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

Case No.: 5042/2012

In the matter between:

JACO STRYDOM	1st Applicant/1st Plaintiff
FERDINAND FREDERICK BEHM	2nd Applicant/2nd Second Plaintiff

and

MEC: FOR POLICE, ROADS AND TRANSPORT FREE STATE PROVINCE	Applicant/Defendant

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CORAM:	MURRAY, AJ
HEARD ON:	30 OCTOBER 2014
JUDGMENT BY:	MURRAY, AJ
DELIVERED ON:	6 NOVEMBER 2014

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[1] This is an application in terms of section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act, Act 40 of 2002 ("the Act"). The applicants seek condonation of their non-compliance with section 3(2)(a) of the Act by failing to serve a notice of intention to institute legal

proceedings against the respondent within the specified six months. The respondent opposed the application.

[2] Both applicants are adult males residing in Vrede in the Free State Province. The first applicant is a security officer and the second an auto electrician. They are the plaintiffs in an action against the MEC for alleged damages which they suffered during a single vehicle accident on the R546, approximately eight kilometres from Vrede, on 23 January 2010. The first applicant was the driver of the relevant vehicle and the second applicant was his passenger.

[3] Summons in the action was served on the respondent on 12 December 2012, one month before the claim would have prescribed. The applicants' section 4(1) notice was filed only five days before the summons, two-and-a-half years after 23 July 2010 which marked the end of the prescribed six months period.

[4] The legal requirements for issuing summons against an organ of state to recover a debt, as *in casu,* are fully set out in section 3 of the Act which specifies that:

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

(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."

[5] In terms of section 3(4)(a) of the Act, a creditor who failed to comply with section 3(1) and (2) may apply to a court with jurisdiction for condonation of such failure if the relevant organ of state relies on such failure. In terms of section 3(4)(b) a court may grant an application for condonation 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."

[6] Section 3(3)(c) makes it clear that the prohibition in section 3(1) on the institution of such legal proceedings without compliance with section 3(1)(b)(i) and section 3(2) is meant to be enforced unless condonation is asked and granted in terms of section 3(4)(a). Subsection 3(c) determines that if condonation is granted in terms of subsection (4)(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."*

The court therefore has a discretion to grant not only condonation, but also leave to institute legal proceedings if such condonation has been granted.

[7] In **Madinda v Minister of Safety and Security**[1] the Supreme Court of Appeal made it clear that a court's power to grant condonation is not unfettered. That is why section 3(4)(b) determines that the court needs to be satisfied with the three specified requirements before granting such condonation. In my view the use of the word "*and*" instead of "*or*" in section 3(4)(b) is a clear indication that the legislature intended to require compliance with all three of the requirements before a court may grant such condonation. This interpretation is in accordance with what the Court held in **Madinda,**

[8] The Supreme Court of Appeal has acknowledged that in section 3(4)(b) the phrase *'if [the court] is satisfied'* sets *"a standard which is not proof on a balance of probabilities but rather an overall impression made on the court which brings a fair mind to the facts set up by the parties"*.[2]

[9] The applicants in the present matter did pass the first hurdle towards condonation, in that their claim has not prescribed,

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1 2008 (4) SA 312 (SCA) at para [6] at 315

2 **Madinda v Minister of Safety and Security**, *supra*, at para [8] at 316.

by serving their summons on the respondent a month before such claim would have prescribed. This court therefore needs to determine whether the applicants also met the remaining two statutory requirements, namely to show ‘good cause’ for the delay and to prove ‘no unreasonable prejudice to the respondent’.

[10] In order to determine whether ‘good cause’ exists, the court needs to investigate those factors which pertain to the fairness of granting the relief and the proper administration of justice. It has been held that there is no exhaustive list of factors to be considered, but that some relevant ones might be the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicants, any contribution by other persons or parties to the delay, the applicants’ responsibility for the delay, and the prospects of success in the proposed action. [3]

[11] In **Silber v Ozen Wholesalers (Pty) Ltd**[4] Schreiner JA said:

> *“…the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.”*

According to Heher JA[5], the court accepted that this principle is also applicable to the interpretation of section 3(4)(b)(ii). He pointed out that in the said section a specific link is

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3 **Madinda v Minister of Safety and Security**, *supra*, at para [10] at 316.
4 1954 (2) SA 345 (A) at 352H – 353A.
5 **Madinda v Minister of Safety and Security**, *supra*, at para [11] at 316.

created between the delay and the 'good cause' and stressed that *'good cause for the delay'* is not simply a mechanical matter of cause and effect. The court needs to decide whether the applicant has proffered *"acceptable reasons for nullifying, in whole or at least substantially, any culpability on his part pertaining to the delay in serving the notice timeously"*.

[12] In my view the applicants in the present case failed to do so. First of all, there is no 'full' explanation which enables the Court to assess how the delay really came about. In the so-called 'chronology' in the founding affidavit, only three specific dates are provided to explain a delay of two-and-a half years. Although the accident happened on 23 January 2010, the first specified date is 31 January 2012 when the applicants are said to have mandated their present attorney of record to institute action on their behalf. The second is 26 June 2012 when the said attorney briefed the 'trial advocacy attorney' to *"consult [her] pertaining to the claims"*. The third is 1 October 2012 and/or 10 October 2012 when a candidate attorney sent the attorney a telephonic note to inform her that he had "phoned SANRAL" to ascertain the identity of the relevant road authority and had received confirmation that the Free State Department of Public Works, Roads and Transport is the said relevant authority.

[14] Details of the year that passed between the instructing attorney's receipt of a mandate until the section 4(1) letter was issued in December 2012 are sketchy, to say the least. The attorney deposed to the founding affidavit herself.

Without providing any dates or details, she merely avers that she spent six months to obtain the listed documents. In '*June or July 2012'* she and presumably the trial attorney held an inspection *in loco* and a consultation with the applicants. At some unspecified date she instructed the *'trial attorney'* to *'settle the demands and issue the summons'*. She offers no explanation for the further delay until December 2014, except to intimate that it took almost a year to find out which body to address the claim to. By 10 October she had the necessary information, on her version. Yet the letter was only served two months later. Once again no information on the reason for that delay is provided.

[15] From the applicants themselves there is no explanation other than to confirm the bald statement in the attorney's affidavit that they had not been aware of their rights in respect of claims against the respondent; the identity of the respondent and/or the institution against which such claims might be instituted; their entitlement to damages and the evidence required to enforce such a claim, or whether they in fact had any enforceable claim against the relevant road authority. To that effect three non-committal general 3-paragraph affidavits by the Applicants and the First Applicant's mother were annexed to the attorney's affidavit.

[16] The explanations in the affidavits submitted in support of the application for condonation, in my view distinctly failed to pass the second hurdle, namely to provide 'good cause' to grant condonation. Although it is obvious that the attorney

played a very prominent role in the delay, the extent to which the applicants might have contributed to the delay is not explained at all. They themselves offered no explanation whatsoever for the two years that passed since the accident. They simply pleaded complete ignorance. They did not explain how or when or through whom they then purportedly became aware of their potential rights, whether they immediately took steps to consult an attorney, why two years passed before they did so, and so forth. Certainly their explanation is not 'full' enough to enable the Court to evaluate their contribution, if any, to the delay.

[17] The prospects of success on the merits might have an important bearing on the determination of the existence or not of 'good cause'. Exercising a discretion to condone where there is no prospect of success would be an exercise in futility. Whether the merits are shown to be strong or weak, may affect the applicants' explanation for conduct which led to the delay. It is hardly likely that an applicant with an overwhelmingly strong case would be careless in pursuing his interest, while one with little hope of success can easily be understood to drag his heals.[6]

[18] In the present application, in my view, therefore there is no satisfactory or sufficient explanation for the delay of two-and-a-half years before the notice was sent out. What happened between the date of the accident and the instructions to the attorney two years later remains a mystery. So, to a

[6] Madinda

significant extent, does the delay of almost a year from the date of the attorney’s first instruction to the filing of the section 3(4)(i) letter of demand. It is highly improbable that the *“investigative works”* regarding the identity of the respondent and the nature and extent of the claim against the respondent could in all reasonableness have occupied an entire year, especially since the respondent’s identity could, on the applicants’ own papers, apparently be solved by two phone calls by a candidate attorney.

[19] The deposing attorney maintained that the court should not blame the applicants for the delay. In the absence of any explanation for the apparent two year delay in contacting an attorney, other than ‘ignorance’, the court can certainly not find that the appellants used the first available opportunity to “assert their determination to see justice done”.

[20] It is true that ignorance, inexperience, naïveté, or a simple lack of intelligence, individually or in any combination, could conduce to a reasonable belief that something would happen. But that requires some pro-active action from the applicants. In the present matter there is no explanation of what the applicants did to pursue a possible claim, whether it be against the Road Accident Fund, or against the relevant road authority. There is no allegation that the applicants are of deficient intelligence or illiterate, and it is hard to believe that any road user in this country would not be aware of the possibility of claiming from somebody or some institution. It

is also hard to believe that anybody would not at least think of approaching an attorney for advice as to a possible claim.

[21] The applicants do not deal with any prospect of success at all. From the founding affidavit it appears that this was a single vehicle accident which occurred on a provincial road which had potholes in the surface. The first applicant is alleged to have driven over or into an invisible pothole. But there is no objective evidence to that effect: the road in question has been completely resurfaced.

[22] As stated in **Madinda**r[7] there are two main elements at play in section 4(b), namely the applicants' right to have the merits of the case tried by a court of law, but also the right of an organ of state not to be unduly prejudiced by delay beyond the statutory prescribed limit for giving notice. Subsection (iii) requires the court to be satisfied that there is no such prejudice.

[23] The complete resurfacing of the road was done before the Defendant was notified of the present claim. Had the letter of demand in terms of Act 40 of 2002 been sent timeously, the Defendant would at least have had an opportunity to investigate the claim and inspect the road surface in the vicinity of the accident before the resurfacing thereof. In my view the requirement of having to notify state organs within six months of any proposed claim for damages was introduced specifically to prevent this type of situation where

7 **Madinda v Minister of Safety and Security**, *supra*, at para [12] at 317.

an organ of state is called upon to meet a claim regarding which it is unable to objectively verify the circumstances leading to the claim.

[24] In my view the applicants failed to meet the third leg of section 3(4)(b) as well, namely that an applicant must satisfy the court that the respondent had not been unreasonably prejudiced by the failure to serve the notice timeously. The requirement of the existence of "*unreasonable prejudice*" rather than simply any level of prejudice, requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent.

[26] The onus is on an applicant to bring the application within the terms of the statute, but a court should be slow to assume prejudice for which the respondent himself does not lay a basis. In the present matter the respondent argued that the relevant road has been completely resurfaced since the accident, which resurfacing was done by an external company upon tender, and that it would be impossible to obtain objective evidence in order to a properly defend the claim three years after the accident.

[27] Counsel for the respondent pointed out that the prejudice in the present case did not constitute the normal type of prejudice, such as witnesses forgetting details, and so forth, but posed a fundamental problem because any evidence of the accident would by 2012 have been totally obliterated.

The resurfacing was done, furthermore, by an independent contractor and not by the Department itself, which of course means that the records of the type of work needed and done on the relevant stretch of road would have been kept by that company and not by the Department.

[28] Counsel for the applicant argued that the Respondent should have known that the road surface was bad, seeing that it needed to be resurfaced, and that it should have kept all records of the condition of the road surface for possible future litigation. That could have been a valid argument if the section 4 notice had been delivered within the specified time and before the road was resurfaced.

[29] On behalf of the applicants it was argued that the fact that the Department did not keep records of the road condition before the resurfacing to meet possible future litigation made it the author of its own prejudice or misfortune. It was also averred that for that reason the late service of the letter was not the cause of any unreasonable prejudice to the Respondent.

[30] I do not agree. Had the Applicants complied with their statutory duty to timeously notify the Respondent of their proposed claim, the prejudice would not have occurred. The Respondent’s lack of access to objective evidence regarding the accident has in my view indeed deprived it of its right to put its case properly before the court.

[31] Once the court has investigated all the facts, it is in a position to assess the combined weight to be attributed to the three elements of section 3(4)(b)(i), (ii) and (iii) in the context of the discretion to grant or refuse condonation. In view of their patent lack of a sufficiently full explanation for the almost three year delay in notifying the Respondent of their proposed claim and the failure to address the probability of success on the merits, the Applicants in my view patently failed to establish 'good cause' for condonation. Furthermore, the prejudice to the Respondent is undeniable.

[32] The Supreme Court of Appeal has determined that the structure of section 3(4) is now such that the court must be satisfied that **all three** requirements have been met before it can exercise its discretion to condone non-compliance with the Act.[8] Therefore, in view thereof that the Applicants did not meet the second and third of the three statutory requirements for condonation in terms of section 3(4)(b), the Court is not in a position to exercise its discretion to grant condonation for the Applicants' non-compliance with the requirements of Act 40 of 2002.

WHEREFORE the following order is made:

The application for condonation in terms of section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is dismissed with costs.

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8 **Madinda v Minister of Safety and Security,** *supra*, at para [16] at 317.

H. MURRAY, AJ

On behalf of the applicants:	Mr Piet Uys Instructed by: Yvonne Kruger Inc c/o Matsepes Inc 26/28 Aliwal Street BLOEMFONTEIN
On behalf of the defendant:	Adv B S M Bedderson Instructed by: The State Attorney 11th Floor Fedsure Building BLOEMFONTEIN

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