notice of demand was condoned insofar as it did not have any opportunity to do an investigation of its own pertaining to the fire that had allegedly broken out on State property and damaged the plaintiff's assets. Also, it was the court's view that no factual foundation was laid for the court to establish whether there was some prospect of success in the action to be instituted.

[14] In *MEC for Education, KZN v Shange* 2012 (5) SA 313 (SCA) the court found that good cause had been shown. The learner could not be blamed for any delay or failure. He was still a minor when his cause of action arose and the court found that he was reliant on others to prosecute his claim and that they had failed him. The attorney's mistake to direct the notice of demand to the Minister of Education instead of the MEC for Education, KZN was excused by the court *a quo* and although the Supreme Court of Appeal referred to case law dealing with attorneys' mistakes that could be attributed to their clients, it found that no blame for any delay or failure could be attributed to the respondent. See also *Dauth and others v Minister of Safety and Security and others* 2009 (1) SA 189 (NC) at para [8].

[15] As to costs, in para [24] of *Shange supra* the court approved the viewpoint of Cloete JA in *Premier of the Western Cape Provincial Government v Lakay* 2012 (2) SA 1 (SCA) in para [25] to the effect that applications for condonation in terms of Act 40 of 2002 should be considered differently from normal applications for

condonation of non-observance of the rules of court and that if an applicant for condonation in terms of the Act succeeds, there should be no reason why he should not be awarded his costs.

[16] Finally, I wish to refer to an unreported judgment by myself, with whom Kruger and Ebrahim JJ concurred, to wit *Minister of Safety and Security v Hilton William Barry,* case number A103/2012, a judgment delivered on 20 June 2013. In that judgment I summarised the applicable legal principles and I richly borrowed from it herein.

V APPLICATION OF THE LAW TO THE FACTS

[17] The facts in *C J Rance supra* differ materially from the facts in the present application. In the *C J Rance* case the court was concerned with a claim relating to damage caused by a fire. Investigations had to be done as to who the owner of the land was upon which the fire originated, and the Supreme Court of Appeal found at para [46] that the company failed to establish good cause, particularly also in respect of a period of at least seventeen months which was not explained. The notice was sent two and a half years after the cause of action had arisen. The Supreme Court of Appeal did not have to consider any delay between the defective notice and/or filing of a special plea and the launch of the application for condonation. *In casu* the SAPS compiled a report. In fact, the AR report was prepared by the same officer who came across the seriously injured deceased, still lying in the street. An inquest was also held. All aspects pertaining to the incident were recorded.

Respondent's personnel will be able to say whether or not the version provided by applicants' witnesses, and the experts in particular, is correct or not. The scene of the incident has not changed materially and respondent was at all times in a position to do its own investigations. We are not concerned with a huge metro municipality and an injury allegedly sustained by a pedestrian falling on a slippery pavement down town and only reporting the incident to such metro one or two years later. Surely, in such instance it would be virtually impossible for the metro to investigate in order to establish whether it should concede or contest liability.

[18] *Bona fides* play an important role in considering good cause. It is evident that applicants very soon after the incident sought legal advice and that their attorneys acted swiftly to do the necessary investigations. Bearing in mind that the only eyewitness - as far as I could gather from the information before me - passed away, the applicants could not issue a letter of demand without ascertaining what could have caused the incident that led to the breadwinner's death. The letter of demand, even accepting that it was sent out of time and reached the respondent's offices much later, sets out the facts relied upon and it should have been clear to any reasonable reader thereof that applicants intended to institute action to claim loss of support due to the negligence of respondent as alleged in the letter with sufficient clarity. It is clear that the applicants intended to pursue their action against respondent at all times. In the words of Heher JA in *Madinda supra*, this was a matter that was clearly very much alive at all relevant times and the respondent had no reason to think otherwise.

[19] In its plea on the merits respondent denies about every allegation in the particulars of claim, but bearing in mind the AR report of the SAPS it can hardly be disputed that an incident occurred causing the deceased to lose control of his motor cycle and sustaining injuries that eventually led to his death. As mentioned the SAPS were on the scene immediately after the incident had occurred. In fact, respondent now admits the incident. It is apparent from the AR report that (a) the deceased lost control of his motor cycle, (b) regarding the quality of the road it was indicated that the road contained a pothole and (c) the road signs were not clearly visible and/or in good order. I considered the reports of the experts and I am satisfied that, without having to come to a final conclusion, applicants might be able to prove at least one percent negligence, and this will be sufficient to succeed on the merits. The prospects of success are not really put in issue by respondent in its answering affidavit. The following is stated in paragraph 6 of the answering affidavit: "I however wish to state that the deceased contributed to his death in that he failed to observe the road signs and was driving at a high speed which resulted in him losing control of his motor cycle." It is not respondent's case that the deceased was solely responsible for his death. It cannot be found that applicants' claims are spurious or without merit.

[20] In the answering affidavit applicants' attorneys are blamed for not acting speedily in order to allow them to serve the required notice timeously. The application for condonation is apparently opposed on the basis of absence of "good cause" and alleged prejudice. However, no factual basis was laid for a finding that respondent was unreasonably prejudiced as a result of any delay. Such

averment could surely not be made with any conviction. Theunissen is such a small town that I would be amazed if the news of a motor cycle crash and serious injuries to the driver would not spread like a veldfire out of control during windy conditions. Respondent will not be disadvantaged at the trial of the main action, whether or not it received late notice and/or the condonation application was brought at the eleventh hour. If respondent was prepared to concede liability after investigating the matter, it might argue that if timeous notice was given, institution of action could have been avoided. This might have a bearing on costs. This is not what transpired as the merits are still contested. As is evident, it is not and cannot be respondent's case that it will be unreasonably prejudiced because of evidence being lost or for whatever unknown reason.

[21] In a condonation application a court considers the merits together with the grounds advanced for the failure. As stated in *Madinda supra*, and quoted above, strong merits may mitigate fault whilst no merits may render mitigation pointless. It is also accepted that the interests of justice play an important role in condonation applications and that it is expected of an applicant to set out fully the explanation of his delay during the entire period of the delay and such explanation must be reasonable. Also, a condonation application must be brought as soon as the party concerned realises that it is required. Bearing all this in mind, Heher JA in *Madinda* highlighted the two important elements to be considered in adjudicating applications in terms of s 3(4)(b), namely the subject's right to have his case tried by a court of law and the right

of the organ of state not to be unduly prejudiced. *In casu* no facts are alleged as mentioned *supra* and it is not even vaguely suggested that prejudice has been or will be suffered by respondent due to applicants' non-compliance. In this regard I wish to refer to the following *dictum* by Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*, quoting from para [13]:

> "[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen

> it should come as no surprise that the court takes a robust view of the matter." (emphasis added.)

[22] There is no *onus* on an applicant for condonation to prove his/her case on a balance of probabilities. The court must merely be satisfied that the three requirements contained in s 3(4)(b) have been met. Although applicants and/or their attorneys might be blamed for the delay in bringing the application for condonation, there is no obvious prejudice to respondent and applicants provided a detailed explanation as to why the notice was not served earlier.

[23] The late bringing of the condonation application can be disposed of in light of the comments by Heher JA in *Madinda_supra* with particular reference to paras [14], [20] and [28] of the judgment. Special pleas are often not dealt with speedily. Often, issues raised in special pleas fall away or are resolved by the parties. No condonation is required if the organ of state does not object to the absence of notice or defective notice. See: *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) at para [10]. Further, it is the duty of the attorney, not the client, to do something with the special plea, e.g. set it down for hearing. The fact that the application for condonation was only brought after sixteen months cannot be held against the applicants. See Shange and *Dauth supra.* I come to this conclusion even though there was not a full explanation as to why the condonation application was not brought immediately after receipt of the special plea, or at the latest immediately after the first rule 37 conference. The overall impression created by the undisputed facts is such that I am

satisfied that applicants are entitled to have their case tried by a court of law.

[24] I refer to *Shange* and *Lakay supra* and am satisfied that applicants are entitled to their costs. The application was previously enrolled for hearing on 10 August 2017. Respondent failed to file its answering affidavit timeously. It was filed after closure of the roll only and as late as 8 August 2017, a mere two days before the matter was to be heard. Respondent should have been ordered to pay the wasted costs, but the parties agreed that costs should be costs in the application. Respondent decided not to appoint counsel to argue the matter today and further unnecessary costs were incurred in that applicants' senior counsel from Pretoria had to come to Bloemfontein to argue the matter, which could have been avoided if a timeous notice was served by respondent abiding by the decision of the court. I considered granting punitive costs against respondent, and even postponing the application to allow the administrator of respondent, Mr Tau, an opportunity why he should not be ordered to pay the costs of the application *de bonis propriis.* Mr Alberts on behalf of applicants submitted that although a punitive costs order might be appropriate, he was not pressing for such order as no notice to that effect was given to respondent.

VI **<u>ORDERS</u>**

[25]

(1) The applicants' failure to serve the notice contemplated in s 3(1)(a) of the Institution of Legal Proceedings Against Certain

Organs of State Act, 40 of 2002, within the period laid down in s 3(2)(a) of the Act is hereby condoned.

(2) Respondent is ordered to pay applicants' costs of the application on an opposed basis.

J. P. DAFFUE, J

On behalf of the applicants: Adv G W Alberts SC
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the respondent: No appearance
Rampai Attorneys
BLOEMFONTEIN