

SOUTH AFRICA / JUDGMENT

**Van De Venter v MEC of Education:
Free State Province (3545/2010)
[2012] ZAFSHC 185 (4 October 2012)
[2012] ZAFSHC 185**

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

3545/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 3545/2010

In the matter between:

SUSAN SHARON VAN DE VENTERApplicant

and

THE MEC OF EDUCATION: FREE STATE

PROVINCERespondent

JUDGEMENT:

RAMPAI J

HEARD ON: 6 SEPTEMBER 2012

DELIVERED ON: 4 OCTOBER 2012

- [1] The matter came to court by way of motion proceedings. The applicant applies to have her failure to comply with a certain statutory provision condoned. The applicant has, prior to this application, instituted proceedings against the respondent. In her main action against the respondent she claimed general damages and special damages in the total sum of R576 814,93. The action is defended. The application is vigorously opposed.

- [2] The applicant averred in her founding affidavit that she was a victim of an armed robbery which took place at Navalsig High School, Andries Pretorius Street, Navalsig in Bloemfontein on 20 July 2007. It was her case that she was physically assaulted and bodily injured by the robbers during the course of the incident.
- [3] At the time of the incident the applicant was in the employ of the respondent. She was an administrative clerk at the aforesaid public school. She was officially on duty at the time of the incident. The respondent was responsible for the safe working conditions and safe working environment of the employees of the department within certain bounds. The applicant resumed her work on the 3rd October 2007. On 2 November 2007 the applicant addressed a letter of demand (annexure “b”) to the principal.
- [4] On the 7th June 2010 the applicant, through her attorney, notified the respondent about the incident, her total claim of R576 844.93, her demand for payment and the grounds on which her claim against the respondent was based (annexure “a”).
- [5] On 19 July 2010 the applicant caused a summons to be issued against the respondent. On the same day the sheriff served the summons upon the State Attorney, Bloemfontein. The action is defended as I have already said. The respondent specifically pleaded, in the main action, that the applicant’s claim had since become unenforceable on account of her failure to comply with the express statutory provisions of section 3. The respondent ignored the applicant’s request of the 7 June 2010 that the applicant’s non-compliance be condoned.
- [6] The respondent’s stance necessitated the launch of the current interlocutory application. In her founding affidavit the applicant gave reasons for her delay. The one reason she gave was that she did not know that she had to give prior notice of her intention to institute legal proceedings against the respondent. The other reason, she said, was that she was busy quantifying her claim. She believe that she had given good explanation for her delay.
- [7] In the answering affidavit the respondent denied some of the applicant’s allegations. The respondent’s deponent, Mr M J Merabe, denied that the applicant’s allegations were all true and correct. The respondent denied that the applicant was injured during the course of the robbery and that she subsequently suffered damages as she alleged. The respondent answered that the applicant was required to provide proof that she was injured as alleged; that she was hospitalised; that she even received medical treatment as well as nursing for some time in the intensive care unit; that she subsequently received psychological counselling and that she suffered severe psychological sequelae.

- [8] The respondent denied the suggestion that the principal's letter (annexure "c") addressed to the respondent's department of education could be equated to the written notice as envisaged by the relevant statutory provisions. The respondent acknowledged that there was an exchange of correspondence between the school and the compensation commissioner's office in connection with the applicants (vide annexure "d") but averred that such correspondence was in keeping with a statutory

process in terms of section 35 of Compensation for Occupational Deceases and Injuries Act 130/1993. The respondents specifically

denied the applicant's assertion that besides her compensatory claim in terms of section, she also had an additional common law remedy to delictually sue the respondent as her employer. The respondent's stressed that there was only one process in

respect of the applicant's occupational claim for compensation and that such process was already on track at the time the applicant consulted her attorney who advised her of an alleged alternative or supplementary claim for delictual damages (annexure "e").

- [9] The respondent denied the applicant's allegations: that her non-compliance was not occasioned by gross negligence; that it was her intention, throughout the entire critical period, to sue the respondent for the recovery of delictual damages; that the purpose of the legislation has not been defeated; that the respondent was notified of the applicant's intention to institute her action or claim within six months; that the requisite notice was served on the respondent by way of annexure "a" and annexure "b", that the respondent was not at all prejudiced by the applicant's failure to strictly comply with the statutory provision; that the applicant has good prospects of success on the substantive merits of her main action; that section 35, Act 130/1993 does not apply to the applicant or that she had given acceptable and satisfactory explanation for her failure to comply.

- [10] In her replying affidavit the applicant repeated that the averments of her founding affidavit were true and correct. She asserted that the injuries that were inflicted upon her during the robbery incident, as more fully set out in her particulars of claim attached to her summons, resorted within the cader of situations where an employer can be civilly held responsible and liable for an employee's delictual damages. She replied that she outlined full and valid reasons for her non-compliance in her founding affidavit. She added emotional depression as one more reason. She denied that her delay in bringing this application showed mala fides on her part. The applicant admitted that, no employee has ever successfully sued her employer since the particular legislation was enacted.

- [11] It was common cause that the respondent's provincial department was an organ of the state. As such, the respondent was entitled to be given written notice in terms of section 3, Act 40/2002 within six months from the date on which the applicant's cause of action arose.

- [12] The main issue in the case was whether good cause existed to condone the applicant's failure to comply with the relevant statutory provision or not.

- [13] On the one hand Mr Buys, counsel for the applicants, submitted that a proper case had been made out to justify an affirmative answer to the question in the case. On the other hand, Mr Mene, counsel for the respondents submitted that no proper case had been made out at all and that the answer to the question must be in the negative.
- [14] Perhaps it is necessary to give an overview of the applicable principles of law. The applicant applies in terms of section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State, Act 40/2002 since she had fallen foul of subsection
- (1) which precludes anyone from instituting legal proceedings against an organ of state unless such claimant had given written notice of intention to do so. Such notice has to be given within six months from the date on which the alleged cause of action arose – subsection (2).
- [15] Since the respondent implicitly declined to condone the applicant's belated notice, her only option was to bring an application to court in terms of subsection 4(a). Her special condonation application maybe granted provided the court is satisfied: (i) that the alleged debt has not been extinguished by prescription; (ii) that good cause exists for the applicant's failure to comply; and (iii) that the respondent was not unreasonably prejudiced by the failure – vide subsection 4(b). These requirements have to be conjunctively established by the applicant. I shall revert to those cornerstones of this sort of a special condonation application in due course.
- [16] The correct approach to a condonation application in terms of section 3(4)(a) was authoritatively laid down in *MADINDA v MINISTER OF SAFETY AND SECURITY* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) 316 par [8] per Heher JA:
- "[8] 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 the parties. See eg Die Afrikaanse Pers Beperk v Naser 1948*
- (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context."
- [17] The section makes it perfectly clear that suing an organ of state is a different ball-game as compared to suing a private or corporate persona. There are special ground rules. An extraordinary procedure is prescribed. It has to be strictly followed. There are special rules that stipulate time frames.
- [18] The late Didcott J once remarked:
- [9] An insistence on notices of the kind required by section 113(1) is by no means peculiar to the particular proceedings that it governs. Similar conditions precedent to the institution of actions are and have long been familiar features of our statutory terrain, especially the part occupied by departments of state, provincial administrations and local authorities once they become prospective defendants. 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.”

MOHLOMI v MINISTER OF DEFENCE 1996 (2) BCLR 1559 (CC) para [9] at 1563E – G.

[19] Those then are the cardinal underlying reasons that seeks to explain why notices such as the one envisage in section 3 have been enacted by the national parliament. In the case of MINISTER OF SAFETY AND SECURITY v DE WITT [2008] ZASCA 103; 2009 (1) SA 457 (SCA), Lewis JA outlined the rationale of section 3, Act 40/2002. At par [1] the learned judge said:

“[1] This appeal turns on the interpretation of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The Act was introduced to harmonize periods of prescription of debts owed by organs of state, and to make provision for a uniform requirement for the giving of notice in connection with the institution of legal proceedings. It repealed several statutes that had previously regulated proceedings against various state bodies such as the police and the defence force. And it came after a decision in the Constitutional Court – Mohlomi v Minister of Defence

- in which it was held that s 113(1) of the Defence Act was unconstitutional since it made no allowance for failure timeously to

notify the defence force of the intention to sue it, despite the circumstances.”

[20] At par [2] she went on to add:

“[2] The Act is meant not only to bring consistency to procedural requirements for litigating against organs of state but also, it is clear, to render them compliant with the Constitution. The way in which it seeks to achieve a procedure that is not arbitrary and that operates efficiently and fairly both for a plaintiff and an organ of state is to give a court the power to condone a plaintiff’s

non-compliance with procedural requirements in certain circumstances. Thus access to courts is facilitated, while at the same time

procedures against large governmental organizations that need to keep their affairs in order are regulated.”

Now I proceed to examine the factual matrix in order to consider the requirements.

[21] In the first place a court which is called upon to consider this sort of a special condonation application has to be satisfied that the alleged debt or claim has not been extinguished by prescription – vide subsection 3(4)(b)(i).

[22] In terms of section 3(a) Prescription Act 68/1969 a claimant’s claim prescribes three years after the underlying cause of action has arisen. In this instance, the prescriptive period of the applicant’s claim was supposed to run until midnight on 19 July 2010. The contrary was not contended on behalf of the respondent.

- [23] It was not in issue that the applicant's cause of action arose on 20 July 2007 and that her summons was issued and served on the 19 July 2010. The service was expected on the very last day of the permissible 3 year prescriptive period. The sheriff served the summons a few hours only before the applicant's claim was due to be extinguished by prescription.
- [24] In casu the first statutory requirement speaks for itself. On the undisputed facts, this statutory requirement needs not detain me any longer. Her claim was salvaged on the verge of extinctive prescription. Accordingly I am satisfied that she relied on an extant cause of action at the time she moved this special condonation application. That that was so in the instant matter has never been disputed. This disposes of the first leg of the inquiry.
- [25] In the second place the court may grant the special condonation application if it is satisfied that good cause exists for the failure by the creditor to give the required statutory notice – vide section 3(4)(b)(ii).
- [26] In the case of *MADINDA v MINISTER OF SAFETY AND SECURITY* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) par [10] Heher JA had this to say about the legal notion of 'good cause', a practically synonymous expression to the legal notion of 'sufficient cause':

"[10] The second requirement is a variant of one well known in cases of procedural non-compliance. See Torwood Properties (Pty) Ltd v South African Reserve Bank 1996

- (1) SA 215 (W) at 227I-228F and the cases there cited. 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. 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."

- [27] The second statutory requirement is a specific factor distinct from the other two prescribed minimum elements of satisfaction a court is required to have before the procedural non-compliance complained of may be condoned. One of the significant facets embraced by the broad spectrum termed good cause, concerns prospects of success in the contemplated main action. To that particular facet I shall shortly turn.
- [28] The respondent took the battle to the applicant on two of the three specific fronts, namely: the specific element of good cause for the applicant's omission and the specific element of unreasonable prejudice to the respondent's interest. Notwithstanding those specific fronts of the attack, it seemed to me that the respondent's primary contention in opposition of the applicant's special condonation application was to the effect that however valid the reason for the omission might have been, however sufficient explanation offered might have been, however honest the applicant's bona fides might have been, however little any negligent contribution by the thirds to the delay might have been, and however minimal the

applicant's responsibility thereto might have been – the special condonation application should be refused since the proposed action for delictual damages has not, never had and would never have any prospects of success.

[29] I found the following conjunctive analysis of subsection 4(b) instructive:

“According to counsel’s submission, no matter how strong an applicant’s case on the merits that consideration cannot be causally tied to the reasons for the delay; the effect is that the merits can be taken into account only if and when the court has been satisfied and comes to exercising the discretion to condone. I do not agree. ‘Good cause for the delay’ is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless.”

MADINDA’S case *supra*, para [12] at 317A – B.

[30] The learned judge continued to say the following about the substantive merits of the proposed action and I am in respectful agreement.

“There are two main elements at play in s 4(b), viz the subject’s right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly

prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice.”

MADINDA’S case *supra*, para [12] at 317C.

[31] As regards the ultimate discretion of the court to condone despite failure, Heher JA commented:

“Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant’s explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration.”

MADINDA v MINISTER OF SAFETY AND SECURITY *supra*, par [10] on 317E – G.

[32] On the one hand Mr Mene submitted that the applicant’s proposed main action had no prospects of success in view of the provisions of section 35 of the Compensation for Occupational Deceases and Injuries Act, 130/1993.

On the other hand, Mr Buys submitted that section 35, Act No 130/1993 did not apply because, as counsel saw things, the facts were unique. Accordingly, counsel submitted that the proposed action has reasonable prospects of success.

[33] I deem it prudent to quote verbatim section 35 Act No 130/1993 as amended. It reads as follows:

“1) No action shall lie by an employee or any dependant of an employee for recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such

employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

2) For the purposes of subsection (1) a person referred to in section 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.”

[34] The applicant was in the employ of the respondent at all times material to the current dispute. She was engaged as an administrative clerk at one of the public schools falling within the respondent's jurisdiction. For all practical intents and purposes, she was a kind of a cashier at Navalsig High School, Andries Pretorius Street in Bloemfontein. On 20 July 2007 she was on duty at school. While she was performing her official duties as such, her school was infiltrated by armed robbers. The finance office, which was the applicant's work station, was under attack. During that attack she was injured.

[35] I accept that subsequent to the robbery incident the applicant was rushed to the hospital and that she was hospitalised for some time. She resumed work on the 30 August 2007. It has to be accepted that the applicant set up a prima facie case of assault by the robbers. In due course she completed a prescribed claim form and lodged her occupational claim with the compensation commissioner in terms of section 35 Act 130 of 1993 – vide annexure “d”.

[36] In a case where a public school as an employer would not have been liable to an injured employee by virtue of the provisions of section 35 of the Compensation for Occupational Injuries and Deceases Act, 130 of 1993, so too a respondent organ of the state would not have been liable to such an injured employee. The particular legislation provides for compensation as a special remedy for employees injured in whatever circumstances. The crux of the matter is that section 35 expressly precludes an injured employee from holding her employer delictually liable and suing such employer for the recovery of delictual damages in respect of any occupational injury. The respondent's special plea to the applicant's summons appeared to have prospects of success – vide MEC FOR EDUCATION, WCP v STRAUSS 2008 (2) SA 366 (SCA) par [15] per Malan AJA, as he then was.

- [37] In the instant matter the factual complex, though not identical with that in the STRAUSS-case supra, it was nonetheless pretty much the same. The question of law was, more or less, the same here as it was there. The conclusion, therefore, has to be the same now as then. In that case the court held that an injury sustained by an educator during the course of an educational activity fell under an occupational injury. Accordingly the injured educator's delictual claim against the defending organ of state was dismissed on appeal.
- [38] In the instant matter, therefore, the conclusion has to be the same. Since the school was not liable in delict to the applicant as the plaintiff, the respondent as the defendant and an organ of state could not be held liable in delict to its own injured employee. Since section 35(1) came into operation the common law right of an injured employee to sue an employer has been abrogated. Such delictual liability can no longer be attributed to an injured employees' employer in any circumstances whatsoever.
- [39] In SKORBINSKI v BEZUIDENHOUT t/a D B TRANSPORT 2009 (5) SA 463 (TPD) par
- [4] Chetty J held as follows about an employee who, as in this instance, sued his employer:
- "Whatever delay there may have been thereanent does not transform the plaintiff's claim into a delictual one entitling him to institute*
- an action for damages under the common law. The plaintiff's remedy was to seek compensation pursuant to the machinery created by the Act. The injury sustained to his hand was and remains an occupational injury in terms thereof. As adumbrated earlier, s 35(1) of the Act precludes an employee from claiming damages from his employer in respect of such an injury."
- [40] Occupational injury is defined as "personal injury sustained as a result of an accident" – section 1. The same section defines the word accident as "an accident arising out of and in the course of an employee's employment and resulting in a personal injury. There is no magic in any of the two definitions. The crux of both definitions is to be found in the words personal injury. The injury which the applicant sustained during the course of the robbery was and remains an occupational injury. It seemed to be of little moment whether a particular injury was causatively brought about by a criminal act or not. The provisions of the particular legislation have to be generously construed in favour of employees. Whether doing so is good or bad remains a debate for another day.
- [41] It follows, therefore, that any personal injury sustained by an employee caused by any criminal act arising out of and during the course of an employee's employment amounts to an accident as defined in section 1. URQUHART v COMPENSATION COMMISSIONER 2006
- (1) SA 75 (ECD) per Jones J.

[42] In our law, therefore, an employee who sustains a compensatable injury or personal injury or occupational injury as envisaged in section 3(1) COIDA 130/1993 is legislatively barred from claiming further compensation in delict, by way of common law action, from her employer, on the ground that her employer had breached a duty to provide her with a safe working environment and on the ground that her criminal assault rendered her personal injury so unique that it fell outside the cadre of occupational injury.

MANKAYI v ANGLOGOLD ASHANTI 2010 (5) SA 137 (SCA) para [36] per Malan JA.

[43] I do not wish to labour the point any longer. The same question of law has previously arisen in a number of decisions. Time after time the legal position has been re-affirmed – vide among others: JOOSTE v SUPERMARKET TRADING (PTY) LTD (Minister of Labour Intervening) 1999 (2) SA 1 (CC) paras [10] and [14], MANKYAYI v ANGLOGOLD 2010 (5) SA 137 (SCA), SANAN v ESKOM HOLDINGS LTD 2010 (6) SA 638 (GSJ).

[44] On the strength of decided caselaw, I am persuaded that the proposed action has no prospects of success. The facts did not give rise to a novel situation. The fact that the applicant was injured by criminal outsiders and not by fellow employees made no difference. A few litigants have previously travelled down that same route before and all of them ended nowhere. I am certain that the applicant's proposed action would probably be found seriously wanting.

[45] Even if it were accepted in favour of the applicant that the respondent had wrongfully neglected to ensure that the applicant was employed in a reasonably safe environment, I could find nothing so substantively inspiring in the alleged passive omission on the part of the respondent to impel me or any other court to override the statutory exemption created in favour of the employer. The ambit, rationale and the validity of section 35 has long been confirmed by the Constitutional Court – vide JOOSTE'S case supra. Therefore, I have come to the conclusion that the applicant is precluded in terms of section 35 from instituting a delictual claim against the respondent.

[46] Having reached that conclusion, I now want to approach the matter from another angle. Accepting, in favour of the applicant, that my foregoing conclusion was wrong and that section 35, Act No 130/1993 was not applicable then the omission rule becomes operative.

[47] The applicant was harmed by some unidentified robbers. There was virtually nothing special in the relationship between those criminal wrongdoers and the respondent. The relationship which existed between them and the respondent was the same kind of ordinary relationship which generally existed between the respondent and any other member of the general public. The primary public duty of the respondent was to see to it that the learners were educated. Doing so, was the respondent's constitutional imperative.

[48] The respondent frankly admitted that it was responsible, within reasonable bounds, for the safe working conditions and safe working environment of its employees at schools. However, such responsibility must not be equated to the public duty to maintain law and

order. The latter is the constitutional imperative of another organ of state and not the respondent. But even the police as agents of the department of safety and security, whose responsibility it is to maintain law and order, by combating crime, are not constitutionally required to perform the preventative police duties perfectly or to function perfectly or to guarantee absolute safety and security to any member of the general public. The constitution created no special relationship in a vacuum between an organ of the state, such as the respondent on the one hand, and any particular individual, such as the criminal wrongdoers who inflicted injuries upon the applicant, on the other hand – vide *SAAIMAN'S AND OTHERS v MINISTER OF SAFETY AND SECURITY AND ANOTHER* 2003 (3) SA 490 (OFS) para [14] at 506E – G.

- [49] The crux of the matter was that the applicant, as the school cashier, was not a unique victim of crime. The risk of crime, it was held in *SAAIMAN'S* – case supra para [18], was shared by all the members of the general public, be they on a public road as in that decision or at a public school as in this matter. The incidence of crime in general and armed robbery in particular was not a unique and particular risk which exclusively affected the public school cashiers. Accordingly, public school cashiers cannot be singled out, because of their supposed high vulnerability to armed robberies, as a preferential breed of cash-handlers entitled to special safety and security measures provided at the state expense. It cannot be convincingly argued that at the time the applicant accepted her appointment as a cashier at the school she had any legitimate expectation that she would be completely insulated from crime.
- [50] As I saw it, nothing extra-ordinary emerged from the peculiar circumstances of this particular matter to evoke the legal convictions of the community to demand that, on the facts, the respondent owed an absolute duty of care to the particular victim of crime, in other words, the applicant. In my view nothing compellingly suggested that the community was convinced that the police, let alone the member of the executive council responsible for education, could and should have prevented the crime and the related injury to the applicant. The relationship between the actual wrongdoer and the passive respondent was too remote to create any particular control authority.
- [51] The undisputed case of the respondent was: that the school premises were securely fenced off; that there was a security gate erected at the entrance; that there was a security guard deployed at the gate; and that the finance office allocated to the applicant as her workstation was secured by means of a wooden door, a steel security gate and a panic button. It was common cause that the applicant herself breached some of those protective security measures. She neglected to lock the security gate and the door through which the robbers gained access into her office.
- [52] The respondent, and indeed the state as a whole, would probably have no adequate resources to deploy two or so heavily armed police at each and every school in the country in general or in this province in particular in order to eradicate or prevent school robberies. The applicant hardly proposed any positive measures which, if implemented, would

absolutely have prevented the robbery and her injury. As already pointed out, the school cashiers were not the only victims of crime. The applicant did not venture to say on what principled constitutional and defensible basis other vulnerable groups such as post office employees or even bank tellers, who were often targeted victims should be denied similar protection at state expens - SAAIMAN'S – case supra.

[53] Accordingly I have come to the conclusion that, even if section 35, Act No 130/1993 did not apply, the proposed main action would still have no prospects of success, to mitigate her unsatisfactory explanation and culpability as a whole.

[54] Let me fleetingly remark about another facet of the notion of 'good cause' – the reasons for the delay. The merits of the proposed main action have been shown to be hopelessly weak. The weakness of the substantive merits adversely coloured the applicant's explanation for the delay. It was correctly observed by Hefer JA in MADINDA'S-case supra at 317F – G that an applicant with little hope of success can easily be understood to carelessly drag her heels. On the contrary, an applicant with an overwhelmingly strong case on the merits always acts vigilantly in pursuing her interest. Therefore, in considering

the applicant's reasons for the delay as a facet of the broad notion of 'good cause', consideration of the prospects of success, remains a critically relevant connective tissue between the special condonation application and the proposed main action.

[55] I have chosen to deal with only two of the most relevant factors that underpin the notion of 'good cause'. I did not ignore the rest. In this matter the prospects of success in the proposed main action and the reason for the delay, stood out above the rest as the most decisive:

"In any given factual complex it may be that only some of many such possible factors become relevant."

MADINDA'S-case supra at para [10] per Heher JA.

That disposes my consideration of the second specific requirement of subsection 4(b)(ii).

[56] In the third place the court may grant a special condonation application if it is satisfied that an organ of state was not unreasonably prejudiced by the failure – subsection 4(b)(iii).

[57] The respondent is obliged by the aforesaid statute to contribute certain mandatory levies to the coffers of the compensation fund under the department of labour to cover itself, its employees and their dependants. Since an employee's common law right to claim delictual damages from an employer has been taken away by statute, the respondent will be seriously and unreasonably prejudiced if the current special condonation application is granted thereby calling upon the respondent to defend, at huge legal costs, an action which is destined to fail in any event. Now if the proposed main action has virtually no prospect of success it becomes fair and equitable to halt the wheels of justice here and now.

- [58] Bringing a fair mind to bear upon the facts set up by the parties in the current proceedings, induces an overall objective impression that dictates of justice between the parties compel the conclusion that the applicant dismally failed to meet two of the specific requirements of section 4(b) - MADINDA'S-case supra, para [8]. I am not satisfied that she is entitled to the relief in terms of subsection 4(a). However, the enquiry does not end here.
- [59] I turn now to a new aspect. It is clear that subsection (4) gives the court a discretion to condone non-compliance subject to three specific requirements as discussed above. At this juncture, the question is whether there is any compelling reason to rescue the applicant's boat which is now in distress and let her proposed main action proceed to trial in due course?
- [60] The purpose of the special condonation application in terms of section 3(4) is to allow the proposed main action to proceed despite the fact that the peremptory provisions of section 3(1) have not been complied with. To suggest that, once it is shown that one of the three specific requirements of satisfaction has not been met, the special condonation application should, on that ground alone fail, cannot be correct. Such mechanical application or rather construction of the section would undermine and erode the discretion of the court – MINISTER OF SAFETY AND SECURITY v DE WITT supra, para [10].
- [61] There are no hard and fast rules which govern the exercise of discretionary power other than that such power has to be properly and judiciously exercised. One's natural inclination is to exercise such power in favour of an applicant in a case where all or the majority of the specific requirements have been established if, and only if, the magnitude of the unestablished requirements does not call for a different response. The converse also holds true. In a case where the majority of the specific requirements have not been established one is naturally inclined to exercise such power in favour of the respondent provided the magnitude or repercussion of the established requirements does not dictate otherwise.
- [62] In this matter the dice is heavily laden against the applicant. The objective standard whereby a fair mind is brought to bear on the facts as set up by the parties dictates that the ultimate discretion be exercised in favour of the respondent. At the heart of the matter in this instance was the question: What can be profitably achieved by putting the court to the laborious task of now exercising a discretion to condone in favour of applicant if, in the long run, there would be no prospect of eventual success? (MADINDA'S-case, supra, para [12] at 317E.)
- [63] On the facts I find myself unable to exercise the discretion entrusted to me in terms of subsection 4(b) in favour of the applicant. I believe, and it is a very firm belief, that if I were to grant the special condonation application in this matter, my decision would have been incompatible with proper exercise of true judicial discretion – MELANE v SANTAM INSURANCE CO LTD 1962 (4) SA 531 (AD) at 532B – E.

- [64] In the instant matter distinction had to be made between two types of delay. The initial and subsequent delay. There was an initial delay before the expiry of the six months statutory deadline. The initial delay formed a critical element of the equation. It was an integral ingredient of the enquiry into the existence or otherwise of 'good cause'. It contributed materially to the applicant's failure to meet the statutory deadline by giving the requisite notice. It did not at all concern the discretionary power of the court to condone or not to condone the critical initial failure. The requisite notice was served on the respondent almost 2½ years out of time.
- [65] Then there was subsequent delay after the expiry of the statutory deadline. The subsequent delay to bring this special condonation application formed no critical element of the equation of satisfaction required in terms of section 3(4)(b) before the grant of the special condonation application. Such subsequent delay was not considered to be an element of the notion of 'good cause'. This is so because unlike the initial delay the applicant's subsequent delay could not be used as a factor that aggravates initial delay. At worst for her it adversely diminished her chances to have the ultimate discretion exercised in her favour – vide MADINDA supra, para [20].
- [66] The current special condonation application was launched on the 10 October 2011. It effectively took the applicant over sixteen months, from the date on which she became aware that such an application was required, to file her special condonation application. That strengthened the perception that the applicant was largely, though not exclusively, responsible for all sorts of delays encountered in this matter. Her summons narrowly escaped prescription. Her application was 16 months unreasonably belated. Her notice was belatedly given almost 29 months after the initial 6 month statutory deadline.
- [67] Implicit in her pathetically remissive conduct is the unfavourable deduction that she never had a genuine interest in her case for she knew all along that her claim had no substantive merits. I would, therefore, decline to exercise my discretion in her favour. I am not satisfied as required by section 3(4)(b) that good cause exists for the applicant's failure to comply. In her founding affidavit she gave inconsistent reasons for the delay. In her replying affidavit she came up with a completely new version or reason. Indeed she blew hot and cold at the same time as Mr Mene put it. She had to stand or fall by the unacceptable reasons as averred in her founding affidavit.
- [68] In my view the respondent's opposition of the special condonation application was not unreasonable. Where an application for condonation in cases of this nature is opposed, there is much to be said for the view that cause should follow the result. However, there is no sound and logical reason for reserving a decision as regards costs. The applicant will not have a second bite of the cherry unless this judgment is reversed on appeal. For now, the respondent has been successful in his opposition of the relief sought. The outcome favours the respondent. In the circumstances the respondent is entitled to the fruits of his success.
- [69] Accordingly, I make the following order:

69.1 The applicant's application for condonation is refused.

69.2. The applicant is directed to pay the respondent's costs.

M.H. RAMPAI, J

On behalf of applicant: Adv. J J Buys

Instructed by:

Crause Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv. B S Mene

State Attorneys

/eb

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