

SOUTH AFRICA / JUDGMENT

Rossouw v Blignaut & Wessels and Another (1836/2019) [2020] ZAFSHC 268 (5 November 2020) [2020] ZAFSHC 268

COURT

Free State High Court, Bloemfontein

BEFORE

Daniso

CASE / FILE NUMBER

1836/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 1836/2019

In

the matter between:

MARTHA

JOHANNA PETRONELLA ROSSOUW

Applicant

And

BLIGNAUT

& WESSELS

First Respondent

MEC

POLICE, ROADS & TRANSPORT

Second Respondent

FOR

THE PROVINCE OF THE FREE STATE

HEARD

ON:

13 AUGUST 2020

JUDGMENT

BY: DANISO, J

DELIVERED ON: 05 NOVEMBER 2020

- [1] On the night of 29 May 2011 Mr Marthinus Lucas Rossouw (“the deceased”) was driving a motor vehicle with registration letters and numbers [...] along the road Reitz or Tweeling when the said vehicle overturned after he overtook other vehicles. The deceased sustained serious bodily injuries. He later died leaving behind a wife (“the applicant”) and two minor children aged 7 months and 4 years respectively.
- [2] The applicant and the children were mainly dependant on the deceased and it is in that regard on 23 April 2019 the applicant issued summons (“the main action”) against the respondents for damages premised on the respondents’ respective breach of their duty of care. The first respondent, a firm of attorneys is the first defendant in the main action and is being sued by the applicant in her personal capacity as the spouse of the deceased for negligence by having caused the applicant’s claim for loss of support to become prescribed.
- [3] The second respondent is the second defendant in the main action. In this claim the second respondent is also sued for loss of support by the applicant who is acting in her representative capacity as the mother and natural guardian of the two minor children. This claim is premised on the second respondent’s apparent failure to maintain and keep the road in which the deceased was travelling in a proper condition which resulted in the deceased’s vehicle capsizing after hitting a series of potholes.
- [4] The main action was defended by the respondents. Apart from the Plea to the merits the second respondent also raised a special plea objecting to the applicant’s non-compliance with the provisions of section 3 (2) (a) of Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (“the Act”) in that the applicant’s notice of its intention to institute legal proceedings against the second respondent was not served within the prescribed period of six months from the date the debt became due. The claim should therefore be dismissed.
- [5] It was common cause that the second respondent is an organ of state as contemplated in the Act and that in terms of section 3 (1) (a) of the Act, no legal proceedings for the recovery of a claim may be instituted against the second respondent unless the applicant has given written notice to the second respondent of her intention to institute such legal proceedings within six months after the claim became due.[1] It was also not in dispute that the applicant’s notice as contemplated in section 3 (1) (a) of the Act was served on 13 December 2018 approximately seven years from the date the debt became due.

- [6] The applicant's concession triggered this application. The applicant seeks an order condoning the late service of the notice in respect of the minor children's claim. The application is opposed by the second respondent.
- [7] In terms of section 3(4) (b) of the Act the court may condone non-compliance in respect of the delivery of the notice if it is satisfied that the debt which forms the basis of the applicant's claim has not been extinguished by prescription, good cause exists for the failure to serve the notice timeously and the second respondent was not unreasonably prejudiced by the failure.
- [8] The parties are ad idem that the applicant's claim has not prescribed therefore for the applicant to succeed with this application, the applicant must simply show that good cause exist for the failure to serve the notice timeously and that the second respondent was not unreasonably

prejudiced by the late notice.

- [9] The applicant's reasons for the delay in serving the notice are set out in her founding affidavit.[2] She avers that three weeks after the accident she instructed an attorney Mr Piet Wessels a partner in the first respondent's

firm to lodge claims for loss of support in her personal capacity as well as in the representative capacity for her children against

"anybody who could be liable" for the deceased's death. On the information she received from Mr Wessel's staff her claim fell under the Road Accident Fund and whenever she made enquiries on the progress of the claim she was informed that some documents were being awaited. She ultimately collected the police docket and delivered it to the first respondent's office in order to expedite the matter. Then in 2017 the first respondent informed her that her claim against the Road Accident Fund had prescribed and only the minor children's claims were still live. Feeling let down by the first respondent she instructed her present attorneys of record who advised her that she actually never had a claim against the Road Accident Fund. Her claim and that of the children actually lies against the second respondent.

- [10] With regard to the merits the applicant maintains that there are good prospects of succeeding with the claim. Her belief is premised on the basis that the accident was caused by the negligence of the second respondent by failing to maintain the road in a good condition. The road was instead peppered with potholes which caused the deceased's vehicle to overturn causing him fatal injuries.
- [11] In his argument Mr Van Rensburg for the applicant contended that the applicant had always been intent on holding accountable those who were liable for causing her husband's untimely death. Soon after the incident occurred she instructed the first respondent to institute a claim in that regard. In order to progress the matter the applicant also took it upon herself to obtain the copies of the case docket relating to the incident and handed it to the first respondent. She made enquiries about the progress of the matter only to be

informed in 2017 that her claim had prescribed. The second respondent “dropped the ball.” It failed to act timeously with the result that the applicant’s claim prescribed and the initiation of the minor children’s claim was also delayed. It is in that regard that the applicant is pursuing a civil claim against the first respondent stemming from its negligence in the manner in which it dealt with the applicant’s claim.

- [12] Few days after the accident the applicant observed the potholes on the road and also that there was no signage to warn the road users of the presence of the potholes on the road. Her opinion and observations that the potholes were the cause for the deceased losing control of the vehicle resulting in the vehicle overturning and causing his demise is corroborated by the expert evidence[3], police sketch plan, witness’ statement, photographs of the scene and the inquest report. The second respondent neglected its legal duty to maintain the road in a good condition and to warn motorists by way of signage of the presence of the potholes. The deceased died as a result of the negligent conduct of the second respondent.
- [13] The respondent’s purported prejudice is based on speculative grounds that records and witnesses may no longer be available. No basis has been set out for unreasonable prejudice. It was thus submitted that on those grounds good cause exists for the applicant’s failure to serve the notice timeously.
- [14] In opposing the application the second respondent averred that applicant’s failure to act timeously is unreasonable. On her own version barely three weeks after the debt arose she had already sought legal representation. The applicant can therefore not rely on lack of knowledge of legal proceedings.[4] Her opinion regarding the cause of the accident which resulted in the demise of the deceased is based on unsubstantiated hearsay evidence which is not even confirmed by the said witness in a confirmatory affidavit.
- [15] Ms Nhlapho argued that accident occurred nine years ago. The notice was served about seven years and seven months from the date the debt became due thus the applicant had an unfair seven year start against the second respondent. With regard to the reasons for the delay of notice the applicant places the blame squarely on her erstwhile legal representative as according to her she did not sit idly but made enquiries on the progress of the matter and even fetched and handed the copies of the docket to the legal representative. The applicant is the litigant not the legal representative therefore she should not have been too far removed from the cause. The applicant only decided to procure services of another legal representative seven years

later. This is not a sufficient explanation of delay.

- [16] Much of what the applicant has stated with regard to the cause of the accident is merely hearsay evidence and also her own opinion, however, the deceased was alone in the vehicle when it overturned. The applicant was not there. She is also not an expert therefore she cannot provide her own opinion as to the cause of the collision. The only witness to the accident stated that the deceased had overtaken his and other vehicles at a high speed prior to losing control of the vehicle. No mention is made in the statement of potholes in the road.

The inquest report also does not state that the accident was caused by driving over potholes. The expert was instructed seven years after the accident therefore is a huge question on the credibility of the information given to this expert. With regard to the photographs, it is not known where and when they were taken. On her own version the applicant at first thought that the party who was liable in this regard was the Road Accident Fund. A bona fide litigant with proper merits ought to have known which defendant to proceed against.

- [17] The second respondent is an organ of state, a large institution which employs a number of staff which changes over time. Its records are not always available thus issuing the notice within the stipulated time allows a state organ to carry out proper investigations into the matter. A delay of seven years evidently places the second respondent at a predicament as it cannot be able to carry out its investigations efficiently as it could had the statutory requirements been complied with. The duty is on the applicant to show that there would be no unreasonable prejudice on the second respondent should condonation be granted while all that the second respondent has to do is to set a basis for such prejudice and this is what the second respondent has done. All these factors viewed conjunctively it cannot be said that the applicant has succeeded in proving why condonation should be granted. The application must be dismissed and since it is by the applicant's own design that the second respondent is embroiled

in these proceedings, the applicant should pay the costs of this application even in the event that the application succeeds.

- [18] Thus is in short the summary of the facts in this matter. In addition to the submissions presented by counsel I was also referred to various judicial authorities applicable when considering applications of this nature.
- [19] It is trite that the applicant is not expected to satisfy the court on a balance of probabilities that good cause exists for the failure to serve the notice timeously nor that the second respondent was not unreasonably prejudiced by the failure "rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties"[5] that the court will consider in determining whether or not the applicant should be granted the order she seeks.
- [20] I now turn to consider whether these requirements elucidated above herein have been established by the applicant in the context of this matter.
- [21] Good cause involves "all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation

offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's

responsibility therefor.”[6]

- [22] The applicant’s explanation of delay leaves much to be desired. The applicant wants to give an impression to the court of someone who relied on her erstwhile attorney to advance the claim on her behalf as she “had no knowledge of legal proceedings” whereas on the available facts, barely few days after visiting the scene of the accident she had already formulated an opinion that the bad state of the road was the cause of the deceased’s vehicle overturning. Three weeks later she was already on the quest to pursue a civil claim arising from the death of the deceased. She instructed her attorney to institute legal proceedings in that regard. It did not end there. She went further and obtained copies of the docket and handed them to the attorney to assist in the progression of the matter.
- [23] The applicant was clearly well versed about legal proceedings. This is also evidenced from her submission that after instructing the attorney she made enquiries about the progress of the matter, then inexplicably, the applicant did nothing more for approximately six years, that is until she was informed in 2017 that her claim had prescribed and only the minor children’s claims were extant. There is also no explanation of the delay for about a year from the time she terminated the mandate of her erstwhile attorneys in 2017 to December 2018 when the present attorneys of record transmitted the notice to the second respondent. The applicant must furnish an explanation of her delay sufficiently full to enable the court to understand how it really came about and to assess her conduct and motives. See *Silber v Ozen Wholesalers (Pty) Ltd* 1954
- (2) SA 345 (A) at 352H-353A.
- [24] The delay is extreme while the applicant’s explanation in that regard is scant. I’m not satisfied with the explanation of the applicant’s delay. It is insufficient and it is also not reasonable. The applicant has not shown good cause for the delay in giving the notice.
- [25] Good cause for the delay is merely one of the consideration that the court takes into account when deciding whether or not to grant the applicant the order she seeks. The applicant’s prospects of success in the proposed action is also a factor that the court must consider as good prospects may make up for the applicant’s ineptitude. The applicant is not expected to satisfy the court on a balance of probabilities that her action would undeniably enable her to the relief she will be seeking at the trial, a prima facie case and a bona fide intention in the sense of seeking an opportunity to have the matter be tried is sufficient.
- [26] In this matter the applicant’s intended cause of action is a claim on behalf of her minor children for damages arising from the untimely death of their caregiver and biological father who died when his vehicle overturned. According to the plaintiff the cause for the deceased’s vehicle to overturn came about as a result of the second respondent’s negligence for failing to maintain to road which resulted in the road developing a series of potholes. The potholes were not visible to the deceased and there were also no warning signs alerting the road users of the presence of the potholes on the road. In this regard the applicant relies on her own observations, the documentary evidence consisting of an inquest report, a

statement by a witness, a report of an engineer, an accident report, photographs of the scene and the police sketch plan.

- [27] The applicant did not see how the accident occurred. The deceased was travelling alone. The applicant is not an accident reconstruction expert therefore her opinion as to the cause of the accident is preposterous.
- [28] The applicant has alleged that the inquest minutes sets out fully the incident[7] but nothing could be further from the truth. There are no such details on the inquest minutes and this is simply because the minutes of the inquest are merely a recording of the magistrate's findings who conducted an inquest into the death of a deceased person[8] and what is recorded therein are the details of the deceased[9], the date and cause of death[10] and also whether the death of the deceased was occasioned by an act or omission on the part of any person.[11] It is however important to note that according to the magistrate's findings the deceased's death did not result from any act or omission involving any person. Similarly, post mortem reports do not explain the cause of the accident but the cause of death, namely the injuries that led to the death of a deceased person. Pathologists do not investigate the cause or scenes of incidents.
- [29] As correctly pointed out by counsel for the second respondent, the only witness of the accident, Mr Jeremia Motlounng made no mention of potholes on the road in his statement, the witnesses instead alluded to the fact that the deceased overtook a number of vehicles at a high speed, lost control of the vehicle and it overturned. The expert's report and the photographs do not take the applicant's case any further as the report was compiled some seven years after the incident and it is also not known where and when the photographs were taken.
- [30] Taking all these factors into consideration, I'm not persuaded that the applicant has any prospect or probability of success in the proposed action.
- [31] Except to contend that the second respondent is speculating about the challenges of state organs with regard to changes of staff and unavailability of records if notices are not issued and served within the stipulated time, the applicant has not set out the grounds upon which it concludes that the second respondent is not unreasonably prejudiced by the failure to serve the notice timeously.
- [32] The second respondent's responsibility is merely to lay a basis of the grounds of prejudice for receiving the notice out of time as they are ordinarily within the knowledge of the second respondent whereas section 3(4) (b) places the onus on the applicant to bring the application within the terms of the statute and satisfy the court that the respondent has not been unreasonably prejudiced by the applicant's failure. As I have already indicated herein the delay of seven years is extreme, except for the applicant's

version and her documentary evidence which do not pass master as far as the prospects of this claim is concerned, there is no evidence

that an investigation has been carried out to substantiate a causal link between the alleged or imputed negligence of the second

respondent and the ultimate collision which resulted in the demise of the deceased. There is no case for the second respondent to answer to, therefore it can therefore not be said that the second respondent is not unreasonably prejudiced by the failure to serve the notice timeously.

[33] I'm alive to the fact that the real creditors in this matter are the minor children, the innocent third party in these proceedings. The children's best interests are of paramount importance in every matter concerning children.[12] The laxity of the applicant in prosecuting the children's claim should not be visited on the children. However, taking into consideration the facts of this case and the case law to be applied it will not serve the best interests of the children to condone a delayed claim which has no merit.

[34] In the circumstances, I'm not satisfied that a proper case has been made out for an order condoning the late filing of the notice.

[35] The following order is made;

(1) The application for an order to condone the late service of

the notice contemplated in s 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, within the period laid down in s 3(2)(a) of the Act is dismissed.

(2) The applicant to pay the costs of the application.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv. SGJ Janse van Rensburg

Instructed by:

Leon JJ van Rensburg

C/O Rosendorff Reitz Barry

BLOEMFONTEIN

Counsel on behalf of 2nd Respondent: Adv. K. Nhlapo

Instructed by:

The State Attorney

[1] S 3(1)

(a) and 3 (2) (a) of the Act.

[2] Paragraphs 30-36.

- [3] Report compiled by an engineer Mr W.R. du Preez on 01 June 2018.
- [4] Paragraph 20 at 20.1 to 20.4 of the Respondent's replying affidavit.
- [5] *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) at 8.
- [6] Paragraph 10 *ibid*.
- [7][7] Form J56 on page 37 of the Applicant's bundle.
- [8] Section 16 of the Inquest Act 58 of 1959.
- [9] Section 16 (a) *supra*.
- [10] Sections 16 (b) and (c).
- [11] Section 16 (d).
- [12] Section 28(2) Constitution Act 108 of 1996.
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