

SOUTH AFRICA / JUDGMENT

Swart v MEC Police, Roads, Transport for the province of the Free State (912/2018) [2021] ZAFSHC 79 (11 March 2021)

[2021] ZAFSHC 79

COURT

Free State High Court, Bloemfontein

BEFORE

NS Daniso

CASE / FILE NUMBER

912/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 912/2018

In

the matter between:

SWART

GERHARDUS

Applicant

And

MEC

POLICE, ROADS & TRANSPORT

Respondent

FOR

THE PROVINCE OF THE FREE STATE

HEARD

ON:

19 NOVEMBER 2020

JUDGMENT

BY: DANISO, J

DELIVERED ON: 11 MARCH 2021

- [1] On 23 February 2018 the applicant issued summons against the respondent for damages in the sum of R1,2 million arising from the injuries he sustained in a motor cycle accident.
- [2] The claim is premised on the grounds that the respondent failed in its duty to maintain the road R716 Ascot Road in Viljoensdrift in a proper condition. On 23 April 2016 the applicant was travelling on the said road riding a motor cycle when it hit a pothole causing his motor cycle to veer off the road. He was thrown off the motor cycle and sustained injuries. There were no adequate warning signs to warn road users of the presence of the potholes.
- [3] The respondent defended the action and also filed a special plea objecting to the applicant's non-compliance with the provisions of s 3 (2) (a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 which provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question a written notice of his/her intention to sue it within six months from the date the debt became due, unless the organ of state has consented in writing to the institution of the legal proceeding(s) without such notice.
- [4] It is not in dispute that the applicant's notice was served on 10 January 2018 approximately two years from the date the debt became due.
- [5] The respondent's objection triggered this application for condonation of the late service of the notice. The application is opposed by the respondent.
- [6] Section 3
 - (4) (b) of the Act confers a discretion on the court to grant condonation if it satisfied that the following requirements have been met namely, that:
 - 6.1. The debt which forms the basis of the creditor's claim has not prescribed;
 - 6.2. Good cause exists for the failure to serve the notice timeously; and
 - 6.3. The organ of state was not unreasonably prejudiced by the failure to serve the notice timeously.
- [7] Once the above-mentioned requirements are met, the discretion to condone the late notice is exercised judicially having regard to the factors enumerated in *United Plant Hire (Pty) Ltd v Hills* 1976

- [1] SA 717 (A) at 720E-G such as the degree of lateness, the explanation of the delay, the prospects of success in the proposed action, the appellant's interest in progressing the matter and the avoidance of unnecessary delay in the administration of justice.
- [8] The phrase 'if the court is satisfied that' does not require proof on a balance of probabilities but rather requires an overall impression made on a court which brings a fair mind to the facts set up by the parties.[1]
- [9] It is not in dispute that the applicant's claim has not prescribed. The respondent's objection is only directed to the last two requirements, namely: whether the applicant has shown that good cause exists for his failure to serve the notice within the stipulated time and that the respondent was not unreasonably prejudiced by the late notice.
- [10] Good cause requires a consideration of 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.[2]
- [11] In the affidavit deposed to by the applicant's attorney, Mr Johannes Jacobus Murray it is alleged that the delay in serving the notice was occasioned by a bona fide mistake. The claim was lodged against the Road Accident Fund instead of the respondent. The applicant instructed Mr Murray's firm on 18 July 2016. The procedure is to first obtain hospital, medical and accident reports, lodge the claims with the Road Accident Fund. The matter is only allocated to an attorney when it becomes necessary to issue summons. On 08 January 2018 the matter was referred to Mr Murray for the purpose of issuing summons and it was when he perused the file that he realized that the entity liable in this claim was the respondent and not the Road Accident Fund. Mr Murray immediately forwarded the notice to the respondent on 10 January 2018.[3]
- [12] It was submitted on the applicant's behalf that it was always the applicant's intention to institute a claim against "the entity that was liable and responsible for the proper upkeep of the said road." The respondent's liability in this regard is set out in the applicant's particulars of claim.[4]
- [13] It was argued by Mr Sander for the applicant that the applicant has no knowledge of what took place in the attorney's firm which in turn resulted in the delay in serving the notice and it is in that regard that the founding affidavit is deposed to by his attorney. The attorney takes the blame for the delay. There is a prima facie case of negligence against the respondent it is therefore in the interests of justice that the applicant is not deprived of his day in court.
- [14] The application was opposed on the basis that the applicant has relied on affidavits attested to by his attorney who has no personal knowledge of the facts therein. In the founding affidavit it is alleged that the delay was occasioned by a mistake in the administrative

department of the attorney's office however, none of the administrative staff have filed confirmatory affidavits to confirm the alleged mistake. The attorney has also alluded to allegations regarding the cause of the accident without the applicant's confirmatory affidavit. The allegations are hearsay evidence and accordingly inadmissible.

- [15] It was the respondent's case that the prospects of success are also not alleged in the founding affidavit. The accident report upon which the applicant relies on as proof that there were potholes on the road was attached on the replying affidavit. The applicant cannot make out his case in a replying affidavit.
- [16] Mr Masihleho for the respondent argued that the applicant did nothing to progress the case for about 14 months after he had instructed his attorneys. It is also "bizarre" that during that time none of the attorneys had consulted with the applicant. There is also an unexplained delay from the time the respondent filed its plea on 06 June 2019 to the date on which the applicant ultimately filed his condonation application in February

2020. The application ought to be dismissed with costs on a punitive scale.

- [17] I'm in agreement with the respondent's contention that the applicant's affidavits constitute inadmissible hearsay evidence. The allegations averred therein are not within the knowledge of the applicant's

attorney and they were also not affirmed under oath by way of confirmatory affidavits. The allegations pertaining to the merits of the claim should have been attested to by the applicant and the error resulting in the delay of serving the notice should have been explained by the person who was responsible for that error.

- [18] In terms of s 3 (1) (c) (i) to (vii) of The Law of Evidence Amendment Act[5] hearsay evidence is admissible if the interests of justice requires it. In casu I'm inclined to admit the hearsay evidence as its rejection would counter the interests of justice. The applicant's right to have the merits of his case tried by a court of law will be curtailed whereas it has not been shown that its acceptance will prejudice the respondent in the conduct of its case.
- [19] I'm not persuaded that the applicant sought to make out his case in the replying affidavit with regard to the existence of the prospects of success. In paragraph 7 of the founding affidavit reference is made to merits of the claim and the copies of the particulars of claim alluding to the basis of the respondent's liability are attached as Annexure "A".
- [20] Prima facie, the applicant has set up a case upon which the respondent's negligence can be attributed. There are good prospects of success.
- [21] The applicant is a bona fide litigant. Approximately three months after he was involved in the accident he instructed his attorneys to institute a claim on his behalf. It was only about two years later that the attorney attended to his matter and by then the prescribed period in which the notice was due had elapsed. The delay cannot be attributed to the applicant but his attorney's lack of diligence.

- [22] Good cause in section 3(4)(b)(ii) is linked to the failure to act timeously. The subsequent delays in bringing the condonation application do not factor in the enquiry of good cause as they did not contribute to the delay in serving the notice. They are 'part of the exercise of the discretion to condone' the late notice.[6] I'm satisfied that the applicant has shown good cause for the late service of the notice.
- [23] 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. The 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.
- [24] It was the applicant's case that the respondent had ample time to investigate the circumstances giving rise to the accident which forms the cause of the action it will thus not be prejudiced if condonation is granted while the applicant will suffer prejudice if condonation is not granted as he has already incurred past hospital and medical expenses as a result of the injuries and would still undergo future hospital and medical treatment. The applicant will be denied an opportunity to properly put his case before court and to be compensated for the damages that he suffered as a result of the respondent's negligence. [7]
- [25] The respondent countered that the respondent would have routinely maintained the said road like any other provincial road thus the delay in notifying the respondent about the accident and the cause has a significant effect on the investigation of the condition of the road within the period alleged by the applicant. The crucial evidence has dissipated with lapse of time. In an attempt to scrap for witnesses who could be of assistance after the notice was served none could be found that could provide the relevant information. This situation causes unreasonable prejudice on the respondent.[8]
- [25] I'm of the view that the respondent's purported unreasonable prejudice is based on speculative grounds that the condition of the road may no longer be the same as when the accident occurred. The respondent's plea militates against these allegations. In paragraphs 4 – 5 of its plea, the respondent lays the blame for the cause of the accident squarely on the applicant on the basis that there was nothing untoward about the road surface. It is specifically pleaded that the road was properly maintained, had no dangerous obstacles and that the cause of the collision was the applicant's medical condition and /or his negligence. The respondent has clearly investigated the merits of this claim. It is also important to note that the respondent does not indicate which witnesses can no longer be traced and what they were required for. Having regard to these factors, it cannot be said that the respondent has been unreasonably prejudiced by the failure to be served with the notice timeously.

[26] For the above reasons, I'm satisfied that a proper case has been made out for condonation for the late filing of the notice in terms of section 3.

Costs

[27] The applicant sought the court's indulgence, ordinarily, the applicant should be saddled with the costs. Taking into consideration the facts of this matter, I don't think the applicant should be penalized for his attorney's lack of diligence.

[28] The respondent contributed to the delay by filing its plea and special plea 7 months late. It is trite that no condonation application can be brought until a respondent raises the objection in its special plea. See *Minister of Safety and Security v De Witt*

[2008] ZASCA 103; 2009 (1) SA 457 (SCA) para 10. The opposition of the application was accordingly unreasonable.

[29] The following order is made:

- (1) Condonation is granted to the applicant for the late service of the notice in terms of s 3(1) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002.
- (2) No order is made in respect of costs.

Dated at BLOEMFONTEIN on this the 11th day of MARCH 2021

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv. I. Sander

Instructed by:

A. Wolmarans Inc.

BLOEMFONTEIN

Counsel on behalf of Respondent: Adv. P.T. Masihleho

Instructed by:

Office of the State Attorney

[1] *Madinda v Minister of Safety and Security*

[2008] ZASCA 34; 2008

(4) SA 312 (SCA) at 8.

[2] Paragraph 10 of the *Madinda* case.

[3] Paragraph 9 -12 of the applicant's founding affidavit.

- [4] Annexure “A” of the founding affidavit.
 - [5] No 45 of 1988.
 - [6] Madinda at paragraph 14.
 - [7] Paragraph 8, 13, 15-16 of the applicant’s founding affidavit.
 - [8] Paragraph 1.5 -8.6 of the respondent’s answering affidavit.
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Prepared on 8 October 2026 · Esheria