



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 788/2015

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| (1) | REPORTABLE:- YES /NO |
| (2) | OF INTEREST TO OTHER JUDGES:- YES /NO |
| (3) | REVISED |

15 July 2024
DATE


SIGNATURE

In the matter between:

NOKUTLA LUCY NTINTILI

Applicant

and

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment/reasons is deemed to be 15 July 2024.

JUDGMENT

MALINDI J

Introduction

[1] On 26 or 27 February 2024 I made an order dismissing the applicants application

for condemnation of her late delivery to the respondent of her notice of intention to institute legal action against the respondent within a period of six months from date of the incident giving rise to because of action that her claim for damages is based on.

- [2] This constitutes the reasons for the judgment after a request for reasons were served on or about 7 March 2024.

Background

- [3] the applicant is a 59 year old woman who at the time of the incident was approximately 48 years old.
- [4] The applicant agrees that on 29 September 2013 “approximately 21h15, at or near Mlangeni Street, in the vicinity of White City Jabavu, Soweto ... (she) was walking when she stepped on an open municipal drainage opening, stumbled and fell into such drainage opening.” As a result of the incident she suffered injury for which she sues the City of Johannesburg.
- [5] The applicant issued summons on 8 January 2015, a year and three months after the incident. She alleges that she complied with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act”). Section 3(1) and (2) of the Act requires that notice in writing of the intention to institute legal proceedings must be served on the organ of state “within six months from the date on which the debt became due”.
- [6] The summons was served by the Sheriff at the City of Johannesburg's offices on 19 January 2015.

- [7] In the application for condonation dated 25 April 2017 the applicant's attorney states that on 4 December 2013 he erroneously served the notice on the Minister of Roads and Transport. It was a year later on 12 December 2024 that he became aware that the notice ought to have been served on the City of Johannesburg and did so on the same day.
- [8] When the plaintiff stated in her summons served on 19 January 2015 that she had complied with section 3 of the Act it was not true to the extent that the notice had not been served within six months of the debt arising on the City of Johannesburg, although it was true that the late notice had been served on 12 December 2024.
- [9] The applicant's attorneys were served with the respondents special plea and the plea over on 18 June 2015 wherein the respondent raised a special plea of non-compliance with the Act. It was only on 24 April 2017, some 22 months after the special plea, that an application for condonation was launched.
- [10] On 23 March 2016 the respondent requested to be furnished with the notice referred to in the particulars of claim but it was not forthcoming. This is the third instance when the applicant should have acted expeditiously in respect of the application for condonation.

Discussion

- [11] An application for condonation must be brought as soon as a party becomes aware that condonation of their late pleading will be required. The applicant's attorney became aware when they realised that the notice was served on the

wrong organ of state and corrected the error on 12 December 2014. Knowledge of the requirements to serve the notice presupposes that they were aware of the six month period applicable. They failed to act on this knowledge.

[12] The second occasion that the applicant's attorneys ought to have launched the application, if for whatever reason they did not appreciate the six months requirement when they read the Act in December 2013, is when they received the special plea on 18 June 2015. Instead they waited for about 22 months before they did so on 25 April 2017.

[13] Both occasions manifest negligence on the part of the attorneys. As was said in *Saloojee v Minister of Community Development*,¹ the negligence of an attorney cannot always be an excuse for failure to discharge their mandate to prosecute their client's case professionally. This is one case where the litigant cannot be excused on account of the negligence of her attorneys.

[14] In *Mohlomi v Minister of Defence*² the reason for the notice requirements is so that an organ of state is afforded an opportunity to immediately investigate the alleged incident and to investigate claims against it so that it can take appropriate legal steps timeously.

[15] This principle was explained in *Mothupi v Member of the Executive Council, Department of Health Free State Province*³ as follows:

"The object of a provision such as s 3 is to enable the State, a large and

¹ 1965 (2) SA 135 (A).

² 1997 (1) SA 124 (CC).

³ [2016] ZASCA 27.

cumbersome organisation, to investigate claims so as to consider whether to settle or compromise a claim before costs escalate unnecessarily, or to properly prepare its defence – which may be frustrated if it is unable to investigate relatively soon after the alleged incident occurred.”

[16] The respondent learnt about the incident for the first time when it was served with the already late notice on 12 December 2014, a year and three months after the alleged incident. By this time, the respondent had lost the opportunity to investigate where the “drainage opening” is and whether it was true that it was open on 29 September 2013. In my view, the respondent was greatly prejudiced by the lack of detail as to the condition of the “drainage opening” at the time of the alleged incident.

[17] Secondly, save for stating that the notice was served seven months out of time, and therefore not inordinately late, and that lateness was not willful, the applicant does not explain fully the circumstances that led to the lateness of the notice. As stated above, the first period is from December 2014 when she became aware that the notice was served on the wrong organ of state and will therefore be late when served on the City of Johannesburg; the second period is from 18 June 2015, the date of the special plea, to April 2017 when the application was launched.

[18] In her heads of argument, the applicant attributes these inexplicable separate delays to the “lack of experience of the attorney.” Firstly, this was not pleaded in the application. Secondly, it is negligence that does not excuse the applicant’s failure to apply for condonation timelessly. Thirdly, no prospect of success are

pleaded. It has been said that reasonable prospects of success militate in favour of the grant of condonation even if the explanation for the delay is not satisfactory.⁴ Such a case has not been made in this case.

[19] I conclude that no good cause has been shown for this court to grant condonation.

Conclusion

[20] Although the claim has not prescribed in terms of the Prescription Act,⁵ the notice prescribed by act 40 of 2002 is inordinately late, without a full and proper explanation for its lateness. Secondly, the lateness defeats the purpose of the enactment of the Act which is to prevent or avoid prejudice to organs of state in instances where investigations of the claim would be undermined by the disappearance of evidence required to prepare a defence especially in circumstances such as those of the respondent. The “drainage opening” or manhole situation would have changed drastically one year and three months from 29 September 2013 to when the incident allegedly took place, to 12 December 2014 when the notice was received.

[21] Therefore, the order made on 26 February 2024 is confirmed as follows:

1. The application for condonation in terms of Section 3 of Act 40 of 2002 is dismissed.
2. The applicant is to pay the cost of the application.

⁴ Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A).

⁵ Prescription Act 68 of 1969.



**MALINDI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

APPEARANCES

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INSTRUCTED BY:

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DATE OF HEARING:
DATE OF JUDGMENT:

26 February 2024
15 July 2024