REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

19/8/2016

CASE NO: **7314/12**

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature 19/08/2016 Date

JOHN MABASO **APPLICANT**

and

MPUMALANGA PROVINCIAL GOVERNMENT

DEPARTMENT OF PUBLICWORKS, ROADS AND TRANSPORT **RESPONDENT**

APPEAL - JUDGMENT

KHUMALO J

[1] This is an Application for condonation of the late filing of a Notice in terms of s 3 (4) (a) of the Institution of Legal Proceedings against the Organs of State Act 40 of 2002 ("the Act") by the Applicant who has instituted an action against the Respondent for damages he suffered allegedly in an accident he had when he drove over a pothole on a road in Mpumalanga.

[2] The accident occurred on 20 March 2009.

[3] In an affidavit deposed to by the Applicant's attorney of record, L M Kobrin ("Krobin"), it is alleged that the related notice dated 24 January 2012 was sent by the attorneys to the Respondent by fax on 27 January 2012, two (2) years and 10 months after the alleged accident.

[4] The delay as articulated by Kobrin was as a result of the following happenings :

[4.1] the Applicant consulted with Zuma, a candidate attorney at his firm on 31 May 2011, 2 years and 2 months or 26 months after the accident, seeking advice on whether or not he had a claim against the Road Accident Fund.

Applicant told Zuma that he drove into a pothole and lost control of the motor vehicle resulting in the accident. He and the passenger in the vehicle sustained injuries.

[4.2] Applicant was however unsure if he had a claim as although he **had not seen the OAR report** concerning the accident, he seemed to have thought that the SAPS recorded information to the extent that the collision occurred as a result of the Applicant losing control of the vehicle when he swerved in an attempt to avoid a collision with a springbok that emerged from the side of the road and ventured into the path of the motor vehicle, which report Applicant said was incorrect as he drove into a pothole.

[4.3] Zuma approached him (Krobin), seeking advise as to whether or not Applicant had a claim. Krobin advised Zuma that there was no claim against the Road Accident Fund and that if the accident was caused by the springbok no claim lays lies against anyone. He also advised him that if however indeed the accident was caused by a pothole, the Applicant has a claim against the authority charged with the maintenance of the road. In that case Applicant had an obligation to make demand within six months of the collision if such Authority an organ of state. Incidentally condonation of the late delivery of the Notice could be sought from a competent court.

[4.4] He instructed Zuma to advise Applicant accordingly and that if Applicant elected to investigate the matter, Zuma or Applicant, (not sure who is referred to) should as soon as possible obtain the OAR report, statements from Applicant and his passenger and the clinical and medical records relating to the treatment Applicant received. Applicant's instructions was for Zuma to investigate and pursue a claim against the authority being adamant that the accident occurred as a result of driving over a pothole on a road without warning notices or signs alerting motorists to proceed with caution due to the existence of potholes

[4.5] Zuma obtained the relevant documents from the Applicant that included the OAR report, also confirmation that Applicant's passenger had confirmed that the accident occurred as a result of the pothole. Zuma was then instructed to obtain statements. He (Krobin) perused the OAR. It stated that the cause of the collision was the Applicant swerving to try and avoid colliding with the springbok. A copy thereof attached.

[4.6] He accordingly conducted his own investigation and found that the Respondent was the Authority charged with the maintenance of the particular road. On 24 January 2012 on receipt of the passenger's statement he prepared the Notice letter to the Respondent that he transmitted on 27 January 2012, 8 months after being consulted by the Applicant and 2 months before prescription. The letter incorporated a request that the Respondent indicate

whether or not it will be inclined to condone the Applicant's failure to deliver the letter of Notice within six months.

[4.7] On 7 February 2012, a month before prescription, when there was no response form Respondent he attended to the issuing of summons, served on the Respondent on 29 February 2012.

[5] It is Krobin's allegation that due to the Respondent's apparent decline in its Special Plea, to waive the Applicant's failure to make a demand within six months of the accident, it became necessary for it to apply for condonation.

[6] He contends further that notwithstanding the delay the Applicant's action has not been extinguished by prescription and the circumstances he has described amount to a reasonable explanation for the Applicant not to have given the required Notice in terms of the Act, showing good cause as is required by s 4 (b) (ii). Further that no prejudice can be claimed by the Respondent, alleging to have attached a copy of the OAR and also undertaking to furnish the Respondent with further information as per its request for further particulars that it reasonably requires to prepare for trial.

Respondent's Answering Affidavit

[7] Respondent opposes the granting of condonation to the Applicant and make the following main allegation, that:

[7.1] Respondent only became aware of the accident when a summons was received on April 2012 by its Principal Legal Officer, Gustav Ludwick ("Ludwick"), who is the deponent to its answering affidavit. The Respondent was never informed of the alleged accident prior thereto.

[7.2] The purported Notice sent allegedly by fax on 27 July 2012 was never received by the Respondent as the fax number on the said notice does not exist. The fax number on the attached transmission receipt is different from the one on the notice and unknown to it. Failing this, it also never received such Notice either by hand or registered mail.

[7.3] It therefore has never been afforded an opportunity to investigate the matter.

[7.4] The summons that allegedly followed the notice state that the accident occurred 500 kilometers from Standerton between Evander and Standerton, whilst the two towns are 66.8 Kilometers apart. The statement was consistently repeated by the Applicant in its summons as well as other documents, being made at that late stage, it made it extremely difficult for Respondent to investigate the accident.

[7.5] The Applicant has also failed to attach the OAR report to the Founding affidavit as alleged.

[7.5] The aforesaid failure by the Applicant has caused it and is still causing it extreme and unreasonable prejudice.

[7.6] The Applicant fails to give an explanation for the long delay of 26 months before it instructed its attorneys and also the long delay taken by the attorneys after the instruction to allegedly send the Notice letter, albeit the vague explanation of having consulted, given advice and investigated for 8 months. There is no confirmatory affidavit from the Applicant's passenger. As a result the Respondent was not afforded an opportunity to investigate the accident prior to engaging in legal proceedings.

[7.7] Furthermore at the date of the alleged notice it was already impossible for the Respondent to investigate and establish where the accident had allegedly occurred and also to verify the correctness of Applicant's allegations, as roads in that area are constantly sealed and repaired, u**rgency being of essence.**

[8] Applicant then filed what it called an Answering affidavit, which is presumably a Replying Affidavit which was opposed by the Respondent who then filed a notice to strike out that was supposedly heard simultaneously with the Condonation Application. The Application to strike out refers to paragraphs that are not contained in the Replying Affidavit. Counsels however indicated in argument that the contention is based on the three documents that are attached to the Affidavit. I was therefore inclined not to refuse the Application due to that discrepancy. The decision would not prejudice any of the parties.

[9] In that affidavit Krobin persists with the description of the accident that it occurred 500 kilometers between Standerton and Evander and insists that it is the most accurate description given by the police, Applicant and his witness. He further argues that he is aware that in preparation for trial it will be necessary to visit the scene and prepared to conduct an inspection at any time then and visit the scene with the Respondent for the Applicant to point out the place where the accident occurred. He argues that the Respondent will then be able to investigate and inspect its records for maintenance and repair work done during that period.

[10] It is only in that application that the Applicant attaches the OAR report and the statement by the Applicant's witness. He argues that the affidavit was deposed to on 17 January 2012 and only then could he ascertain the Authority responsible for the maintenance of the road thus preparing the Notice letter and sending it on 27 January 2012.

LEGAL FRAMEWORK

[11] Section 3 (4) (a) provides that if an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (), the creditor may apply to a court having jurisdiction for condonation of such failure.

[12] Section 3 (2) sets out the following factors that the court has to consider to determine whether or not to grant condonation:

(a) that the debt has not been extinguished by prescription;

(b) good cause exists for the failure by the creditor; ie to serve the statutory notice that complies with the prescripts of s3(2) (b); and

© the organ of state was not unreasonably prejudiced.

[13] On hearing the matter it was conceded by the Respondent that although the issue of prescription was raised in its answering affidavit, it does not arise, the summons having been served a month before the date of prescription. The factors that remained to be determined was whether good cause exists and prejudice to the Respondent.

[14] The Applicant has taken more than two years to approach attorneys with his claim without proffering any explanation as to why he could or did not do that earlier. According to the attorney, obtaining a statement from the Applicant's witness, the OAR report and investigation which he left to his candidate attorney also took long causing a further delay of 8 months. It is of significance that the Accident Report indicates that it was received from Barlow World Trichard, which is the employment of the Applicant on 28 June 2011, whilst the consultation took place on May 2011. It is therefore evident that a month after the consultation the attorneys were in possession of the OAR report. Neither the Applicant nor his attorney explains why the Applicant's witness' statement is only obtained six months thereafter. They also do not explain what the investigation that took such a long time entailed, as it is evident that it excluded the OAR report which was already in their possession a month after the consultation.

[15] The Applicant fails to provide an explanation for the period of his delay, whilst Krobin provides a scanty account of the further delay in his office. It was pointed out that an Applicant for condonation has to set out fully the explanation for the delay, covering the whole entire period of the delay and must be reasonable. The court must be able to assess his motives and conduct. Which is what the Applicant has failed to do and therefore his motives unascertainable.

[16] The fundamental imperatives of the Notice as contemplated in s 3 of the Act are clearly elucidated in Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd (293/09) [2010] ZASCA27 (25March 2010) where the following was stated:

> "The conventional explanation for demanding prior notification of intention to sue organs of State, 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 endeavor to settle them, (Mohlomi v Minister of Defence 1997 (1) SA 124 (cc) para 9). From time to time there have been judicial

pronouncements about how such provisions restrict the rights of its potential litigants. However, their legitimacy nd constitutionality is not in issue."

[16] In casu, the urgency of Respondent having to be notified in time is very clear and comprehensible. It was not able to conduct an investigation in time to be able to responsibly make decisions with regard to the validity of the Applicant's claim or to decide what to do with the claim. It is therefore obvious that Respondent was severely prejudiced. The manner in which the claim was submitted post the alleged Notice in its summons and the attitude of Applicant's attorney that the Respondent can wait until preparation of trial when they will conduct an inspection in loco and that is when the Respondent will see for itself where the accident occurred was unaccommodating and exacerbated the situation. IIt contradicts the fundamental imperative of the section 3 as elucidated in *Rance*. In Mohlomi it was pointed out that 'such rules prevent procrastination and those harmful consequences of it and thus serve a purpose to which no exception in principle can cogently be taken.'

[17] The Respondent as evidently pointed out did also not receive the purported notice and even though the Applicant's Replying affidavit is silent on the challenge, Krobin however contends that the transmission by fax is recognized as valid transmission of demand as envisaged in section 3(2) (a). Conversely Section 4 (1) of the Act requires such a notice to be served on the organ by delivering it by hand or by sending it by certified mail or (subject to s 4 (2)) by sending it by electronic mail or transmitting it by facsimile.

[18] Section 4 (2) clearly states as pointed out by Mr Mills, Respondent's Counsel that, if a notice has been sent by fax, the creditor must take all reasonable steps to make sure that the notice has been received by the officer or person to whom it was sent or transmitted, and within 7 (seven) days after the date upon which the notice was sent or transmitted, deliver by hand or send by certified mail a certified copy of that notice to the relevant officer or person which must be accompanied by an affidavit by the creditor or the person who transmitted the notice indicating, *inter alia,* the date on which and the time and fax number to which the notice was sent or transmitted, containing proof that it was sent or transmitted and setting out the steps taken to ensure that the notice has been received by the officer, and also indicating whether confirmation of the receipt of notice has been obtained.

[19] For all these reasons, concerning the partly unexplainable, partly insufficiently explained delay, failure to comply with the section when sending the alleged Notice, the incorrect information conveyed and the withholding of documents relevant to the claim just attests to the matter being one of those where the prejudice suffered by the Respondent is unassailable. Not only does the conduct of the Applicant amounts to unreasonable prejudice to the Respondent but it also fails to comply with the prescripts of s 3 (2) (b) and 4 (2).

[20] Even though it has been indicated that the prospects of success also play a significant role in deciding whether good cause exists. For the court to be able to make

such determination the Applicant must deal with the merits completely and candidly. In dealing with the merits in the Founding Affidavit Krobin has not explained the apparent discrepancy between the OAR report and Applicant's statement regarding how the accident occurred and also does not mention who made the statement to the police except stating that the discrepant information was recorded by the police and that it was only after the witness has furnished a statement that he could ascertain what had happened, obviously dealing scantily with the details. He also failed to attach the OAR report, the statement by the Applicant and his witness statement. Only with the Replying affidavit is the OAR and other crucial documents are attached and an allegation made for the first time that the Applicant was unconscious after the accident. The following was on 29 March 2009 recorded in the OAR:

> *"the driver tried to avoid a springbok animal that was crossing from the left to the right hand side of the road when the driver lost control and overturned.* ***The driver and the passenger sustained minor injuries.****" (my emphasis)*

[21] The OAR proving to be such a crucial document for the Respondent's investigation which Applicant had in its possession since June 2011, a witness statement obtained in January 2012 that also indicates otherwise are for the first time put forward in a Replying Affidavit. Also what surfaces added to the documents is an undated statement where the Applicant for the first time alleges to have been unconscious. Of note is that the Applicant's witness does not say anything about Applicant being unconscious nor do the police who were at the scene. The police report actually says the driver and the passenger sustained minor injuries. Applicant on the other hand gives even a more bizarre account of what happened, stating that:

> *"The accident happened 50 Km before we could reach our destination. The car started flying in the air and rolled on the ground. I then came out of the car and saw Springboks which I believed caused the accident. The following* ***we went to fetch the bakkie we then realized two potholes caused the accident.****"(my emphasis)*

[22] As a result the court is not placed in a position to be able to make a proper assessment on the merits of the Applicant's intended action. So far the prospects of success are indistinct. According to *Rance* an Applicant acts at his own peril when a court is left in the dark on the merits of the intended action and a paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause for the delay.

[23] The information that was left out and unexplained exhibit such a crucial discrepancy and more the reason why it was important that the Respondent is notified of the claim in time so as to conduct its investigation and obtain statements from the police. The Respondent has eloquently referred to the frustration it experienced due to the scarce and confusing information that followed the failure to comply with s 3 (2) (a) Notice causing it unreasonable prejudice.

[24] The Applicant has therefore failed to establish the good cause required and with the Respondent successfully showing the prejudice it suffered as a result of Applicant's failure to comply, his delay and conduct.

[25] Under the circumstances the following order is made:

[25.1] The Application for condonation in accordance with prayer 1 and 2 of the Notice of Motion is dismissed with costs, including costs for senior Counsel.

[25

.2] The Respondent's Application for striking out the Replying affidavit is dismissed with no order as to costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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