



IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
VRYSTAATSE AFDELING, BLOEMFONTEIN

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 3859/2015

In the case between:

O C POTGIETER

Applicant

and

MEC FOR POLICE, ROADS & TRANSPORT:
FREE STATE

Respondent

JUDGMENT BY: LEKALE, J

HEARD ON: 4 AUGUST 2016

DELIVERED ON: 11 AUGUST 2016

BACKGROUND AND INTRODUCTION

- [1] On 7 September 2012 the applicant, who was a self-employed architect / technologist, allegedly sustained bodily injuries when he allegedly lost control over a motor vehicle

he was driving along the R82 road between Kroonstad and Koppies as a result of potholes in the road. He received involved medical attention and successfully lodged a disability claim with his insurers during December 2012.

- [2] Some 2 years and 8 months later on the 26 May 2015 the applicant, through his attorneys of record, notified the respondent in terms of section 3(1) of Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the “Act”) of his intention to institute action against him for recovery of damages arising out of the alleged accident. Summons was, thereafter, issued on 18 August 2015 and within 3 years after the alleged cause of action arose alleging that the respondent breached his legal duty towards the applicant by, *inter alia*, failing to ensure the repair of all potentially dangerous rutting and/or potholes on the road surface.
- [3] The respondent resists the action and on 5 November 2015 filed a special plea to the effect that the notice in question was defective in that it was not served timeously. On 8 February 2016 the respondent, through the State Attorney, responded to the applicant’s request for condonation in his letter of 17 November 2015 and pointed out that same could not be agreed to.
- [4] On 4 May 2016 the applicant filed the instant application moving for condonation of the late delivery of the relevant

notice together with costs in the event of opposition by the respondent. The respondent, on his part, opposes the motion on the ground that there exists no good cause for condonation.

ISSUES IN DISPUTE

[5] The parties are at variance on whether or not good cause exists for condonation with specific reference to the following:

- (a) Whether or not the delay involved has been explained adequately full with the respondent contending that the delay involved in launching the application after the special plea was filed and after the applicant was advised of the respondent's attitude towards his request for condonation has not been explained;
- (b) Whether or not the applicant's claim enjoys any prospects of success with Mr Mene for the respondent maintaining that the applicant's refusal to deal with the issue in the present application is fatal;
- (c) Whether or not the reason advanced by the applicant for pre-notification delay is acceptable and satisfactory with the respondent holding that same is contradictory, flimsy and renders the delay inexcusable;
- (d) Whether or not the respondent would suffer prejudice if condonation is granted with the applicant contending that the fact that the respondent deals with the merits

of the action in its opposition of the application is indicative of his ability to deal with the matter without any prejudice in his defence.

DEPOSITIONS AND CONTENTIONS FOR THE APPLICANT

- [6] The applicant attributes the delay to the fact that after the accident he was not aware that he had a cause of action against the respondent and only acquired the relevant knowledge after he consulted his attorneys of record following an advertisement on the radio. He, further, cites lack of funds on his part as the reason for not seeking legal advice earlier and points out that he only consulted his attorneys after learning that they take instructions on contingency fee basis.
- [7] In argument on papers and before the court Mr Du Preez submits that the applicant furnished proper reasons constituting good cause for condonation. He, further, contends that the respondent has not been unreasonably prejudiced by the delay involved insofar as he has not shown any detrimental prejudice in his ability to properly investigate the applicant's cause of action. In conclusion he reiterates that the post-notification delay in applying for condonation is not prejudicial to the respondent and is, as such, not necessarily fatal to the present application.

DEPOSITIONS AND CONTENTIONS FOR THE RESPONDENT

- [8] The respondent's Director of Legal Services deposes at length to, *inter alia*, the effect that the respondent has been severely prejudiced in his investigation of the alleged accident because of the road works, repairs and other developments that took place on the relevant road between the date of the alleged accident and the date of the relevant notice. In his view it is simply impossible to verify the alleged accident after the inordinate delay involved in bringing same to the respondent's attention.
- [9] On the papers and in argument before the court Mr Mene contends, *inter alia*, that the delay of 6 months after the special plea was served and/or almost three months after an objection was raised against condonation remains unexplained and creates the impression that the applicant is lackadaisical and uncaring in his approach to the matter. He, further, submits that the applicant is self-contradictory insofar as in the founding affidavit he attributes the alleged accident to potholes while in his affidavit annexed thereto he alleges that he swerved away from potholes and the car went into a skid on the oil / diesel spillage.

APPLICABLE LEGAL PRINCIPLES

- [10] Section 3 of the Act proscribes the institution of legal proceedings against organs of state such as the respondent

without either a written notice given within 6 months from the date on which the cause of action arose or written consent to the institution of such legal proceedings without such notice.

[11] Failure to give the prescribed notice may be condoned by the court on application if the relevant organ of state withholds consent and if the court is satisfied that:

- (a) the relevant claim has not prescribed;
- (b) good cause exists for the failure to comply; and
- (c) the relevant organ of state was not unreasonably prejudiced by the failure. (See Section 3(4) (a) and (b) of the Act)

[12] In the context of the Act and for the purposes of condonation “[t]he phrase ‘if [the court] is satisfied’ in S3(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.” (See Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at para [8].)

[13] For the purposes of condonation the court has a wide discretion and “... ‘good cause’ may include a number of factors that are entirely dependent on the facts of each case; and that the prospects of success of the intended claim play a significant

role.” (See MEC for Education, KwaZulu Natal v Shange 2012 (5) SA 313 (SCA) at para [15].)

[14] It is incumbent upon the applicant for condonation to “furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and assess his conduct and motives.” (See Premium, Western Cape v Lakay 2012 (2) SA 1 (SCA) para [17].)

[15] Post-notification delay exacerbates the matter insofar as “condonation must be applied for as soon as the party concerned realises that it is required. The onus, to satisfy the court that all the requirements under s4 (b) of the Act have been met, is on an applicant, although a court would be hesitant ‘to assume prejudice for which [a] respondent itself does not lay a basis’.” (See Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd 2010 (4) SA 109 (SCA) para [39].)

[16] Prescribed time periods in litigation seek to obviate inordinate delays which compromise the interests of justice insofar as time is the worst enemy of human memory. The notice prescribed by section 3 of the Act, *inter alia*, “allows the organ of state time to investigate the complaint and [to] possibly agree to payment or settlement without incurring the costs of litigation.” (See Francis Ralentsoe Moloi v Minister of Safety and Security and Others, case number 3821/2013, unreported judgment of Free State High Court delivered on 12 June 2014 and Mohlomi v Minister of Defence 1997 (1) SA 124 (CC).)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [17] In law the applicant was obliged to serve the relevant notice on the respondent not later than 6 March 2013 but same was only served some 26 months later on the 26 May 2015. The delay involved was indeed inordinate and called for sufficiently full explanation on the part of the applicant. This pre-notification delay has, in my view, been fully explained but the same cannot be said about the post-notification or pre-condonation application delay which simply cries out for explanation and reflects negatively on the applicant's attitude towards the matter regard being had to the fact that he was legally represented at the relevant time.
- [18] It is correct that the applicant was obliged to apply for condonation as soon as he became aware of the respondent's attitude with regard to condonation regard being had to the special plea and the communication between the office of the state attorney, acting for the respondent, and the applicant's attorneys. The delay in question was not reasonable insofar as it stretched from 5 November 2015 to and including 3 May 2016. The reason for the delay in question is an enigma to the court.
- [19] The reason advanced for the pre-notification delay is, in my judgment, not satisfactory and acceptable regard being had to the fact that the applicant was a professional

architect/technologist and, as such, educated although not in the legal field. It is not apparent from the papers that the applicant did anything to secure the funds he needed to secure legal advice which he was clearly aware was necessary in order to protect his rights. It is correct, as submitted by Mr Mene, that the applicant could have approached Legal Aid SA for assistance. Once again the reason why he did nothing to secure the necessary and/or assistance prior to May 2015 remains a mystery.

[20] The applicant expressly refrained from dealing with the prospects of success of his action against the respondent. I only have the respondent's views on the issue which are based on the applicant's own depositions with regard to the cause of the accident. It appears *ex facie* the applicant's deposition that the cause of the accident was *stricto sensu* not the potholes but the oil/diesel spillage on the road which caused the applicant to lose control over the vehicle. To the foregoing extent and without any further input from the applicant his claim *prima facie* has remote, if any, prospects of success.

[21] The applicant insists that the respondent has not shown any detrimental prejudice to his ability to properly investigate the cause of action. The onus is, however, on the applicant to show that all the requirements set out in the Act for condonation have been met. The respondent, as the organ of state concerned, is only saddled with evidentiary burden

to lay the basis for the court to infer presence of unreasonable prejudice on his part. (See **Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd** (*supra*))

[22] I am satisfied from the opposing papers that the respondent has done more than lay the basis for the relevant inference to be drawn. He has, in effect, demonstrated how he would be forced to accept the applicant's *ipse dixit* because of the delay involved which effectively deprived him of the opportunity to investigate the matter properly in order to, *inter alia*, test the veracity of the claim.

[23] When all is said and done I am not persuaded that good cause exists for condonation in the instant matter.

COSTS

[24] There exists no cause to deviate from the general practice with regard to costs. Costs, therefore, follow the event in the instant matter.

ORDER

[25] In consequence the application is dismissed with costs.

L. J. LEKALE, J

On behalf of the applicant: Adv. W.R. du Preez
Instructed by:
Du Plooy Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv.B.S. Mene
Instructed by:
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