FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4617/2010

In the matter between:

JJ VAN DER MERWE Applicant

and

MEC PUBLIC ROADS AND TRANSPORT: 1st Respondent
FREE STATE PROVINCE
PREMIER OF THE FREE STATE 2nd Respondent

JUDGEMENT: MOENG, AJ

HEARD ON: 4 DECEMBER 2014

DELIVERED ON: 29 JANUARY 2015

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[1] Applicant seeks condonation in terms of section 3(4) *(a)* and *(b)* of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Act") for her failure to comply with the provisions of section 3(2) (a) of the Act. The application is opposed on the basis that the applicant unduly delayed instituting the condonation application and that the application in itself has no merit.

[2] On 9 September 2010, applicant issued summons against the respondents claiming damages in the amount of R 7 091 179.87 for personal injuries (primary quadriplegia) she suffered arising from a motor vehicle accident that occurred on 27 July 2009. Applicant alleges 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. Respondent, so applicant alleges, was 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.

[3] A notice in terms of section 3 of the Act was hand delivered at the offices of the second respondent on 2 June 2010, approximately eleven months after the accident. This notice was therefore served roughly four months after the expiry of the six month period prescribed by section 3(2)(a) of the Act. The respondents assert in a special plea filed on 10 February 2011that applicant failed to comply with the provisions of the Act in that she failed to serve the notice within six months of the date of the incident. On 20 September 2012, applicant’s attorney addressed a letter to the respondents’ attorney requesting him to reconsider the special plea but this request was turned down on 13 December 2012. This stance compelled applicant to lodge the current application on 16 October 2014.

[4] The reasons for the delay in serving the section 3(2)(a) notice were narrated by applicant's attorney of record and confirmed by applicant's father. As indicated earlier, applicant was involved in an accident which rendered her quadriplegic on 27 July 2009 when the vehicle she was driving overturned on the provincial road between Dealesville and Bloemfontein. She was admitted to the Rosepark hospital in Bloemfontein on the same day and was taken to theatre as her spine showed a fracture dislocation. She spent some time in the intensive care unit due to respiratory complications and numerous bronchoscopies were performed. On 29 September 2009, she was transferred to Pasteur hospital for active rehabilitation. In her report compiled on 1 October 2009, Dr M Van Zyl reports that the applicant had an impaired lung function and received chest physiotherapy twice daily. She had no functional independence and was fully dependant on the assistance of a helper. She was very stressed and emotional about her condition. She still required intensive rehabilitation and was discharged from hospital in the beginning of February 2010.

[5] The applicant's father consulted the attorney of record on 3 September 2009 to assist him with a possible claim against the respondents. He had however already visited the accident scene on 28 July, a day after the accident, and had taken photographs of the scene. Attached to the founding affidavit, is also an Accident Report Form compiled by Inspector GJ Van Eeden from the SAPS Dealesville depicting the portion of the road were the accident occurred. Shortly after the first consultation on 3 September, applicant's father and the attorney visited the scene but the particular

portion of the road had already been repaired. Applicant's father declares that he presented the photos of the scene a few weeks after the accident to a certain Mr Frewn who was attached to the Free State Provincial Legislature. Mr Frewn had promised to inform the relevant officers in the first respondent's office about the condition of the road. A few weeks thereafter, towards the beginning of September, applicant's father received a call from the first respondent's office advising him that the particular section of the road where the incident took place will be repaired.

[6] The attorney thereafter engaged with a number of people in an attempt to investigate a possible claim against the respondents and only managed to consult with the applicant on 28 January 2010 at Pasteur hospital and it is only at this stage that she managed to relate the incident to him. This consultation was delayed due to the medical condition of the applicant. Between the period 28 January and 2 June 2010 when the section 3 (2)(a) notice was delivered, different experts were consulted to compile reports relating to the medical condition of the applicant and the condition of the motor vehicle.

[7] In response, deponent to respondents' affidavit contends that applicant has unduly delayed in instituting the current proceedings since she was informed on 13 December 2012 that respondents were not prepared to condone her failure to comply with the provisions of the Act. He further declares that the explanation for the default is extremely vague and that the respondents' have been extremely prejudiced by applicant's failure to give them notice timeously since

the evidence regarding the cause of the accident has been extremely compromised. I should however pause to state that in their plea, respondents contend that steps were always taken to ensure that routine inspections were conducted to ensure that the road was in a good condition and that the road shoulder was in a degree 2 condition as per the departmental maintenance quality standards. The shoulder of the road was therefore in a reasonably good condition.

[8] The issue in this case is whether good cause exists to condone the applicant's failure to comply with the relevant statutory provision and whether applicant's post notification delay of approximately 22 months in bringing the application for condonation disentitles her to the relief sought.

[9] Section 3(1) precludes anyone from instituting legal proceedings against an organ of state unless such claimant had given written notice of his intention to do so. Such notice has to, in terms of subsection (2), be given within six months from the date on which the alleged cause of action arose. The purpose of this provision is to afford the organ of state the opportunity to investigate the basis of the intended claim at an early stage. In **<u>Mohlomi v Minister of Defence</u>** 1997 (1) SA 124 (CC) at para [9], Didcott J summarises the purpose of such a notice as follows:

> "The conventional explanation for demanding prior notification of any intention to sue such an organ of government is 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."

He proceeded at para [11]:

> "Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."

Lewis JA explains the position as follows in **Minister of Safety and Security v De Witt** 2009 (1) SA 457 (SCA):

> "The Act is meant not only to bring consistency to procedural requirements for litigating against organs of State but also, it is clear, to render them compliant with the Constitution. The way in which it seeks to achieve a procedure that is not arbitrary and that operates efficiently and fairly both for a plaintiff and an organ of State is to give a court the power to condone a plaintiff's non-compliance with procedural requirements in certain circumstances. Thus access to courts is facilitated, while at the same time procedures against large governmental organisations that need to keep their affairs in order are regulated."

[10] The applicant has admittedly given such notice approximately eleven months after the accident and roughly four months after the expiry of the six month period prescribed by subsection (2)(a). Her default and respondents' subsequent reliance on her failure to serve the notice timeously, prompted her to file the current application in terms of subsection 4(a). 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. See **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA).

[11] Such application may be granted in terms of subsection 4*(b),* provided the court is satisfied: (i) that the alleged debt has not been extinguished by prescription; (ii) that good cause exists for the applicant's failure to comply; and (iii) that the respondent was not unreasonably prejudiced by the failure. The approach I should follow is succinctly stated by Heher JA in **Madinda** *supra* at para [8], that the phrase 'if [the court] is satisfied' in s 3(4)(b) is setting a standard which is not proof on a balance of probability, but it is rather the overall impression made on a court which brings a fair mind to the facts set up by the parties.

[12] I will now proceed to examine the provisions of subsection 4(b) in detail to determine whether applicant made out a case. The debt has undeniably not prescribed since the cause of action allegedly arose on 27 July 2009 and summons was served on 9 September 2010.

Action was therefore instituted within the extinctive prescription period of 3 years as provided for by the Prescription Act 68 of 1969.

[13] The second requirement necessitates the applicant to demonstrate that good cause exists for her failure to comply with the statutory notice period. These are factors which bear on the fairness of granting the relief as between the parties and affecting the proper administration of justice. Such factors include the 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. See **Madinda** *supra* at para [10].

[14] One should also not lose sight of the fact that the delay in bringing an application for condonation, which relates to the period after the notice was given, will ordinarily not fall within the ambit of section 3. 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'. See **Madinda** *supra* at para [14].

[15] Save to state that the application in itself has no merit, respondents did not contend that applicant has no prospects of succeeding in her claim. The allegations made in the particulars of claim and the founding affidavit are that applicant 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. The condition of the road, applicant avers, was caused by respondents' failure to properly maintain same in accordance with the required standards. To these critical allegations, all that respondents' state in their opposing affidavit is that they do not admit that these allegations are true and correct. These averments were therefore met by a bare denial and did not set up a genuine dispute. In my view, a *prima facie* case was raised which triggered applicant's fundamental right to have her evidence evaluated as against the opposing testimony of the respondents.

[16] As to the reasons for the delay in delivering the notice, it is contended on behalf of applicant by her attorney and the supporting medical evidence that she was involved in an accident on 27 July 2009. She was admitted to hospital on the same day. She spent some time in the intensive care unit due to respiratory complications and had an impaired lung function. She had to receive chest physiotherapy twice daily and had no functional independence. She was very stressed and emotional about her condition. She required intensive rehabilitation and was discharged from hospital in the beginning of February 2010 after the statutory notification period had already expired. This accident rendered her quadriplegic. It is inconceivable, based on this course of events, that it can be argued that applicant could have consulted and instructed an attorney to institute an action before expiry of the notice period.

[17] The respondents' argument that the explanation for the default is extremely vague since no medical evidence was tendered is not only factually incorrect but is also misplaced. It was argued that applicant failed to make out a case in the founding papers but attempted to do so in reply. This contention however fails to recognise the unrefuted averments in the founding affidavit that after the collision, applicant was admitted to hospital in a critical state and was only discharged in February. All that respondents' did was to put applicant to the proof of these allegations, hence corroborative medical evidence was provided.

[18] There was always an intention, albeit by the applicant's father the day after the accident and later by the applicant after the first consultation with the attorney, to institute action against the respondents'. This is fortified by the steps that were taken to obtain various expert reports to support applicant's case. The sufficiency of the explanation offered, is in my view indicative of the bona fides of the applicant. The fact that the notice was not delivered before midnight 27 January 2010 cannot be attributed to the applicant. She was bedridden in hospital. I am satisfied that the prospects of success and the explanation for the initial delay both favour the applicant. Good cause therefore exists for her failure to comply.

[19] The next requirement relates to whether the respondent was unreasonably prejudiced by the failure to serve the notice timeously. In **Madinda** *supra*, Heher J held at para [21] that this requirement calls for a common sense analysis of the facts, bearing in mind that

the grounds of prejudice often lies peculiarly within the knowledge of the respondent. 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.

[20] The essence of applicant's case is based on the premise that the respondents' 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. Respondents' in turn state 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. This averment was however not supported by any facts. In contrast, it is stated in the founding affidavit that an officer in the second respondent's office called the applicant's father and indicated that the road would be repaired. This was followed by the repair of the road roughly two months after the accident. To this critical averment, all that respondents' declare in their opposing affidavit is that they have no knowledge of the allegation and they put applicant to the proof thereof. Whether this road was repaired or not fell within the knowledge of the respondents' and they could not put up with such a vague denial of knowledge.

[20] As correctly pointed out by counsel for applicant, respondents contended in their plea that steps were always taken to ensure that routine inspections were conducted to ensure that the road was in a good condition and that the road shoulder was in a degree 2

condition as per the departmental maintenance quality standards. The shoulder of the road was therefore in their view in a reasonably good condition. Based on this allegation, I cannot see how the respondents can claim that evidence was extremely compromised. If one accepts that the road was indeed repaired after two months of the accident, then the evidence could have been tampered with even if the required notice was given within 6 months. The inescapable conclusion is that respondents are attempting to craft a non-existent prejudice.

[21] Based on the routine maintenance that respondents admittedly conducted on the said road and their failure to negate the averment that they repaired the specific portion of the road two months after the accident, as well as their positive averment that the road was in a reasonable good condition, I am satisfied that the respondents were not unreasonably prejudiced by the failure. This is more so since respondents failed to lay any basis as to how they would be prejudiced and how evidence relating to the accident was extremely compromised. One would have expected respondents to indicate whether there are any records for the routine maintenance that was carried out on the road, when such maintenance was done and if the road was repaired, what the condition thereof was prior to the repairs. It was not sufficient to vaguely refer to prejudice without any factual support thereof.

[22] I am satisfied that all three requirements of section 3(4)*(b)*(i), (ii) and (iii) were established.

[23] The final issue relates to whether the post notification delay in bringing the application for condonation should disentitle applicant to the relief sought despite applicant having satisfied the provisions of section 3(4)(b). The explanation offered by applicant's attorney is that on receipt of the special plea, from his experience, he verily believed that the issue will be resolved in the form of consent to condonation by the respondents. A letter dated 20 September 2012 was directed to the State Attorney, inviting him to condone the late delivery of the notice. He however refused to accede to this request on 13 December 2012. Applicant's attorney concedes that upon receipt of this letter, he ought to have appreciated the need to bring this application within a reasonable time. He was however confident that he would be able to persuade the State Attorney to change his stance. This delay, he contends, was solely caused by him and not by the applicant. All that respondents assert in relation to these averments is that applicant did not satisfactorily explain the delay. No factors are stated why the self-confessed remissness of the attorney should be attributed to the applicant.

[24] Condonation must be applied for as soon as the party concerned realises that it is required. See **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd** 2010 (4) SA 109 (SCA) at para [39]. Applicant's attorney admittedly caused this delay. The question is whether his neglect should be imputed on the applicant and whether she should suffer for the negligence of her attorney. It is generally accepted that there is a limit beyond which a litigant cannot escape

the results of his attorney's lack of diligence. This is so as the attorney is the representative whom the litigant has chosen for himself. Whether such blame can be attributed to the applicant will depend on the unique circumstances of each case. A certain degree of negligence will debar the client and another degree will not.

[25] The circumstances *in casu* are that the attorney bona fide believed that the State Attorney would condone his failure. In his own words, he declares that he was "in retrospect foolishly confident that he would be able to persuade the state attorney to abandon the special plea"*.* It can be accepted that a layman cannot sit passively by, if there is a protracted delay, without so much as directing any reminder or enquiry to his attorney. The attorney was however not inactive during this period to arouse anxiety from the applicant as to why the matter does not reach finality. Trial dates where arranged and the matter was set down for trial on 19, 20, and 22 February 2013, but was by agreement removed from the roll. Further dates were arranged for the end of November and beginning of December 2014.

[26] A lay client is customarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Such a client places considerable reliance upon the advice, competence, skill and knowledge of an attorney and trusts that the attorney will fulfil his or her professional responsibility. Applicant could therefore trust her attorney's professional view that he bona fide believed that the state attorney will condone the failure. His professional view was in the circumstances of the case reasonable and there was no reason why

applicant could doubt same. Moreover, in my view, the refusal by the State Attorney to accede to the request to condone was unwarranted having regard to the factors that were placed before him. I am satisfied that the attorney's admitted neglect should not in the circumstances of this case, debar the applicant from relief.

[27] Accordingly, I make the following order:

1. Condonation is granted for the applicant's 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.

2. The respondents are to pay the costs of the application including the costs occasioned by the employment of two counsel.

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L.B.J. MOENG, AJ

On behalf of applicant: Adv. JF Mullins SC and J Zietsman
Instructed by:
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On behalf of respondents: Adv. B S Mene
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