

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A234/2013

In the appeal between:-

MINISTER OF SAFETY AND SECURITY

Appellant

and

LEONARD UWAM

Respondent

CORAM:

KRUGER, MOLEMELA JJ *et* MBHELE, AJ

JUDGMENT BY:

KRUGER, J

HEARD ON:

4 AUGUST 2014

DELIVERED ON:

7 AUGUST 2014

- [1] The respondent applied in the magistrates' court for condonation of his failure to deliver a notice in terms of section 3(1)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. The magistrate granted condonation, but the appellant appealed. The two judges to whom the matter was allocated could not agree and the matter was referred to three judges.

- [2] The respondent's cause of action arises from a motor collision on 23 December 2009, involving three vehicles. Respondent says his vehicle was stationary at the robot in St Georges Street, at the intersection with Hanger Street in Bloemfontein. A Quantum vehicle driven by one Radebe (this was the unmarked police vehicle) was standing at the opposite red robot. A taxi was proceeding in Hanger street towards the intersection with St Georges Street. The Quantum drove over the red light and bumped into the taxi which, according to what respondent saw, drove over an amber light and bumped into the taxi. Respondent's vehicle was still stationary at the intersection. As a result of the collision between the Quantum and the taxi, the Quantum was propelled towards respondent's vehicle and bumped into it.
- [3] The reason for the respondent's delay in notifying the appellant of his claim was that he was waiting for the completion of the criminal proceedings against Vela Gigi, the taxi driver and second respondent in the case in the magistrates' court. In those proceedings the appellant was the first respondent and B C Sithole the taxi operator was the third respondent. As stated, the collision occurred in December 2009. In February 2010 respondent's attorneys were instructed to represent him in an action he intended to institute. He consulted with his attorney and they decided to keep the civil action in abeyance pending the outcome of the criminal case. This decision was taken so that the evidence led at the criminal trial could be used in the civil proceedings. During the period February 2010 to June 2011 the criminal case was postponed several times whereafter charges were withdrawn due to the fact that some of the witnesses did not attend court. On 7

June 2011 the respondent informed his attorney of the outcome and instructed his attorney to obtain copies of the accident report and details of the registered owners. The documents and information were obtained in July 2011. In his founding affidavit the present respondent states that he was at all times aware that the vehicle DSR 537 FS was driven by one Radebe, a police official, and that it was a state-owned vehicle.

- [4] On 20 July 2011 the respondent was advised that a notice had to be sent in terms of Act 40 of 2002. His attorney then sent a letter to the offices of the Minister of Safety and Security at 45 Maitland street, Bloemfontein. The legal adviser of the Provincial Department of Police, Roads and Transport wrote to respondent's attorney on 31 August 2011 informing him that notice had to be given to the National or Provincial Commissioner. On 3 November 2011 the applicant's attorney addressed a notification to the Provincial Commissioner. This notice was served on 17 November 2011. The respondent's attorney in the letter stated that if no response is received, it would be deemed that condonation was granted. No response was received, and respondent caused summons to be issued on 26 January 2012. The Special Plea was lodged on 8 August 2012.
- [5] On behalf of the appellant Mr Mene contends that condonation should not have been granted. He says the notice was about two years out of time. Mr Mene says the sending of the notice to the wrong address initially cannot be excused. He says the respondent is mala fide in bringing this action against the appellant, because the party who is liable is before court and not defending the action.

- [6] Mr Mene stresses that from all the facts before the court it appears that the respondent knew that the vehicle was a state-owned vehicle. The respondent probably knew it was a police vehicle. Mr Groenewald, who appeared for the respondent, did not try to convince us of the fact that the respondent did not know it was a state vehicle. He stressed that in condonation applications the court considers all the circumstances and because the respondent's merits are strong, his reasons for the delay need not be so good.
- [7] One must bear in mind that this was a collision involving three vehicles. It is possible that a measure of blame attaches to more than one vehicle. There could be an apportionment. It is not possible to decide the merits of the collision at this stage. The respondent has shown that he has prospects of success in the main case.
- [8] Mr Mene says it was unreasonable for the respondent to wait for the criminal case, with reference to the unreported judgment of Jordaan J in this division in **Marais v Minister of Safety and Security and Another**, Case 1521/2010, 6 September 2010. In that case Marais was a magistrate who was arrested because she straddled the barrier line on the road between Thaba Nchu and Bloemfontein. Her notice to the respondent was more than a year out of time. Mrs Marais said she intended to wait for the finalisation of her prosecution before dealing with her civil claim for unlawful arrest and detention (p4 line 20). Jordaan J found that the result of the criminal charge, if it was proceeded with, would have no bearing on the question whether she was arrested or

detained unlawfully (p11 line 15). The traffic offence and the unlawful arrest have different causes of action. That is not the case here. In both the criminal and the civil case the same collision, involving relative blame of the same drivers, is before court. The **Marais** case must be distinguished on the facts. A further point is that Mrs Marais was a magistrate, in this case the respondent is a lay person.

- [9] Mr Mene also referred to **MEC Department of Health, FS v Mothupi** Case A241/2012, 29 May 2014 where a full bench of this court refused to grant condonation because the respondent's delays remained substantially unexplained (par [20]). In that case the respondent's attorney was repeatedly advised by the state attorney who the correct party to sue was, but the respondent's attorney, until the hearing in the court *a quo* insisted that the National Minister of Health was the correct party, not the MEC. In that case there were numerous delays which remained unexplained. In this case the respondent took the view to wait for the criminal case. That is a sensible reason.
- [10] Mr Mene also blames the respondent for waiting for five months after the special plea was lodged before he brought a condonation application. The respondent believed he was within his rights and has prospects of success. No undue prejudice has been shown.
- [11] In applications of this nature the party seeking condonation must fully explain the delay and it must be clear that there will not be undue prejudice to the state department. In this case the respondent had a legitimate and sensible reason for the delay.

Often parties wait for criminal cases to be completed, especially in motor collision cases, before instituting civil claims. Once the criminal case has been finalised, the facts have been established, and cases are often settled at costs which are much lower than had the civil case run its course. That was the respondent's intention in the present case. The test to be applied is that the court comes to an overall impression as to whether condonation should be granted bringing to bear a fair mind to the facts set out by the parties - see **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) par [8]. A court will be slow to assume prejudice for which an organ or state does not lay a basis (par [21]).

- [12] In the judgment the magistrate comprehensively considered the facts and circumstances and decided to grant condonation. That evaluation and decision cannot be faulted.

ORDER

1. The appeal is dismissed with costs.

A. KRUGER, J

I agree.

M.B. MOLEMELA, J

I agree.

N.M MBHELE, AJ

On behalf of appellant:

Adv B.S. Mene
Instructed by:
State Attorneys
BLOEMFONTEIN

On behalf of the respondent:

Adv W.J. Groenewald
Instructed by:
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