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

Case number: 1509/2010
1510/2010
1511/2010

In the matter between:

SOOBRAMONEY MOODLEY	1st Applicant
VIJAYKUMARIE MOODLEY	2nd Applicant
VEKNESHAN MOODLEY	3rd Applicant

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED	1st Respondent
VIJAYKUMARIE MOODLEY	1st Third Party
PENNY FARTHING ENGINEERING (SA) (PTY) LTD	2nd Third Party

JUDGMENT: FISCHER, AJ

HEARD ON: 30 JULY 2015

DELIVERED ON: 20 AUGUST 2015

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[1] This application turns on the interpretation and application of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act") relating to facts arising out of a motor vehicle accident which occurred on the N6 National Road in the vicinity of Smithfield in the Free State Province.

[2] On 1 April 2007 and at 4h00, the Moodley family left Midrand in the Gauteng Province by motor vehicle for a holiday in East London in the Eastern Cape Province.

[3] At approximately 8h00 that same morning, having passed Bloemfontein on the N1 National Road and thereafter proceeding down the N6 National Road in the direction of Smithfield, they were involved in an accident resulting in Mr and Mrs Moodley and their one son (the applicants) sustaining serious bodily injuries, the details of which are irrelevant for purposes hereof.

[4] Some 34 months later a notice in respect of each of the three applicants, as envisaged in terms of Section 3 of "the Act", was sent to the South African National Road Agency Limited (SANRAL) and 6 days before the three claims prescribed, as envisaged in terms of the Prescription Act 68 of 1969, action was instituted by the applicants against SANRAL and several other defendants jointly and severely for the recovery of damages allegedly arising out of the accident. Subsequently the claims against the other defendants were withdrawn and Mrs Moodley, the current second applicant and the driver of the motor vehicle at the time of the accident, as well as Penny Farthing Engineering (SA) (Pty) Ltd ("Penny Farthing") were joined as first and second third parties to the claims.

[5] SANRAL responded to the three claims by not only pleading over on the merits, but, in additions thereto, raising a special plea which reads as follows:

"**<u>AD SPECIAL PLEA</u>:**

1.1 The First Defendant is an organ of state as defined in terms of section 4(1)(e) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 ("the Act"):

1.2 In terms of section 3(1) of the Act, no legal proceedings for the recovery of a debt may be instituted against an organ of state unless:

(a) The creditor has given the organ of state notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) The organ of state has consented in writing to the institution of that legal proceeding.

1.3 The First Defendant pleads that the Plaintiff has not complied with the peremptory provisions of Section 3(1) of the Act and therefore barred from instituting action against the First Defendant.

1.4 The First Defendant has not consented to the institution of this action.

1.5 First Defendant prays that the special plea be upheld and that Plaintiff's claim be dismissed with costs.

1.6 …"

[6] The special plea and a subsequent denial in writing by SANRAL "…that we… have any record of the initial letter of demand and kindly request that you provide us with a copy thereof as well as proof of delivery", followed by a court sanctioned pre-trial conference in terms whereof the applicants accepted that they were obliged to launch a condonation application, eventually resulted in the present application for condonation in terms of "the Act".

[7] Section 3 of "the Act" contains the relevent provisions and reads as follows:

"3. **Notice of intended legal proceedings to be given to organ of state**

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of subsection (2) (a)-

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of 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 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.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

[8] Any uncertainty as to whether or not SANRAL was relying on the fact that they had not received the Section 3 notice at all, alternatively that they had received such notice, but out of time, was clarified by Mr Zietsman appearing for SANRAL that it could be accepted for purposes of the application that the Section 3 notices had been received by SANRAL but way beyond the expiry of the six month period referred to in Section 3(2)(a) of the "the Act".

[9] What is quite clear from a reading of Section 3 of "the Act" is that, notwithstanding the peremptory provisions of Section 3(1) and (2) thereof, the legislature has nevertheless seen fit to afford a claimant the right to apply for and be granted condonation for failing to send a notice within the six month period referred to in Section 3(2) of "the Act", provided that the three criteria referred to in Section 3(4)(b) have been met (See **Minister of Safety and Security v De Witt** 2009 (1) SA 547 (SCA) para [12] and [13]).

[10] In terms of Section 3(4)(b) of "the Act" a court must be "satisfied that" the three criteria have been met, which the SCA has interpreted as not meaning proof on a balance of probabilities but rather 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] and **Minister of Agriculture and Land Affairs v C J Rance** 2010 (4) SA 109 (SCA) at para [33]).

[11] It is not in dispute that the claims have not been extinguished by prescription. What is in dispute is firstly whether or not "good cause" exists and secondly whether or not SANRAL, as an organ of state, has been unreasonably prejudiced by the applicants' failure to timeously send the relevant notice of intended legal proceedings.

[12] The determination of what exactly "good cause" entails, has enjoyed the attention of the SCA over several years and involves the consideration of a number of factors which have a bearing on not only the rights of the individual seeking condonation but, as importantly the rights of an organ of state not to be unduly prejudiced by delay. These factors may include (1) the prospects of success (2) a full explanation for the delay covering the entire period of the delay (3) the sufficiency of the explanation for the delay (4) the *bona fides* of the applicants and (5) whether or not any other party could be held responsible for such delay (See **Madinda** case *supra* at 316E-F, **Minister of Agriculture and Land Affairs v C J Rance** *supra* at 117C-G and **MEC for Education, KZN v Shange** 2012 (5) SA 313 at para [15]).

[13] The chronology of events giving rise to the present application as well as the explanation for the delay are set out in a founding affidavit deposed to by one Stephen Bezuindenhout

("Bezuidenhout"), an attorney and director of applicants' attorneys of record Ronald Bobroff and Partners Inc. ("the attorneys").

[14] What is most disturbing is that it is not Bobroff but Bezuidenhout who deposes to the founding affidavit notwithstanding the fact that Bezuidenhout only took over the files from Bobroff during December 2011.

[15] The founding affidavit contains reference to no less than 13 so-called "file notes" and "memos" prepared on the face of it by various clerks and candidate attorneys who, at the time of filing of the current application, were no longer in the employ of the attorneys. Bobroff, for reasons that were never explained, chose not to depose to any affidavit in support of the founding papers but, for the first time and in a replying affidavit, states that from May 2007 when the applicants first attended at his office and until December 2011, the applicants files were under his control and that he had from time to time instructed the various clerks and candidate attorneys as evidenced by the "file notes" and "memos".

[16] The founding affidavit, "file notes" and "memos" evidence the following activities by the attorneys pursuant to the accident on 1 April 2007:

1. On 29 May 2007, being some two months after the accident, one or more of the applicants approached the attorneys who, according their letter head, hold themselves out as "The Leaders in Medical Negligence and Personal Injury Claims".
2. The first file note dated 29 May 2007, contains a terse summary which reads as follows:

> "Clients travelling on highway past Bloem when they hit a pothole the size of a small car which was not visible from afar. Client lost control of the car, and the trailer swung out and the car hit a tree".

The file note further records that certain members of the Moodley family were admitted to hospital and that attempts were made to obtain a copy of the Accident Report from the South African Police Services in Smithfield.

3. The very next file note is dated 9 March 2009, being some 22 months after the Moodleys first attended at the offices of the attorneys, and records the following:

> "Received file from Darren today, with file note. No work has been done on the file."

The file note furthermore records that attempts were made to obtain a MMF1 form which, according to Mr Davel appearing for the applicants, relates to Road Accident Fund claims which by the very nature thereof involve the negligence of a Third Party.

4. According to a file note dated 9 April 2009 the whole Moodley family attended at the offices of the attorney so as to consult. Affidavits were redrafted, executed and returned to the attorneys. These affidavits do not feature in the present proceedings.

5. On 19 May 2009 a file note records that Mrs Moodley (second applicant) was now herself attempting to obtain a copy of the Accident Report from the South African Police Services in Smithfield.

6. On 26 May 2009 a memo directed to one Bronwen by one Lia records that Lia "looked through these matters and discussed them with Darren, these matters are not RAF matters.
These are general matters and we need to issue a letter of demand and summons against the responsible person.
We must quickly determine who the responsible party is who has control over the roads in that area (Smithfield, Bloemfontein)." (my emphasis)

7. Various "file notes" and "memos" show that by 27 November 2009 the attorneys were still attempting to obtain a copy of the accident report and eventually and on 22 January 2010 a file note by one Jessica records that now, for the first time, and after numerous phone calls, the attorneys had identified SANRAL as the responsible party against whom the claims for general damages had to be instituted as opposed to the Road Accident Fund

8. On 17 February 2010 the three notices as envisaged in terms of Section 3 of "the Act" were sent to SANRAL by means of registered letters.

9. The further annexures to the founding affidavit contain reference to a detailed report compiled by Ferlio Group of Investigators which itself contains reference to affidavits deposed to by all the Moodleys, one Constable Bikitshi who attended at the scene and compiled the Road Accident Report, one Mr Pretorius who attended at the scene with a breakdown vehicle, a copy of the Road Accident Report as well as a memorandum from a certain Louis Roodt who appears to be a road transport safety expert.

[17] The three claims were served on SANRAL on 25 March 2010 and subsequently amended to deal with the withdrawal of claims against certain other defendants and the joinder of both Mrs Moodley, being the driver of the motor vehicle at the time of the accident and Penny Farthing as first and second third parties.

[18] I believe it is apposite to deal with the pleadings in this regard as the contents thereof, read together with annexures to the application papers as well as the pleas filed on behalf of SANRAL and Penny Farthing, would place this court in a more favourable position to determine the prospects of success in the context of "good cause".

[19] The three claims are based on essentially the same cause of action and seek to hold SANRAL liable on the following basis:

> "10. The sole cause the collisions was the negligence of [SANRAL] who:
>
> 10.1 failed to ensure that the potholes were properly indicated (sic) to vehicular traffic;
>
> 10.2 failed to ensure sufficient and lawful road signage were (sic) installed;
>
> 10.3 failed to have due regard to users of the N6 along Smithfield and in particular the plaintiff;
>
> 10.4 failed to take reasonable steps that could and should have avoided the incident;
>
> 10.5 failed to adequately and properly design and construct the road;
>
> 10.6 failed to provide road users with a functional and safe road and driving environment;

10.7 failed to warn road users of the potential danger that exists at the point of collision on the N6 Freeway;

10.8 failed to timeously repair the pothole along the N6 Freeway that caused the incident.

Alternatively

10.9 by reason of the facts alleged above, (SANRAL) owed the plaintiff a duty of care to ensure that:

10.9.1 the road was properly indicated to vehicular traffic;

10.9.2 ensure sufficient and lawful road signs were installed;

10.9.3 reasonable steps be taken to avoid the incident;

10.9.4 the design of the road was adequate and proper;

10.9.5 the road functional and safe to road users; and

10.9.6 potential danger that exists at the point of collision on the N6 Freeway was properly prepared."

[20] In response thereto and in pleading over on the merits, SANRAL filed the usual plea containing a denial, alternatively a denial that SANRAL was responsible for the collision, further alternatively that should it be found that SANRAL was negligent, then in such event that Mrs Moodley, being the driver of the motor vehicle at the time of the collision was also negligent in that:

"9.3.1 She failed to keep a proper lookout;

9.3.2 She failed to apply the brakes of the vehicle in time or at all or sufficiently;

9.3.3 She travelled at an excessive speed under the prevailing circumstances;

9.3.4 She failed to prevent the collisions by the exercise of reasonable care when she was in the position to do so;

9.3.5 She failed to adhere to the road signs that what were present at the point in time;

9.3.6 She failed to timeously swerve the vehicle to avoid a collision."

The plea concludes by alleging that at all material times Penny Farthing had been contracted to attend to the construction, maintenance and upkeep of the N6 National Road and that Penny Farthing would be joined as a Third Party. Penny Farthing, in its capacity as the second Third Party filed a plea similar to that filed by SANRAL. The details thereof are irrelevant for purposes hereof.

[21] It is unnecessary to deal at any great length with the documentation referred to above save to record that (1) the Moodleys encountered extensive road works on the stretch of road immediately before the accident, (2) the road was badly potholed and they encountered a stop/go station where they were brought to a standstill for a period of time allowing Mrs Moodley to exchange places with Mr Moodley who had been driving up until that stage, (3) Mrs Mrs Moodley drove on for several kilometres without encountering any road signs and/or road works whereupon she suddenly and unexpectedly encountered what she initially described as a ditch running across the road surface, (4) she was obliged to swerve and in the process lost control of the motor vehicle colliding with a tree on the left-hand-side of the road, (5) Mrs Moodley's version was, to an extent, supported by both Constable Bikitshi as well as Mr Johannes Pretorius particularly in so far as reference was made to both the existence of road works as well as the poor condition of the road surface.

[22] During a subsequent pre-trial, SANRAL placed on record that it wished to deal firstly with the special plea as envisaged in terms

of High Court Rule 33(4) and furthermore that it had been prejudiced by the applicant's failure to respond to both a High Court Rule 37(4) questionnaire as well as a High Court Rule 21(1) request for particulars relating to the accident scene, identifiable fixed points, the dimensions of the hole in the road, the distance between the hole and the tree with which the Moodleys had collided and the existence and/or availability of relevant photographs.

[23] As to "good cause", the following appears from what has been placed before me:

1. The applicants have clearly set up a *prima facie* case of negligence against SANRAL if regard be had to not only the allegations contained in the pleadings as to where, when, in what manner and under what circumstances the accident occurred but, in addition thereto the contents of the Road Accident Report, the sworn affidavits deposed to by the witnesses and finally the report compiled by the investigators.
2. The pleas on the merits, as already referred to, contain not only the well-known denials and alternatives thereto but, in conclusion, the standard allegations of contributory negligence on the part of Mrs Moodley in her capacity as driver of the motor vehicle.
3. There is nothing before me to suggest that the Moodleys were tardy in consulting as soon as possible with the attorneys, considering the fact that the entire family was admitted to hospital after the accident. It was in any event never suggested that the Moodleys themselves were

negligent in only approaching the attorneys some 59 days after the accident.

4. Both the applicants as well as the attorneys were thereafter involved in attempts to obtain copies of the relevant hospital records as well as the Road Accident Report.
5. No facts were placed before me to suggest that the applicants were, before February 2010, aware of the requirement contained in Section 3 of the Act. Of importance in this regard is that the papers show that the applicants in fact approached what they believed was a firm of attorneys holding themselves out as "specialists in medical negligence and personal injury claims".
6. I must accept for purposes hereof that at all material times the applicants were totally reliant on the expert advice and guidance offered by the attorneys. There is nothing on the papers to suggest that the applicants were complicit in the manner in which the attorneys themselves went about handling the case.
7. What is clear from the annexures to the founding affidavit is that once SANRAL had been identified as the responsible party on 22 January 2010, reasonably prompt steps were taken by the attorneys to prosecute the applicant's claims.

[24] Mr Davel urged me to accept that, in the absence of any factors that would be relevant by virtue of the provisions of Section 3(3)(a) of the Act, the period of 6 months afforded the applicants, had only started to run once the attorneys had acquired knowledge of the identity of the relevant organ of state, in *casu* SANRAL on 22 January 2010. Mr Davel was however at pains to

explain why, if that be the case, the application for condonation had been launched in the first place. Mr Zietsman on the other hand argued that if regard be had to the memo of 26 May 2009, referred to in detail earlier, then that should be regarded as the date on which the debt became due as it was on that date that the identity of SANRAL and the facts giving rise to the debt had been acquired as envisaged in terms of Section 3(3)(a). I am not convinced of the merits of either argument as the "file notes" and "memos" most certainly suggest that the involvement of SANRAL could have been established at an earlier stage by the exercising of reasonable care especially if regard be had to who the attorneys are, and the fact that by 29 May 2007 such attorneys had been instructed as to where and in what manner the accident had occurred and that a Third Party was not involved. (See **Premier of the Western Cape Provincial Government NO v BL** [2012] 1 All SA 465 SCA at 470 to 471 and **Madinda** case *supra* at para [5]). By virtue of the conclusion I arrive at I deem it unnecessary to go back further than 26 May 2009 as being the date on which the 6 month period would commence as well as being the date on which the debt should be regarded as being due as envisaged in terms of Section (3)(3)(a).

[25] Nothing whatsoever has been placed before me to suggest that any blame for the delay in acting promptly and timeously, having regard to the provisions of Section 3 of the Act, can be laid at the door of the applicants themselves. If anything, the applicants were badly let down by the attorneys who failed to exercise the appropriate professional approach in taking the necessary

instruction and thereafter enforcing the applicants' claims timeously.

[26] I am aware of the law relating to the question as to whether or not attorneys mistakes are to be attributed their clients. The facts referred to above indicate that no blame for the delay or failure can be attributed to the applicants and I believe any further prejudice can be prevented especially if regard be had to the fact that the prospects of success tend, at this stage, to favour the applicants (See **MEC for Education, KZN v Shange** 2012 (5) SA 313 (SCA) at para [18] and [19].

[27] Post-notification delays fall to be distinguished from pre-notification delays, as the former do not constitute factors which must be taken into account for purposes of determining whether or not "good cause" exists as envisaged in terms of Section 3(4)(b)(ii). As I see it post-notification delays and the reasons therefore are taken into account for purposes of considering the condonation as a whole (See **Madinda** case *supra* at para [20]). As regards the post-notification delays, there was clearly a dispute between the parties as to what exactly the special plea entailed, namely, whether or not a notice had been sent, alternatively sent timeously and this was only clarified in part during a pre-trial conference on 9 February 2015 and finally resolved during the hearing of this application when Mr Zietsman, on behalf of SANRAL, confirmed that it was his client's case that the Section 3 notice had in fact been received but outside the 6 month period calculated as from 26 May 2009. No reason was advanced as to why this fact had not been brought to the

attention of either the applicants, alternatively their attorney at a far earlier stage.

[28] Having regard to the “facts set up by the parties”, I find that the facts in *casu* must be distinguished from the facts in **Minister of Agriculture and Land Affairs v C J Rance** case *supra* as in this latter case it was the claimant company itself which made futile, ill-advised and unexplained attempts to identify the correct organ of state and not its attorneys of record. I believe the approach in the **Madinda** matter *supra* is more apposite as in this latter case the claimant relied on her attorneys of record and the SCA granted condonation on the basis that the three criteria in terms of section 3(4)(b) had been met.

[29] In terms of Section 3(4)(b)(iii), the applicants also have to satisfy this court that SANRAL has not been unreasonably prejudiced by their failure to serve the notices within the six month period. In determining whether or not unreasonable prejudice exists as a fact, sight should not be lost of the reason why notices of the type contemplated in Section 3 of the Act have been insisted upon by the legislature (to afford large institutions an opportunity to investigate) (See **Minister of Agriculture and Land Affairs v C J Rance** case *supra* at paras [13] and [14]). In addition thereto a common sense approach is required in dealing with the relevant facts which, more often than not, lie particularly within the knowledge of the opposing parties, in c*asu* SANRAL and Penny Farthing (See **Madinda** case *supra* at para [21]). Notwithstanding the fact that the applicants carry the onus in this regard, I will refrain from assuming prejudice in the absence of any factual

basis therefore raised by either SANRAL, alternatively Penny Farthing.

[30] The facts raised on behalf of both SANRAL and Penny Farthing in support of the contention that SANRAL has been "unreasonably prejudiced", are the following:

1. The accident took place on 1 April 2007.
2. The relevant stretch of the N6 National Road on which the accident took place was under construction in terms of a contract concluded between SANRAL and Penny Farthing.
3. The 6 month period commenced, on SANRAL's version on 26 May 2009. 4. On 17 February 2010 the relevant Section 3 notices were sent.
4. The application for condonation was launched shortly after a court sanctioned pre-trial meeting during which it was agreed that a substantive application for condonation be launched by the applicants.
5. In their answering papers both SANRAL and Penny Farthing claimed that they had been unreasonably prejudiced by the failure on the part of the applicants to send the Section 3 notices within 6 months of 26 May 2009. Penny Farthing, in its capacity as the second Third Party relied on the alleged prejudice suffered by SANRAL which may be summarised as follows:
   (i) SANRAL appointed Penny Farthing to act as the main contractor responsible for the construction, maintenance and upkeep of the N6 National Road.

(ii) The contract concluded with Penny Farthing was for a stipulated period from 1 September 2004 to 31 August 2007.

(iii) By the time the applicants eventually gave notice during February 2010 the construction and maintenance had already been completed and no investigation of the accident scene could accordingly be conducted.

[31] If the aforegoing facts are approached on a common sense basis, I find it hard to accept that either SANRAL or for that matter Penny Farthing, were "unreasonably prejudiced" by any delay on the part of the applicants, or for that matter the attorneys. The accident took place on 1 April 2007 on a stretch of road that was in the process of being constructed and maintained which, by the very nature thereof, meant that both the road and its surface as well as the shoulders and reserve thereof were constantly undergoing a material change on a daily basis. On SANRAL's own evidence their contract with Penny Farthing was only up until 31 August 2007, being 5 months after the accident and there is nothing on record to suggest that Penny Farthing remained on site thereafter.

[32] Given the particular circumstances of the case and notwithstanding the conduct of the attorneys, I believe that, even if the Section 3 notices had been sent shortly before the expiry of the 6 month period in early November 2009, SANRAL would have, for all practical purposes, been notified of the pending claim more than two years after the expiry date of the contract with

Penny Farthing. Had that been the case, SANRAL would have been prejudiced by events well beyond both the scope of the Act as well as the control of the applicants.

[33] The irony of the matter is that even if it could have been argued that, given the evidence the attorneys were privy to on 1 April 2007, SANRAL should have been identified as the relevant organ of state and notified within 6 months of such date, the road works would in any event have been completed long before SANRAL had received the notices and thereby afforded an opportunity to investigate the claims (See **Minister of Agriculture and Land Affiars v C J Rance** case *supra* at para [13] and [14].

[34] The post-notification delay in bringing the current condonation application has not, on the papers before me, exacerbated the prejudice either SANRAL, alternatively Penny Farthing has allegedly suffered. As mentioned earlier, It was only at a court sanctioned pre-trial conference during February 2015 that it was agreed that a substantive condonation application be launched for the late sending of the Section 3 notices and that it was thereafter and only during argument before me that Mr Zietsman conceded that it was as such his client's case that the notices had been received, but well outside the expiry of the 6 month period.

[35] In the context of the undisputed facts placed before me and having regard to the relevance of the combined weight to be attached to the three criteria contained in Section 3(4)(b) of the Act, and in adopting a common sense approach, I find that "good cause" exists for the failure and furthermore that SANRAL, as an

organ of state, has not been unreasonably prejudiced by the failure on the part of the applicants to dispatch the notice of intended legal proceedings within 6 months from the date on which the debt became due, being 26 May 2009. I accordingly believe that I should exercise my discretion in favour of the applicants and this notwithstanding the unfortunate manner in which their claims were dealt with and managed by the attorneys. The dictates of justice and fairness do not, in the circumstances of the present application, justify this court depriving the applicants of an opportunity to place their case before a court of law.

[36] In considering an appropriate order as to costs I have a discretion which I am obliged to exercise judicially and upon a consideration of all the relevant facts of the particular case, striving to be fair to all concerned (See **Naylor v Jansen** 2007 (1) SA 16 (SCA) at 23F – 28F). I am furthermore mindful of rules that have been developed over a period of time and which serve as guidance in exercising my discretion. In *casu* and where a successful application is launched for the grant of an indulgence the general rule is that the costs do not follow the event (See **Mann v Leach** [1998] 2 All SA 217 (E) at 221). Where however the application for the grant of an indulgence is unreasonably opposed the respondents may be deprived of their costs and, in appropriate circumstances be ordered to pay the costs of opposition to the application (See **Rautenbach v Symington** 1995 (4) SA 583 (O)).

[37] To my mind both SANRAL and Penny Farthing acted unreasonably in seeking to oppose the application. In this regard I pause to emphasize that SANRAL's plea was filed as far back as 1 February 2012, whilst the plea of Penny Farthing, in its capacity as the second Third Party was filed some 6 weeks later and on 16 March 2012. In opposing the application both SANRAL and Penny Farthing lost sight of the fact that, on their own versions, they had not been unreasonably prejudiced by any failure on the part of the applicants, either pre- or post-notification in terms of Section 3. In the circumstances and in exercising my discretion in favour of the applicants I find that the first respondent and the second Third Party should pay the costs occasioned by opposition to the application for condonation.

[38] The following order is made:

1. Condonation is granted for the applicants' 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 lay down in Section 3(2)(a) of "the Act".

2. The applicants must pay such costs of the application as would have been incurred had there been no opposition.

3. The costs incurred by the applicants in consequence of the opposition to the application for condonation must be paid by the first respondent and the second Third Party jointly and severally, the one paying the other to be absolved.

P. FISCHER, AJ

On behalf of the appellant:	Adv. W. Davel Instructed by: Matsepes Inc BLOEMFONTEIN
On behalf of the first respondent:	Adv. P. J. J. Zietsman Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of the second respondent and second Third Party:	Adv. W. A. van Aswegen Instructed by: Webbers BLOEMFONTEIN

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