



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

Reportable / Not reportable

Case no: 2936/2023

In the matter between

MODISE SIMON BANDA

PLAINTIFF/APPLICANT

and

DEPARTMENT OF POLICE, ROADS

AND TRANSPORT

DEFENDANT/RESPONDENT

Neutral citation:

Coram: MAHLATSI AJ

Heard: 28/11/2024

Delivered: 12/12/2024

Summary: Application for condonation – late filing of notice in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

ORDER

1. Application for condonation for the late filling of notice in terms of ss 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 is dismissed
 2. The applicant is ordered to pay the costs of this application.
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JUDGMENT

Mahlatsi AJ

Introduction

[1] This is an application in terms of which the applicant sought condonation for the late filing of a notice of intended legal proceedings as contemplated in s 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) and that the respondent be ordered to pay the costs of this application in the event it unreasonably opposes this application.

[2] The applicant launched this application in response to the special plea raised by the respondent of non-compliance with s 3 of the Act. In the main, the respondent contended that the applicant failed to serve the required notice within the prescribed period and that the applicant's claim has prescribed.

[3] This court is required to determine whether the applicant has made out a case for condonation as contemplated in s 3(4)(a) and (b) of the Act.

Brief material background

[4] On or about 12 June 2021, the applicant was involved in a single vehicle collision when his vehicle hit a pothole on the on the R70 road in Ficksburg, Free State. He lost control of the vehicle and the vehicle overturned. He sustained bodily injuries and a brain head injury. He received medical treatment at Phuthuloha Hospital and later transferred to Dihlabeng Regional Hospital for further treatment.

[5] The applicant did not approach his attorney to institute a claim until April 2023, when he heard a discussion on a radio programme which indicated that persons who were involved in accidents as a result of poor road maintenance had a right to institute legal proceedings to recover their losses.

[6] After one year and ten months the applicant, through his attorneys of record, notified the respondent in terms of s 3(1) of the Act of his intention to institute action against the respondent for recovery of damages arising out of the alleged accident. Summons was, thereafter, issued on 12 June 2023 and served on 14 June 2023 to the Respondent, which is within three years after the alleged cause of action arose alleging that the respondent breached his legal duty towards the applicant by, *inter alia*, failing to ensure the repair of all potentially dangerous rutting and potholes on the road surface.

[7] The respondent resists the action and filed a special plea to the effect that the notice in question was defective in that it was not served timeously.

[8] On 15 July 2024 the applicant filed the instant application, moving for condonation of the late delivery of the relevant notice together with costs in the event the respondent unreasonably opposes the application. The respondent opposes the application on the grounds that there exists no good cause for condonation.

Applicable law

[9] Section 3 of the Act proscribes the institution of legal proceedings against organs of state such as the respondent without either a written notice given within six months from the date on which the cause of action arose or written consent to the institution of such legal proceedings without notice.

[10] Failure to give the prescribed notice may be condoned by the court on application if the relevant organ of state withholds consent and if the court is satisfied that:

- (a) The relevant claim has not prescribed;
- (b) good cause exists for the failure to comply; and
- (c) the relevant organ of state was not unreasonably prejudiced by the failure.¹

[11] In the context of the Act and for the purposes of condonation 'the phrase "if [the court] is satisfied" in s 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by parties.'²

[12] For the purpose of condonation the court has a wide discretion and '... "good cause" may include a number of factors that are entirely dependent on the facts of each case; [and] that the prospects of success of the intended claim play a significant role.'³

[13] It is incumbent upon the applicant for condonation to '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.'⁴

[14] Post-notification delay exacerbates the matter insofar as '[c]ondonation must be applied for as soon as the party concerned realises that it is required. The onus to satisfy the court that all the requirements under s 4(b) of the Act have been met, is on an applicant, although a court would be hesitant "to assume prejudice for which a respondent does not lay a basis."⁵

¹ See s 3(4)(a) and (b) of the Act.

² *Madinda v Minister of Safety and Security, Republic of South Africa* [2008] ZASCA 34; [2008] 3 All SA 143 (SCA) para 8.

³ *MEC for Education, KwaZulu-Natal v Shange* [2012] ZASCA 98; 2012 (5) SA 313 (SCA) para 15.

⁴ *Premier of the Western Cape NO v Lakay* [2011] ZASCA 224; 2012 (2) SA 1 (SCA) para 17.

⁵ *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* [2010] ZASCA 27; 2010 (4) SA 109 (SCA) para 39 (*C J Rance*).

[15] Prescribed time periods in litigation seek to obviate inordinate delays which compromise the interest of justice insofar as time is the worst enemy of human memory. The notice prescribed by s 3 of the Act, *inter alia*, 'allows the organ of state time to investigate the complaint and [to] possibly agree to payment or settlement without incurring the costs of litigation.'⁶

[16] In *Mofolo v Minister of Police*⁷ at para 19 the Court held: '... the argument that she did not know that she was wronged stands to be rejected because it is farfetched and untenable. It is a doctrine of law that ignorance of the law is not an excuse. I agree with counsel for the respondent that if this argument was to pass muster, then the flood gates for any person escaping accountability relying on it will be open.'

Issues in dispute

[17] The parties are at variance on whether or not good cause exists for condonation with specific reference to the following:

- (a) Whether or not the reason advanced by the applicant for pre-notification delay is acceptable and satisfactory with the respondent holding that same is flimsy and the delay is inexcusable.
- (b) Whether or not the respondent would suffer prejudice if condonation is granted with the applicant contending that the fact that the respondent deals with the merits of the action in its opposition of the application is indicative of his ability to deal with the matter without any prejudice in his defence.

Depositions and contentions for the applicant

[18] The applicant attributes the delay to the fact that after the accident he was not aware that he had a cause of action against the respondent and only acquired relevant knowledge when he heard a discussion on the radio that persons who were involved in accidents as result of poor road maintenance had a right to institute legal proceedings to recover their losses. After gaining knowledge that he had a claim, through the radio and

⁶ See in this regard *Moloi v Minister of Safety and Security* [2014] ZAFSHC 76 para 9; *Mohlomi v Minister of Defence* [1996] ZACC 20; 1996 (12) BCLR 1559.

⁷ *Mofolo v Minister of Police* [2022] ZAFSHC 23 (*Mofolo*).

consulting with his attorney, the applicant immediately gave instructions to his attorney to proceed with the notice in terms of s 3 of the Act, dated 12 April 2023. Same was attached to the applicant's replying affidavit and sent to the respondent via registered mail. However, it later came to light from the respondent's plea, that the respondent did not receive the initial notice, and a second notice was only sent on 17 October 2024.

[19] In argument on papers and before the court, Adv Van der Sandt submits that the applicant furnished proper reasons constituting good cause for condonation. She further contends that the respondent has not been unreasonably prejudiced by the delay involved insofar as he has not shown any detrimental prejudice in his ability to properly investigate the applicant's cause of action. In conclusion, she reiterates that the pre-notification delay in applying for condonation is not prejudicial to the respondent and is, as such, not necessarily fatal to the present application.

Depositions and contentions for the respondent

[20] The respondent's Acting Legal Director Services deposes at length to, *inter alia*, the effect that the respondent has been severely prejudiced in his investigation of the alleged accident because of the repairs that took place on the relevant road between the date of the alleged accident and the date of the relevant notice. In his view, it is simply impossible to verify the alleged accident after the inordinate delay involved in bringing same to the respondent's attention.

[21] On the papers and in argument before the court, Adv De Kock contends, *inter alia*, the pre-notification delay of about two years before the application for condonation remains unsatisfactory and the attempted explanation is not full enough to enable this court to evaluate the applicant's contribution to the delay and the applicant's bona fides.

Discussion

[22] In law, the applicant was obliged to serve the relevant notice on the respondent no later than six months, but same was only served almost two years after the alleged cause of action being the alleged accident. The delay involved was indeed inordinate and called for a sufficiently full explanation on the part of the applicant. This pre-notification delay, in

my view, simply cries out for explanation and reflects negatively on the applicant's attitude towards the matter, regard being had to the fact that he is self-employed as plumber not necessarily well-versed in legal affairs. Once again, the reason why he did nothing to secure the necessary assistance prior to April 2023 remains a mystery.

[23] The argument that the applicant did not know that he was wronged up and until he heard a discussion on the radio that people who were involved in accidents where the roads were not properly maintained, had a right to claim, stands to be rejected because it is farfetched and untenable. It is a doctrine of law that ignorance of the law is not an excuse. I agree with counsel for the respondent that if this argument was to pass muster, then the floodgates for any person escaping accountability, will be opened.⁸

[24] The applicant insists that the respondent has not shown any detrimental prejudice to his ability to properly investigate the cause of action. The onus is, however, on the applicant to show that all requirements set out in the Act for condonation have been met. The respondent, as the organ of state concerned, is only saddled with the evidentiary burden to lay the basis for the court to infer the presence of unreasonable prejudice on its part.⁹

[25] The court is satisfied from the opposing papers that the respondent has done more than lay the basis for the relevant inference to be drawn. It has in effect demonstrated how it would be forced to accept the applicant's *ipse dixit* because of the delay involved, which effectively deprived it of the opportunity to investigate the matter properly in order to, *inter alia*, test the veracity of the claim.

[26] Having considered the authorities cited and the facts of this application for condonation, I am not persuaded that good cause exists for condonation in the instant case.

Costs

⁸ *Mofolo* para 19.

⁹ *C J Rance* paras 38-39.

[27] There exists no reason to deviate from the general rule in practice with regards to costs. Costs, therefore, follow the result.

Order

[28] Accordingly, I make the following order:

1. Application for condonation for the late filling of notice in terms of ss 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 is dismissed
2. The applicant is ordered to pay the costs of this application.



MAHLATSI AJ

Appearances

For the Applicant:

Adv. N Van Der Sandt

Instructed by:

Nemakanga Attorneys
c/o Webbers Attorneys
BLOEMFONTEIN

For the Respondents:

Adv. D. DE KOCK

Instructed by:

Office of The State Attorney
BLOEMFONTEIN