



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

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **3884/2022**

In the matter between:

SEBOLELO MERIAM MATLI

Applicant

and

MINISTER OF POLICE

Respondent

Coram: DAFFUE J

Heard: 29 AUGUST 2024

Delivered: 24 OCTOBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 24 OCTOBER 2024.

Summary: A minor child, a pedestrian at the time, was killed in a motor vehicle collision. The driver of the vehicle belonging to the South African Police Service (SAPS) was an employee on official duty. The foster mother of the minor child belatedly gave notice to SAPS in accordance with Act 40 of 2002 of her intention to claim damages in the form of emotional shock and funeral expenses. On receipt of the summons the Minister of Police filed a special plea relying on non-compliance with s 3 of Act 40 of 2002, where after the foster mother brought an application for condonation which was opposed. The court considered all relevant circumstances with reference to the established principles laid down in *inter alia Madinda v Minister of Safety and Security*. It held that the Minister was not unreasonably prejudiced by the failure to serve the required notice timeously. Condonation was granted.

ORDER

1. The applicant's non-compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is condoned.
 2. The respondent shall pay the applicant's costs of the application, including the fees of counsel on scale A as contemplated in Rule 67(A)(3).
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JUDGMENT

Daffue J

Introduction

[1] On 21 August 2019 a minor child, she being a pedestrian at the time, was killed in a motor vehicle accident in Maokeng, Kroonstad, Free State Province. The driver of the State vehicle was a member of the South African Police Service (SAPS) who was on duty at the time. The minor child's foster parent, Me Sebolelo Meriam Matli, belatedly received advice from a legal representative to institute action against the Minister of Police to claim damages for emotional shock and funeral expenses due to the alleged negligence of the SAPS driver.

[2] The letter of demand was sent by registered post on 16 August 2022 to the National and Provincial Commissioners of SAPS. It was hopelessly out of time as the statutory period of six months expired on 18 February 2020. Thereafter, summons was issued which was eventually met with a special plea, relying on non-compliance with the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (Act 40 of 2002). The defendant also pleaded over the merits. The plaintiff filed the required application for condonation in terms of Act 40 of 2002 which was opposed by the defendant.

The parties

[3] As indicated, the plaintiff in the main action is Ms Sebolelo Meriam Matli who resides in Maokeng, Kroonstad, Free State Province. She instituted action in her capacity as foster mother of the late Pinkie Augustina Jantjie (the minor child).

[4] The Minister of Police in his official capacity as political head of SAPS is cited as the defendant in the main action.

[5] In order to avoid confusion, I shall herein after refer to the parties as cited in the condonation application, to wit the applicant and respondent respectively.

The claim in the main action

[6] The applicant claims R550 000 from the respondent, to wit R500 000 as general damages for her trauma and emotional shock and R50 000 in respect of funeral costs incurred as a result of the death of her foster child.

Material events in chronological order

[7] I record the following:

- a. the minor child was born on 2 December 2002;
- b. the applicant was awarded foster care over the minor child in terms of s 159(1) of the Children's Act 38 of 2005 which order was extended from time to time, the last extension being to 31 December 2020;
- c. on 21 August 2019 the minor child was killed in the aforesaid motor vehicle collision which means that she was 16 years old when she died;
- d. on 24 March 2021 the applicant consulted an attorney who started to communicate on her behalf with the Road Accident Fund (RAF);
- e. the RAF sought the contents of the SAPS docket as a result of which the applicant's attorney contacted the Independent Police Investigative Directorate (IPID) on 24 March 2022, requesting the docket contents under case number 252/08/2019, this being a clear indication that a docket was indeed opened in August 2019;
- f. during August 2022 the applicant received advice from counsel that a civil suit should be instituted against the respondent whereupon the letter of demand dated 16 August 2022 was sent as mentioned;

- g. summons was issued on 17 August 2022 whereupon the respondent filed a notice to defend on 16 September 2022;
- h. notwithstanding the requirements of rule 22 of the Uniform Rules of Court, the respondent failed to file his plea within 20 days from 16 September 2022;
- i. nothing happened for nine months until a notice of bar was served by the applicant's attorney on 6 July 2023 whereupon the plea, including the special plea, was filed on 10 July 2023;
- j. on 23 May 2023 the RAF offered to settle the applicant's funeral expenses which offer was apparently not accepted;
- k. on 19 April 2024 the applicant filed her application for condonation;
- l. the respondent failed to give timeous notice of his intention to oppose the application and consequently, it was set down for hearing on 6 June 2024;
- m. on 31 May 2024 the defendant filed a notice of intention to oppose which caused the application to be removed from the roll, the respondent to pay the wasted costs;
- n. on 25 June 2024 the respondent eventually filed an answering affidavit, deposed to by Captain MM Pieters to which the applicant did not reply;
- o. the matter was set down for hearing on 29 August 2024 where after judgment was reserved.

Legal Proceedings against Certain Organs of State Act 40 of 2002 (Act 40 of 2002)

[8] The relevant portion of s 3 of Act 40 of 2002 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)
- (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.' (emphasis added)

Evaluation of the evidence and submissions

[9] Save for the time line referred to above, I did not deal specifically with any evidence presented by the parties, but shall deal with that during my evaluation hereinafter.

[10] These kinds of applications serve all too often in our courts. Litigants frequently fail to comply with the aforesaid statutory requirements. In many of these cases the organs of state often do not comply with the rules of court, but unnecessarily try to close the doors of the court for litigants who are often lay, poor and unsophisticated citizens. As I have shown when I dealt with the material events in chronological order, this is a typical case where the organ of state is guilty of non-compliance with the rules of court. In the absence of a special plea and on the basis that the plea was filed timeously, the main claim would have been heard by now, bearing in mind the short waiting list in this Division.

[11] Section 34 of the Constitution confirms the constitutional right of citizens to have access to courts. It reads as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

I shall consider the applicant's right to have her dispute resolved in a fair public hearing during the evaluation of the evidence.

[12] It is apposite to refer to some provisions of the Road Accident Fund Act 56 of 1996 (RAF Act) in light of the failure of the applicant's legal representative to correctly advise her of her rights. The liability of the RAF is excluded in certain cases. The relevant part of s 19 of the RAF Act reads as follows:

'The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) suffered as a result of an emotional shock sustained by that person when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle. (emphasis added)

Certain common law claims have been abolished in the RAF Act, but it should be noted that claims based on emotional shock may still be instituted in certain instances. Section 21 reads as follows with particular emphasis on s 21(2)(b):

'(1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie-

(a) against the owner or driver of a motor vehicle; or

(b) against the employer of the driver.

(2) Subsection (1) does not apply-

(a) if the Fund or an agent is unable to pay any compensation; or

(b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle.' (emphasis added)

[13] The applicant *inter alia* claims damages from the respondent for the alleged emotional shock that she has suffered as a result of the death of her foster child. The *locus classicus* in respect of the negligent infliction of nervous shock is *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*.¹ In *Swartbooï v Road Accident Fund*² (Swartbooï) the court held that the plaintiff had a valid claim for damages in respect of emotional shock against the RAF in accordance with s 17 of

¹ 1973 (1) SA 769 (A), cited with approval in *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 209 and further.

² 2013 (1) SA 30 (WCC).

the RAF Act and that the claim was not limited in terms of s 18 of that Act. Since *Swartbooi*, the RAF Act has been amended with effect from 1 August 2008. The RAF's liability in respect of claims based on emotional shock has now been excluded.

[14] I stated the following, writing for a unanimous full bench, in *Minister of Police v Maseko*:³

'Inordinate delays in litigating damage the interests of justice as Didcott J pointed out in *Mohlomi v Minister of Defence (Mohlomi)*. Logic dictates that it may be extremely difficult for an organ of state to deal with a claim instituted against it just before prescription is interrupted and without any notice or demand whatsoever. The authorities are clear. Documentary evidence may not be available anymore and/or witnesses might have passed on in the meantime and/or might not be available to testify anymore. But, it is not the purpose of the demand requirement to prevent a worthy litigant from access to justice in accordance with s 34 of the Constitution. The purpose was explained as follows by Didcott J in *Mohlomi*:

'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.' (footnotes omitted)

[15] In *Mugwena and Another v Minister of Safety and Security*⁴ the Supreme Court of Appeal considered the Minister's special plea to the effect that the plaintiffs had not complied with the time periods set out in s 57 of the South African Police Service Act 68 of 1995 which was applicable in August 1997 when an off-duty policeman shot and killed a person. Act 40 of 2002 was promulgated much later. However, the judgment of Ponnar JA, writing for a unanimous court, is a perfect example of how time limits should be adjudicated. The following *dictum*⁵ remains valid today:

'Section 57 permits account to be taken of the claimant's fault or the lack thereof and the prejudice suffered by the State, or its absence (*Mohlomi* at para [19]). It seeks, on the one hand, to protect innocent claimants who may be time-barred in consequence of not having complied with the prescribed time-limits and, on the other, to protect the police, a large bureaucracy, against the prejudice it may suffer in consequence of inordinate delays in instituting actions against it. Striking a balance between these competing considerations is thus central to the enquiry envisaged by ss (5). That subsection is cast in wide terms. It

³ (A107/2023) [2024] ZAFSHC 121 (30 April 2024)

⁴ 2006 (4) SA 150 (SCA).

⁵ *Ibid* para 18.

empowers a court to engage in a weighing-up exercise. ... That prejudice to the respondent had not been asserted and, in fact, was manifestly absent, did not merit a mention in the trial Court's judgment. ... Absent prejudice, there was little, if anything, to tip the scales in favour of the respondent or against the grant of the relief sought.'

[16] Organs of state often rely on the judgment of the Supreme Court of Appeal in *Minister of Agriculture and Land Affairs v CJ Rance*⁶ (*Rance*) in order to bolster their opposition of condonation applications in terms of s 3(4) of Act 40 of 2002. This was exactly the stance taken *in casu*. The facts in *Rance* are often completely distinguishable from the facts encountered where lay and unsophisticated persons seek condonation for non-compliance with Act 40 of 2002. In that case the applicant was a huge and well-resourced company who could afford quality legal representation and who even made use of an internationally renowned expert in order to investigate the circumstances leading to the damages suffered by it. A reading of the judgment makes it clear that *Rance* dragged their feet⁷ and consequently, its application for condonation was dismissed on appeal due to its failure to establish good cause.

[17] I am satisfied that the applicant's prospects of success are more than reasonable. I do not have to speculate on the likely outcome of her claim if it goes on trial. It is apparent that the attorney that she initially consulted did not display expertise in respect of claims for emotional shock. Therefore, he tried to claim damages in this regard from the RAF. Earlier, this was possible as the authorities indicate.⁸ Any negligence on his part may play a role in adjudicating the application, but it is obviously not the only factor to be considered.

[18] Ms Matli did not explain why she approached an attorney for the first time in March 2021, being one year and seven months after the minor child was killed. There was no attempt to justify the delay. However, there cannot be any doubt that she is a lay person and that the attorney that she approached at the time did not have the expertise required of a legal representative specialising in personal injury claims. Obviously, he believed and advised her that the RAF was the correct entity to be held responsible. Act 40 of 2002 does not apply to the RAF. Immediately after receiving the correct advice from counsel in August 2022, the letter of demand was issued as

⁶ 2010 (4) SA 109 (SCA).

⁷ *Ibid* paras 15-46.

⁸ See *inter alia* *Swartbooi v Road Accident Fund* in footnote 2 above.

mentioned above. The facts in this case remind me of the Supreme Court of Appeal's judgment in *MEC for Education, Kwazulu-Natal v Shange (Shange)*.⁹ In that case the minor child was injured in June 2003, but he only received advice that he had a claim against the MEC from an advocate in the Office of the Public Protector during January 2006. Having considered all relevant factors, the Supreme Court of Appeal concluded that the court *a quo* was correct to grant condonation in accordance with s 3(4) of Act 40 of 2002.

[19] The prospects of success are a relevant consideration in order to deal with the requirement of good cause for the delay. It is common cause that the minor child was a pedestrian when she was hit by the SAPS vehicle. It is the applicant's case that the driver drove the vehicle at an excessive speed, failed to keep the vehicle under control and also failed to avoid the collision. The respondent's version is that the driver applied reasonable care and even stopped at a stop sign immediately before the collision. On this version the minor child and her friends entered the road whilst running, causing a sudden emergency. The negligence issue is for the trial court to adjudicate. I am satisfied that there are relatively strong merits favouring the applicant's case. Also, strong merits may mitigate fault.

[20] In line with what Heher JA stated in *Madinda v Minister of Safety and Security, Republic of South Africa*¹⁰ (*Madinda*), Ms Matli has to satisfy the court that the respondent had not been unreasonably prejudiced by the failure to serve the notice timeously. The learned justice proceeded in this regard as follows in *Madinda*:

'This must inevitably depend on the most probable inference to be drawn from the facts which are to be regarded as proved in the context of the motion proceedings launched by an applicant. The approach to the existence of *unreasonable* prejudice (not simply any level of prejudice, an aspect which the judgment of the court *a quo* blurs) 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. 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.'

⁹ 2012 (5) SA 313 (SCA) para 12.

¹⁰ 2008 (4) SA 312 (SCA) para 21.

[21] There is no onus on the respondent to show the absence of unreasonable prejudice, but any grounds of prejudice that could have been relied upon would be within the respondent's and/or the SAPS officials' particular knowledge. The respondent failed to present facts indicating that he will be prejudiced if condonation is granted. In *casu*, reliance was placed on financial issues such as having to retain the services of counsel for the condonation application. A vague averment was made, suggesting a potential that the prosecutor and witnesses in SAPS' employ might not be available. This was said without considering the time already wasted by the respondent to file his plea and the further time gone by because of the insistence that a condonation application be brought. Furthermore, the respondent failed to file the notice to oppose and answering affidavit timeously. I refer to the time line set out above, indicating that the respondent failed to comply with the Uniform Rules of Court on more than one occasion. In my view the respondent knew from the day when the minor child was killed that a SAPS vehicle, driven by a SAPS employee whilst on duty, collided with the minor child who was a pedestrian at the time. There is no doubt about the identity of the driver. It is also evident that the matter was internally investigated by IPID and furthermore, it is not the respondent's case that the driver or any other witnesses are not available anymore. It is emphasised that I should not consider any level of prejudice, but unreasonable prejudice.

[22] In my view the following *dictum* of the Supreme Court of Appeal in *Mothupi v MEC, Department of Health Free State*¹¹ is apposite:

'Moreover, given that the respondent does not rely upon any prejudice, it is clear that it is seeking to short-circuit the claim by relying solely upon a technical point. Had it been able to show that the conduct of its case had in fact been prejudiced in some way by reason of the delay and a failure to give notice timeously, the court may well have viewed its opposition to condonation with a less jaundiced eye. However, relying upon the failure to give notice when such failure did not cause any prejudice does not redound to the credit of the respondent — Cf *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA) paras 17-22.' (emphasis added)

¹¹ (20598/2014) [2016] ZASCA 27 (22 March 2016) para 16.

[23] Having considered all aspects mentioned herein, I am satisfied that the following *dictum* in *Madinda*¹² is apposite:

'[29] One is now in a position to assess the combined weight to be attributed to the three elements of s 3(4)(b)(i) (ii) and (iii) which were established, in the context of the discretion to grant or refuse condonation. Given the absence of unreasonable prejudice to the SAPS from the equation and the persuasive, though not flawless, reliance on good cause, no court exercising a discretion unaffected by the misdirections which tainted the assessment of the trial judge, would have deprived the appellant of the opportunity to have her claim tested according to the dictates of law and justice. Condonation should therefore have been granted. It follows that the appeal must succeed.'

[24] It is common cause that the debt has not prescribed. I have a wide discretion in adjudicating the application and am satisfied that I have considered all the relevant circumstances in a balanced fashion. I accept the trite principle that the reference to 'satisfied' in s 3(4)(b) does not mean that an applicant has to prove their case on a balance of probabilities, but rather that the court must form an overall impression 'which brings a fair mind to the facts set up by the parties.'¹³

Conclusion

[25] I conclude that good cause has been established for condonation to be granted under s 3(4) of Act 40 of 2002. I am satisfied that it is in the interests of justice that the applicant has access to court as provided for in s 34 of the Constitution to allow her to attempt to prove her claim. Having accepted that the respondent has not been unreasonably prejudiced and that the applicant's delays should be condoned, it is necessary to consider the costs of the application.

[26] Ms Matli sought an indulgence. The general rule is clear. The litigant seeking an indulgence shall pay the costs of the condonation application, even in the event of they being successful, including the opponent's costs of opposition, unless the court finds such opposition to be unreasonable. Notwithstanding the aforesaid general rule, I have taken cognisance of the judgment in *Shange*¹⁴ where the court concluded that the costs in applications for condonation in terms of Act 40 of 2002 shall follow the

¹² *Ibid* para 29.

¹³ *Ibid* para 8.

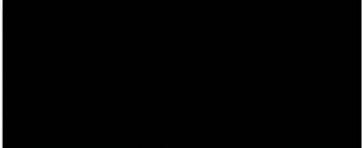
¹⁴ *Loc cit* para 24 where the court accepted the reasoning of Cloete JA in *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) para 25.

event if the application is opposed. Ms Matli's application for condonation deserves to be criticized, but bearing in mind the established facts, the respondent should not have opposed the application. The opposition was unreasonable. Therefore, costs should be awarded to the applicant as the successful party.

Order

[27] The following order is made:

1. The applicant's non-compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is condoned.
2. The respondent shall pay the applicant's costs of the application, including the fees of counsel on scale A as contemplated in Rule 67(A)(3).



DAFFUE J

Appearances

For applicant: Adv P Chaka
Instructed by: Mokhomo Attorneys
BLOEMFONTEIN.

For respondent: Adv NM Seleso
Instructed by: State Attorney
BLOEMFONTEIN.