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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 5035/2014

In the matter between:

WILLEM MAAS VAN NIEKERK

1st Applicant/Plaintiff

MAGDALENA JOSINA VAN NIEKERK

2nd Applicant/Plaintiff

(née NEETHLING)obo NICOLAAS JACOBUS
VAN NIEKERK

And

Case No.: 3310/2013

MARIA JOHANNA VAN JAARSVELD

2ND Respondent/Plaintiff

MEC FOR POLICE, ROADS,
TRANSPORT, FREE STATE

1ST Respondent/ Defendant

HEARD ON:

25 February 2016

JUDGMENT BY:

C. REINDERS, J

DELIVERED ON:

3 MARCH 2016

- [1] On 12 May 2012 Willem Maas van Niekerk (the deceased) was driving on the R716 road between Heilbron and Deneysville, at the Oranjeville T-junction (the road) when he drove through the T-junction, lost control of his vehicle, collided with a fence pole and overturned the vehicle (the incident). The deceased sustained fatal injuries.
- [2] Action was instituted under case number 3310/2013 by Maria Johanna van Jaarsveld (the Van Jaarsveld plaintiff) against the MEC for the Department of Police, Roads and Transport: Free State (the defendant) as being the responsible entity for the maintenance and the upkeep of the road. Willem Maas van Niekerk Junior and Magdalena Susanna van Niekerk, on behalf of her minor son [N.....] [J.....] van [N.....], (the Van Niekerk plaintiffs) likewise instituted action under case nr 5035/2014 against the Defendant as being the responsible entity for the maintenance and the upkeep of the road. All the plaintiffs claim loss of support due to the death of the deceased in the incident. The defendant brought an application for consolidation of the aforementioned actions, which order was granted on 19 March 2015. For the sake of clarity I shall refer to the parties as indicated in this paragraph.
- [3] On 22 September 2014 the Van Niekerk plaintiffs served a notice in terms of section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002

(the Act) on the defendant, followed by summons being issued on 18 November 2014. The defendant raised a special plea on non-compliance with the provisions of section 3(2)(a) of the Act and did not consent to the late serving of the statutory notice. The Van Niekerk plaintiffs now seek condonation in terms of section 3(4)(a) of the Act.

[4] The applicable provisions of section 3 of the Act read as follows:

“(4)(a) If an organ of State relies on a creditor’s failure to serve a notice in terms 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 had 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.”

[5] It is trite that section 3(4)(b) circumscribes a court’s power to grant condonation by requiring that it be satisfied that all the requirements as set out are met. These requirements are conjunctive and must be established by the applicant.

See: Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at par [11].

[6] The cause of action arose on 12 May 2012 and summons was issued on 18 November 2014. I am satisfied that the first

requirement in considering condonation, namely that the debt has not been extinguished by prescription, has been met.

[7] I next turn to the requirement that the organ of State was not unreasonably prejudiced by the failure to serve the statutory notice within the prescribed six month period. In the founding affidavit of this application for condonation it is stated that the defendant was already made aware of the incident during April 2013 when the Van Jaarsveld plaintiff's statutory notice was served on the defendant. In their opposing affidavit defendant does not deny being aware of a possible loss of support claim, nor is it denied that it would be unreasonably prejudiced by the Van Niekerk plaintiffs' failure to give notice within the prescribed time. Defendant chose not to deal with the issue of prejudice but rather indicated differences between the application *in casu* and the condonation application by the Van Jaarsveld plaintiff which was not opposed. The Van Niekerk plaintiffs aver that defendant will not be unduly prejudiced if condonation is granted, the defendant in turn does not allege or complain of any prejudice. I am at ease therefore to find that that the defendant was not unreasonably prejudiced by the late filing of the statutory notice by the Van Niekerk plaintiffs.

[8] The remaining requirement is whether good cause for failing to deliver the statutory notice was established by the Van Niekerk plaintiffs. In **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) at para [8] it was held that an applicant's

burden of establishing good cause has to be discharged not on a balance of probabilities, but rather on the overall impression made on the court which brings a fair mind to the facts set up by the parties.

- [9] Good cause within the meaning of section 3(4)(ii) has not been defined but may include a number of factors which will vary from case to case. These include prospects of success, the reasons for delay, sufficiency of the explanation offered and the bona fides of an applicant.

See: Madinda *supra* par [10].

- [10] In considering condonation it is instructive to bear in mind why notices of the kind contemplated in section 3 of the Act have been insisted on by the legislature. The conventional explanation for prior notice to the State organ has been articulated by Didcot J in **Mohlomi v Minister of Defence** 1997 (1) SA 124 CC par [9] as follows:

“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.”

- [11] Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant. Whereas good cause primarily concerns the applicant's

conduct and its motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the protection of its interests by receiving timeous notice.

See: Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd *supra* at par [38].

[12] In attempting to show good cause for the delay the Van Niekerk plaintiffs aver that they have consulted with the attorneys of the Van Jaarsveld plaintiff as early as August 2012, whereafter they were advised of the need to appoint their own attorneys due to a conflict of interest. Jacques Bierman Attorneys were recommended to them. They however mistakenly assumed that the necessary instructions would be given to Jacques Bierman Attorneys by the Van Jaarsveld Plaintiff's attorneys. It only became clear to them that they had to formally instruct Jacques Bierman Attorneys in July 2014, which they did during August 2014. They have no knowledge or experience in litigation matters and were thus not aware of the procedures to be followed. Both these plaintiffs are the children of the deceased with the youngest still a minor.

[13] The test for the sufficiency of the explanation tendered was formulated by Schreiner JA in **Silber v Ozen Wholesalers (Pty) Ltd** 1954 (2) SA 345 (A) at 352H-353A:

“It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently to enable the court to understand how it really came about and to assess his conduct and motives.”

I will deal with my evaluation of the explanation tendered by the Van Niekerk plaintiffs shortly.

[14] It was argued by Me Slingers on behalf of the defendant that the Van Niekerk plaintiffs had launched a similar application for condonation during 24 April 2015, withdrew it and launched the present application on 27 August 2014 and that this is indicative of the absence of good faith. I am not persuaded that this mere fact is indicative of any absence of good faith on the part of the Van Niekerk plaintiffs. What is clear from the the papers is that they indeed had the intention of instituting a claim against the defendant from the start and did in fact consult with an attorney shortly after the incident. I cannot reasonably conclude that the Van Niekerk plaintiffs are therefore not bona fides in bringing this application.

[15] It was furthermore contended by Me Slingers that the merits do not favour the Van Niekerk plaintiffs. She relied on the facts placed before court in the defendant's answering affidavit as extracted from an expert report. Mr Sander on behalf of the Van Niekerk plaintiffs pressed hard upon me to strike out the relevant paragraphs as the report was not annexed to the defendant's papers. However, from all the papers before me it

was clear that on request of the Van Niekerk plaintiff's attorney, the said report was indeed discovered by the defendant on 4 November 2015 and filed with the said attorneys. In essence the expert deals with the absence or not of warning signs near the T-junction which could have prevented the incident. It is then mentioned in par 21.5 of the defendant's opposing affidavit that all of these signs were "probably" in position at the time of the incident. It is trite that the prospects of success of the intended claim play a significant role. Strong merits may mitigate fault, no merits may render mitigation pointless. I am not of the view that it can be concluded that the Van Niekerk plaintiffs have no merit based on the aforementioned.

- [16] The overall impression that I have come to taking all the above mentioned factors into account is that the Van Niekerk plaintiffs' attempt at showing good cause for the delay is very thin and indeed borderline. Had it not been common cause that the Van Jaarsveld plaintiff had already instituted action and a plea been filed therein, I would in all probability have declined this application on the basis that good cause had not been shown. Adjudicated in isolation the Van Niekerk Plaintiffs' affidavit herein discloses very scant particularity of either the reasons for their failure to file the said notice in time or the launching of this application at an earlier stage. The founding papers disclose no allegations of the cause of action, but same was canvassed by the defendant in its opposing papers. I would have expected the the Van Niekerk plaintiffs to have concentrated on the

strong case they believe they have in order to assist them in obtaining condonation.

[17] Being challenged in this regard by the deponent to the defendant's answering affidavit, the Van Niekerk plaintiffs in reply deems it sufficient to merely aver that they "will present a case to proof that there were inadequate warning signs warning the road users that there is a T-junction ahead". More skimpy and vague allegations are difficult to fathom.

[18] Having said that, I cannot merely ignore the objective facts herein that the Van Niekerk plaintiffs have served a summons in which the cause of action to be adjudicated upon, is exactly the same as that in the Van Jaarsveld summons. The defendant based thereon brought an application that these cases should be consolidated and heard as one. The defendant on the papers have not been prejudiced at all due to the late filing of the statutory notice in as far as the preparation for trial and/or the obtaining of witnesses or evidence are concerned. On the contrary, they aver that they have a good defence to the merits and will *inter alia* rely on the evidence of at least one expert. In all probability therefore, the Van Jaarsveld matter will proceed on the merits and the court will adjudicate the merits. To now deny condonation herein will not detract from those facts but will merely refuse the Van Niekerk plaintiffs of claiming their damages in the event that the Van Jaarsveld plaintiff is succesful. To my mind the main purpose of the statutory notice,

to wit to inform the defendant of a potential claim to enable it to investigate same timeously, to gather evidence and to consider its position on this specific cause of action had been fulfilled to a large extent in the Van Jaarsveld matter which is not an issue to be determined therein anymore.

- [19] It is trite that the very purpose of the provision allowing condonation is to give a court a discretion to determine whether the organ of State can rely on con-compliance.

See: Minister of Safety and Security v de Witt 2009 (1) SA 457 (SCA) at para [12].

- [20] In general terms the interest of justice play an important role in condonation applications.

See: Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (4) BCLR 442 para [20].

One of the Van Niekerk Plaintiffs is a minor, and the Van Niekerk plaintiffs' claims have been ordered to be heard simultaneously with the Van Jaarsveld action by order of court and at the request of the defendant. In the circumstances, having taken all these factors into consideration, I am of the view that the interest of justice requires that condonation be granted instead of dismissing the application having the effect that the Van Niekerk plaintiffs may not ventilate the dispute simultaneously with the Van Jaarsveld plaintiff.

[21] Although the reliance placed by the Van Niekerk plaintiffs on good cause was indeed not flawless, the absence of unreasonable prejudice to the defendant played a very significant role in the unique facts of this matter in weighing up all of the factors and exercising my discretion. I am not willing to deprive the Van Niekerk plaintiffs of the opportunity to have their claim tested according to the dictates of law and justice.

[22] I make the following orders:

1. Condonation is granted for the First and Second Applicant's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 within the period laid down in section 3(2)(a) of the Act.
2. Costs of this application to be in action nr 5035/2014.

C. REINDERS, J

On behalf of 1st and 2nd Applicants:

Adv. A. Sander
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of 1st Respondent:

Adv. H. Slingers
Instructed by:
The State Attorney
BLOEMFONTEIN