

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

Case No.: 4617/2010

In the matter between:

**MEC PUBLIC ROADS AND TRANSPORT:**

1<sup>st</sup> Applicant

**FREE STATE PROVINCE**

**PREMIER OF THE FREE STATE**

2<sup>nd</sup> Applicant

And

**JJ VAN DER MERWE**

Respondent

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**JUDGEMENT:** MOENG, AJ

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**HEARD ON:** 11 MARCH 2016

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**DELIVERED ON:** 18 MARCH 2016

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- [1] The applicants seek leave to appeal against the judgment delivered by this Court on 29 January 2015 in which condonation was granted for respondent's non-compliance with the provisions of section 3(1) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act"). A similar application was launched on 18 February 2015. I ordered that heads of argument be filed and that the application be decided in chambers. I was only favoured with respondent's heads whereas applicant failed to provide same. I subsequently dismissed the application for leave to appeal with costs on 20 March 2015. However, it later transpired that the heads of argument were indeed filed with the Registrar's office but due to an administrative error, they

were not placed in the court file. The order dated 20 March 2015 was resultantly rescinded by Van der Merwe J on 10 December 2015.

[2] In total thirteen grounds of appeal were raised. These are contained in the notice of appeal and I do not deem it necessary to repeat same. Viewed in totality, applicants contend in the main;

- That I erred in finding that the applicants were not unreasonably prejudiced by the respondent's failure to serve the notice timeously;
- That I erred in finding that the applicants did not contend that the respondent has no prospects of succeeding in her claim as this issue was raised in the applicants heads of argument;
- By finding that the applicants failed to lay any basis as to how they would be prejudiced and how evidence relating to the accident was extremely compromised is a material misdirection as it reversed the onus and placed it on the applicants;
- That I erred in finding that the post notification delay in bringing the application for condonation does not disentitle the respondent to the relief sought and that the remissness of the attorney should not be attributed to the respondent and;
- That I erred in directing that the applicants should pay the respondent's costs including the costs of two counsel. The respondent was granted an indulgence and costs should not have followed the event.

[3] On the strength of the foregoing grounds of appeal, applicants submit that there is a reasonable prospect of success and that another Court may come to a different conclusion. The application is opposed. The respondent contends

that none of the grounds of appeal have any substance and that there is no reasonable likelihood that another Court will arrive at a different conclusion.

- [4] It is trite that leave to appeal should not be granted unless the applicant satisfies the trial court concerned that he has a reasonable prospect of success on appeal. The issues at hand relate to whether there was merit in the application in terms of section 3(4) of the Act and whether respondent unduly delayed instituting the condonation application.
- [5] I concluded in my judgment that it is implausible, based on the course of events, that the respondent could have consulted and instructed an attorney to institute an action before expiry of the statutory notice period. It was not in dispute that the respondent was admitted to the intensive care unit for some time and was further hospitalised in the Pasteur Hospital for active rehabilitation from 29 September 2009 to the beginning of February 2010 when she was discharged. The statutory notice period had therefore already expired when she was discharged. The accident rendered her quadriplegic.
- [6] I further concluded that a *prima facie* case was established which triggered applicant's fundamental right to have her evidence evaluated as against the opposing testimony of the respondents. I was satisfied that the applicant's contention that they have been extremely prejudiced by the failure to give notice timeously since the evidence regarding the cause of the accident has been extremely compromised, was not supported by any facts and that the applicants were attempting to craft a non-existent prejudice. I was satisfied that all three requirements encapsulated in section 3(4)(b)(i), (ii) and (iii) were established. I was also satisfied that the attorney's admitted neglect to timeously proceed with the condonation application should not in the circumstances, debar the applicant from relief.

- [7] Mr Notshe SC, counsel for applicants contended in the main that the burning issue related to the post notification delay of around 22 months in bringing the condonation application. He argued that the remissness of the attorney should have been imputed on the respondent as litigants must accept responsibility for what their legal representatives do. This argument was fully canvassed in para 23 to 26 of my written judgment and I do not intend to restate those reasons herein save to mention that the attorney was not inactive during this period to arouse anxiety from the applicant as to why the matter does not reach finality. No factors were stated by the applicants why the self-confessed remissness of the attorney should be attributed to the respondent and what prejudice they would suffer as a result of the delay in launching the condonation application.
- [8] As was stated by Boshoff J in **Evander Caterers (Pty) Ltd v Potgieter** 1970 (3) SA 312 (T) at 315–16, condonation should not be lightly refused if the delay did not prejudice the other party in respect of the merits or in the conduct of his case, other than the procedural advantage gained by him owing to the existence of the time-limit. Everything should be done to secure a fair trial between the parties in the litigation so that the disputes and questions between them may be settled on their merits. It is a fundamental rule that justice cannot be done to a person without having given him an opportunity of presenting his case.
- [9] The Constitutional Court in **Ferris v FirstRand Bank Ltd** 2014 (3) SA 39 (CC) at 43G–44A has laid down that lateness is not the only consideration in determining whether condonation may be granted and that the test for condonation is whether it is in the interests of justice to grant it. It further held that the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both

enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.

[10] Mr Zietsman, counsel for respondent persuasively argued with reference to the full bench judgment of the North Gauteng High Court Pretoria in **Roets v MEC for the Department of Public Works, Roads and Transport Mpumalanga**, case A228/12 at para [10], that no prejudice was brought about as a result of the failure to launch the application for condonation timeously as there is no indication that the position would have been different had the notification being received in time. He argued that the prejudice faced by the respondent if condonation was not granted would far outweigh the prejudice claimed to be suffered by the applicants.

[11] Mr Notshe SC further argued that I erred in finding that the respondent has prospects of success in the proposed action. If I correctly followed his argument, he contended that the mere fact that the applicants were negligent in failing to properly maintain the road could not in itself clothe them with liability. He pressed upon the fact that there was no causal link between the condition of the road and the ultimate occurrence of the alleged accident. He contended that respondent failed to depose to an affidavit and that the evidence contained in the founding affidavit of her attorney relating to how the accident took place is tantamount to inadmissible hearsay. Mr Zietsman in turn argued in the main that the evidence contained in the founding affidavit was not hearsay. He argued that even if it may be accepted that such evidence was hearsay, applicants failed to apply for such evidence to be struck out and that they are not at liberty to raise this issue in these proceedings.

[12] It is common cause that the respondent did not depose to a confirmatory affidavit and that the course of events that led to the accident were narrated by

her attorney and father. The deponent to the founding affidavit, who is the attorney to the respondent, declares that the facts deposed therein fall within his personal knowledge and belief unless stated otherwise and are true and correct. With reference to the particulars of claim, deponent proceeds to recount the course of events that led to the accident in detail. Respondent alleges in her particulars of claim that she lost control of her vehicle when the left wheels alternatively the left front wheel of her vehicle unexpectedly encountered a point where the tarred verge of the road had broken away and where there was a significant difference between the level of the tar and that of the gravel shoulder, immediately adjacent to the tar. Applicants, so respondent alleges, were negligent in failing to properly maintain the road and failing to ensure that it was reasonably free from edge break and dangerous drops between the levels of the tar and the gravel verge. This, in my view, set out a *prima facie* case.

- [13] The contents of the founding affidavit are in my view not hearsay simply because what the attorney deposed to was not being tendered to prove the truth of what was asserted or to prove the truth of what was related to him, but merely as to what the respondent's evidence would be during the main action. Even if accepted that the version relating to how the accident occurred amounts to hearsay, it is trite that hearsay evidence by way of affidavit may be admitted were the existence of other special circumstances appear to justify their doing so, provided the deponent reveals the source of the information concerned, and avers that he believes such information to be true and correct, and furnishes the ground for such belief. See **Galp v Tansley NO and Another** 1966 (4) SA 555 (C).

- [14] The admission of hearsay evidence is governed by s 3 of the Law of Evidence Amendment Act 45 of 1988, which gives the court a wide discretion whether or

not to admit hearsay evidence. What a Court has to consider in determining whether to accept such evidence amongst others is the nature of the proceedings at hand and the purpose for which the evidence is tendered. As was stated in **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) para [8], the phrase “*if [the court] is satisfied*” in s 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. All that was therefore expected of the respondent was to 'satisfy' the Court that there is a fair probability that she has prospects of success in the main action and not to prove same on a balance of probabilities.

- [15] Applicants contention that I erred in finding that the applicants failed to lay any basis as to how they would be prejudiced and in so finding I reversed the onus and placed it on the applicants, is in my view likewise misplaced. Relying on **Madinda** *supra*, I concluded at para [19] of my written judgment that 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. I was satisfied that the applicants' claim of prejudice was not supported by any facts. I find it apposite to refer to **MEC for Education, Kwazulu-Natal v Shange** 2012 (5) SA 313 (SCA) where the following was stated at para [22]:

“First, the complaint of prejudice raised by the appellant is general and unspecified in its terms and unrelated to any facts that indicate prejudice. Second, the respondent's allegations that the teacher involved is now the principal of the same school and that pupils who were present during the incident, identified by name, are still available, are unchallenged. The absence of any prejudice is therefore illustrated by these facts.”

[16] In conclusion, the contention that I erred in directing that the applicants pay the respondent's costs as she was granted an indulgence and costs should not have followed the event, is likewise not well taken. The Court in **Premier, Western Cape v Lakay** 2012 (2) SA 1 (SCA), held that:

“Ordinarily, in applications for condonation for non-observance of court procedure, a litigant is obliged to seek the indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter's costs if it does oppose, unless the opposition was unreasonable. I doubt that this is the correct approach in matters such as the present, as an application for condonation under the 2002 Act has nothing to do with non-observance of court procedure, but is for permission to enforce a right, which permission may be granted within prescribed statutory parameters; and such an application is (in terms of s 3(4)) only necessary if the organ of State relies on a creditor's failure to serve a notice. In the circumstances there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result.”

[17] After having revisited my judgment and having re-evaluated same with the notice of appeal as well as the arguments submitted herein, I come to the conclusion that applicant has no reasonable prospect of success on appeal. I will accordingly make the following order:

1. Leave to appeal is dismissed with costs.

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**L.B.J. MOENG, AJ**

On behalf of the applicants: Adv. V.S. Notshe SC  
Instructed by:  
State Attorneys  
BLOEMFONTEIN

On behalf of the respondent: Adv. J. Zietsman  
Instructed by:  
Honey Attorneys  
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