IN THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 94370/16

In the matter between:

PIETER JOHANNES JOUBERT **FIRST APPLICANT / PLAINTIFF**

CATHARINA ELIZABETH JEAN **SECOND APPLICANT / PLAINTIFF**

and

THE CITY OF TSHWANE,
METROPOLITAN MUNICIPALITY **FIRST RESPONDENT / DEFENDANT**

THE MUNICIPAL COUNCIL,
CITY OF TSHWANE **SECOND RESPONDENT / DEFENDANT**

THE MINISTER OF SAFETY
AND SECURITY **THIRD RESPONDENT / DEFENDANT**

THE NATIONAL COMMISSIONER
OF THE SOUTH AFRICAN POLICE
SERVICE **FOURTH RESPONDENT / DEFENDANT**

JUDGMENT

VAN NIEUWENHUIZEN AJ:

[1] This is an application whereby the Applicants seek condonation for their failure to comply with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act"). The necessity of this application arose due to the special plea of the First and Second Respondents ("the Respondents") to the effect that the Plaintiffs had instituted the main action to which this application relates without complying with Sections 3(1), 3(2)(a) and (b), and 4(1) [the latter has no true bearing on the matter and I thus do not deal with this section any further] of the Act.

[2] The Applicants' Particulars of Claim raised four separate causes of action, albeit

that the second to fourth claims were all interrelated to the extent that they arose from the same alleged incident. The claims were respectively categorised as "A", "B", "C", and "D". Claim A, which is further titled *"Intimidation and Threat of Assault"* was alleged to have arisen on or about 2 January 2015. Claims B to D were alleged to have arisen on or about 20 April 2015. Although the Respondents' special plea was not limited to any specific one or more of the claims contained in the Particulars of Claim, from the content of the answering affidavit, as well as in argument before me, it was readily apparent that the special plea was truly aimed at Claim A. Indeed, on the facts before me, the Applicants' erstwhile attorneys of record had duly delivered a written notice in compliance with the Act on 29 July 2015 relating to the Applicants' other claims ("the initial notice"). The content thereof clearly was sufficient to have met the threshold as required in terms of Section 3(2)(b) of the Act which is evident from a simple reading thereof and comparing same to the allegations contained in the Particulars of Claim to which the Respondents were able to adequately plead. Accordingly, what I am truly called upon to determine is whether or not the Applicants' failure to comply with Section 3 of the Act in relation to Claim A should be condoned.

[3] Section 3 of the Act provides as follows:

"3 Notice of intended legal proceedings to be given to organ of state

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of subsection (2) (a)-

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

[4] From the provisions of Section 3(4) of the Act, I am accordingly called upon to determine whether it would be in the interests of justice to grant condonation (*cf* **Van Wyk v Unitas Hospital (Open Democratic Advice Centre as *amicus curiae*)** 2008 (2) SA 472 (CC) [20]) in the present application in relation to Claim A if I am satisfied that:

(i) the debt arising from Claim A had not been extinguished by prescription;

(ii) good cause exists for the failure by the Applicants to have served a notice in terms of sub-section 2(a) [i.e. within six months from the date on which the debt became due, to wit midnight 2 June 2015]; and

(iii) the Respondents were not unreasonably prejudiced by the said failure.

[5] As I indicated in the preceding paragraph, the general proposition as to whether or not condonation ought to be granted depends on whether or not it would be in the interests of justice to do so. The classic example of where the law requires *"good cause"* to be demonstrated by a litigant is where condonation is sought for the late institution of applications to rescind default judgments (**Van Wyk** *op cit*). This standard laid down by the Constitutional Court would similarly still apply, in my view, in relation to the "post-notification" [or "pre-condonation"] delay of delivery of the notice required in terms of Section 3(1) of the Act. In other words, once a plaintiff is notified, through a special plea, that a State organ has raised non-compliance with Section 3 of the Act (and has not consented in writing to the institution of legal proceedings absent such a notice or upon receipt of a notice which does not comply with all the requirements set out in sub-section (2), as the organ of State may do in accordance with Section 3(1)(b) of the Act) then it is incumbent upon the plaintiff in such a situation to, without delay, institute an application for condonation.

[6] As intimated in the preceding paragraph, it follows that there are two possible periods of delay which may require consideration as to the granting of condonation, namely a “pre-notification” delay, being the delay in excess of the six month requirement as set out in Section 3(2)(a) of the Act, and a “post-notification” delay, being the delay in the period between when belated notice was given and the launching of an application for condonation of its belatedness in terms of Section 3(4)(a) of the Act. This was succinctly put as follows by the Full Bench in **O C Potgieter v MEC for Police, Roads and Transport**, an unreported judgment of the Free State High Court, Case No. A131/2017, delivered on 12 June 2018, at paragraphs 49 to 50, as follows:

“[49] Mr Scheepers, in their heads of argument, submitted that the failure to have timeously launched the condonation application, did not contribute to the prejudice claimed by the respondent. It was furthermore submitted that the court a quo erred in failing to properly distinguish between the appellant’s failure to have timeously served the notice as opposed to the subsequent delay in the bringing of the condonation application. In this regard, Mr Scheepers relied on the Madinda-judgment, supra.

[50] In the said Madinda-judgment, at paras [14] and [20], the court indeed drew a distinction between the two respective periods of delay:

‘[14] One other factor in connection with 'good cause' in s 3(4)(b)(ii) is this: it is linked to the failure to act timeously. Therefore subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms. Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s 3(4), but it is not, in this statutory context, an element of 'good cause'. This is a distinction which the learned judge did not draw or maintain and I think he was wrong not to do so.

[20] It is also true that, although her attorney received the rejection of the notice in the middle of October 2005, the appellant did not commence proceedings for condonation until July 2006. As I have earlier pointed out, unexplained delay which relates to the period after the notice was de facto given will ordinarily relate not

to the establishment of good cause but to condonation. The learned judge erred in his approach in this regard...."

[7] Indeed, as was stated by Heher JA in **Madinda v Minister Of Safety and Security** 2008 (4) SA 312 (SCA) at 318B – D, the legislature curtailed the discretion of a court to the extent that in deciding whether condonation ought to be granted may only arise once the three requisites in Section 3(4)(b) of the Act had been met. Put differently, if any of the three requisites have not been met, as they are indeed conjunctive (see **Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd** 2010 (4) SA 109 (SCA) [11]), then the question of whether or not it would be in the interests of justice to grant condonation does not even arise. (Compare **O C Potgieter** at paras [51] to [53]).

[8] Accordingly, it is necessary to set out the applicable facts of the matter in relation to the Applicants' Claim A. Claim A is pleaded as follows:

"10.1 On or about the 2nd of January 2015, at 993 Michael Brink Street, Villieria, the First and Second Plaintiffs' daughter, Catharina, and the Second Plaintiff were approached by two un-identified coloured males at the main gate of the premises, who arrived in a construction vehicle with registration number CZ71PW GP, who indicated that they are in the employ of the First Defendant; [the First and Second Plaintiffs are the Applicants in this matter and the First and Second Defendants, the Respondents].

10.2 'Razor Roadside Assistance and Panel Beating' is the decal applied to the body of the vehicle, creating the impression that the drivers thereof were vehicle specialists.

11.

The First and Second Plaintiffs' daughter, Catharina, denied them access to the premises, believing that the two men had a mala fide motive, due to their failure to introduce themselves as identification would be reasonably expected by officers of the First Defendant.

12.

12.1 Upon refusal of access to the premises, the two officers proceeded to draw their firearms in an ill attempt to evoke authority, and fear and force any resistance into submission, after which they boastfully announced that they 'will' enter the premises;

12.2 The two officers of the First Defendant furthermore demanded that all copper on the premises be handed over to them, failure of which would lead to an undesirable arrest of the occupants to the premises.

12.3 At no point in time did the officers of the First Defendant indicate a specific load/batch of copper which they were instructed to seize.

13.

The Plaintiff's daughter, Catharina, cautiously approached the officers of the First Defendant and demanded that they put away their weapons, which they blatantly refused.

14.

As the encounter engulfed into a heated conversation, the First Plaintiff appeared from the house due to the commotion and noise, only to be confronted by the aggressive and provocative officers, who pointed their firearms at First Plaintiff and his daughter, Annemaria, respectively.

15.

The First Plaintiff and his daughter, Annemaria, further requested the officers of the First Defendant to remove themselves from the premises, which they subsequently ignored. Thereafter the Second Plaintiff and her daughter, Catharina, after observing the debacle, escorted the officers of the First Defendant to their vehicle stationed outside of the premises, where the Second Plaintiff and her daughter, Catharina, insisted that the local police station be contacted before any further investigation would take place.

16.

Shortly after the Second Plaintiff informed the officers of her incentive to contact the Villieria Police Station once again, another construction vehicle, with registration number CZ71JR GP arrived on the scene. Two unidentified adult males existed the vehicle and introduced themselves as undercover police officers who were instructed to investigate the scene and seize any illegal copper.

17.

The Second Plaintiff phoned the Villieria Police Station to speak to the officer in charge of all second-hand goods offences and requested him to find out who these people were and what they wanted. Constable Mobec Mabelo then requested to speak to one of the officers and Second Plaintiff handed her cellphone to one of the officers. After discussions, Mebelo advised the First and Second Plaintiffs to allow the officers to inspect the premises. The Second Plaintiff and the officers then proceeded onto the premises where they inspected all goods of the First and Second Plaintiffs as well as the First and Second Plaintiffs' register in which all goods had been properly recorded.

18.

18.1 After a brief observation of the adjacent area, the officers identified a bucket containing approximately 25 kgs of copper cabling and demanded that the Plaintiffs hand it over;

18.2 The Second Plaintiff then informed the officers that she was in lawful possession of the copper in question and she had received it as a gift from a certain Marius Becker during the course of their business. Attached hereto is a letter confirming the origin of the copper marked ***ANNEXURE "A"****;*

18.3 Notwithstanding the above, the officers proceeded to load the said copper into the construction vehicle and subsequently left the premises, without giving any receipt confiscated copper.

19.

19.1 As a direct consequence of the intimidation of the Plaintiffs, they have suffered damages in the amount of R 100 000.

19.2 Notwithstanding demand, the First and Second Defendants have refused to pay the amount claimed or any portion thereof.

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19.3 As a consequence of the theft by the First and Second Defendants as described above, the Plaintiffs have suffered damages, being the market value of the missing coper. The market value of the stolen copper at the relevant date was approximately R 75 per kilogram. The Plaintiffs have accordingly suffered damages in respect of the missing copper in the amount of R 1 875,00.

19.4 In the premises, the First and Second Defendants are jointly and severally liable to the First Plaintiff for the amount of R 200 000,00 in respect of the intimidation and threat of assault and R 1 875,00 in respect of the stolen copper." (*sic*).

[9] As already alluded to above, on 29 July 2015, the Applicants' erstwhile attorneys addressed the initial notice as required in terms of Section 3(1) of the Act to the Respondents. The said demand was annexed as Annexure "PJJ2" to the founding affidavit in the application before me. I do not propose to repeat its content herein but suffice it to state that it in no uncertain terms deals comprehensively, bút exclusively, with the events of 20 April 2015 relating to the other claims of the Applicants. More about this later herein.

[10] The summons commencing the action in the present matter was served on the Respondents on 15 December 2016 and the Respondents filed their plea on 23 October 2019 after an application for default judgment was served. Another written notice purporting to comply with Section 3(1) of the Act was served on the offices of the Respondents on 5 March 2020 by the Applicants' present attorneys of record which then included the events of 2 January 2015 relating to Claim A.

[11] The Respondents raised a further special plea to the Applicants' claim, namely that same had prescribed, which prescription point was pursued with in opposing the present application. In their replying affidavit, the Applicants demonstrated that the summons had indeed been timeously served on 15 December 2016 which was also recorded in the joint practice note of the parties' counsel as a common cause fact. It

was thus surprising that the Respondents' counsel was not provided with the necessary instructions that the Respondents would abandon any opposition premised upon the assertion that the debt had been extinguished by prescription as envisaged in terms of Section 3(4)(b)(i) of the Act. However, Mr du Preez, being the Respondents' counsel, acted quite appropriately in disclosing to me that he held no instructions to abandon such a point, however, did not seek to waste this court's time by pressing the matter any further. This point may readily be put to bed as follows: not only had the parties' counsel agreed as to the date when summons had been served on the Respondents in their joint practice note, but the Applicants had annexed the returns of service in this regard to their replying affidavit when there had clearly been a *bona fide* error in annexing the wrong returns of service to the founding affidavit. The point raised in the Respondents' heads of argument that such returns of service being put forward only in reply being impermissible was premised on the general proposition that a party may not raise new facts in reply. That general proposition is subject to the power of a court to exercise its discretion in special circumstances to allow such matter to stand.

[11.1] In **Pat Hinde & Sons Motors (Brakpan) (Pty) Ltd v Carrim and Others** 1976 (4) SA 58 (T), Nestadt J held as follows at 63E – 64A :

"I find it unnecessary to decide whether the applicant's replying affidavit sets out a new cause of action against the second and third respondents or merely raises new matter. In either event I have, I consider, a discretion either to strike out what I would call the new matter (or direct that the applicant cannot rely upon it) or to permit it to stand but give the respondents an opportunity of filing a second set of answering affidavits so as to deal with the new matter. Both remedies stem from the general principle of our law of procedure that

'... an applicant should set out in his petition or notice of motion and supporting affidavits a cause of action and, since in application proceedings the affidavits constitute not only the pleadings but also the evidence, such facts as would entitle him to the relief sought'.

(Kleynhans v Van der Westhuizen, N.O., 1970 (1) SA 565 (O)).

On p. 568 DE VILLIERS, J., goes on to state the following:

'Normally the Court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion (cf. Mauerberger v Mauerberger, 1948 (3) SA 731 (C); De Villiers v De Villiers, 1943 T.P.D. 60; John Roderick's Motors Ltd. v Viljoen, 1958 (3) SA 575 (O); Berg v Gossyn (1), 1965 (3) SA 702 (O); Van Aswegen v Pienaar, 1967 (1) SA 571 (O)), but may do so in the exercise of its discretion in special circumstances (cf. Bayat and Others v Hansa and Another, 1955 (3) SA 547 (N); Schreuder v Viljoen, 1965 (2) SA 88 (O)). Once such a discretion has been exercised in favour of an applicant a Court of appeal will only interfere if it comes to the conclusion that the Court a quo has not exercised its discretion judicially.,
'

At p. 569 - the learned Judge stated:

'Respondent was prima facie entitled to ask for the new matter to be struck out, because it was only after such an application had been formally made that applicant filed an affidavit explaining fully why the new matter had not been included in the initial application. Even after the latter affidavit had been filed respondent's opposition to applicant's request that the Court in the exercise of its discretion should allow the new matter to remain in the replying affidavit, was not unreasonable. Applicant was in effect asking for an indulgence and at no stage offered to pay respondent's wasted costs up to that stage.'

(See too Herbstein and Van Winsen, supra at p. 75, from which it appears that the principle also applies to the making out of a new case in a replying affidavit).”

[11.2] Similarly, in **Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others** 2016 (3) SA 143 (SCA) at paragraph 16 it was held as follows:

“[16] Then there is the fact that a voluminous replying affidavit containing a great deal of evidential material relevant to the issues at hand had been filed. Relying upon authorities such a Sooliman, the appellant argued that it was 'axiomatic . . . that a reply is not a place to amplify the applicant's case' and that the new matter had been impermissibly raised by Lehane in reply, that it was evidential material to

which the appellant had not been able to respond, and that it fell to be ignored. However, again, practical common sense must be used, and it is not without significance that many of the hearsay allegations complained of were admitted by the appellant in its answering affidavit. …"

[Footnotes omitted.]

It has not been sought that the allegations contained in the replying affidavit and the annexures, to wit the returns of service, be struck out, nor has there been any suggestion of prejudice should such allegations remain. Adopting a common sense approach, it would be unreasonable to turn a blind eye to the returns of service in this regard. Accordingly, I am satisfied that the first hurdle required by Section 3(4)(b) of the Act has been met.

[12] The next question is whether or not good cause exists for the failure by the Applicants to have timeously served the notice in terms of sub-section (2)(a) of the Act. In this context, *"good cause"*, was discussed comprehensively by Heher JA in **Madinda** at paragraphs 10 to 15 as follows:

"[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.

[11] In Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) Schreiner JA said (at 352H - 353A):
The meaning of 'good cause' in the present sub-rule, like that of the practically synonymous expression 'sufficient cause' which was considered by this Court in

Cairn's Executors v Gaarn 1912 AD 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.

Although this passage relates to a different legislative context (viz rule 46(5) of the magistrates' courts rules), I am of the view that it holds good for the interpretation of s 3(4)(b)(ii).

[12] 'Good cause' usually comprehends the prospects of success on the merits of a case, for obvious reasons: Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765D - E. But, as counsel for the respondent stressed, whether that is the case must depend on the terms of the statute in which it is found. In s 3(4)(b)(ii), there is a specific link created between the delay and the 'good cause'. 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. 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. 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. The learned judge a quo misdirected himself in ignoring them.

[13] The relevant circumstances must be assessed in a balanced fashion. The fact that the applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved.

[14] One other factor in connection with 'good cause' in s 3(4)(b)(ii) is this: it is linked to the failure to act timeously. Therefore subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms. Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s 3(4), but it is not, in this statutory context, an element of 'good cause'. This is a distinction which the learned judge did not draw or maintain and I think he was wrong not to do so.

[15] Absence of prejudice has often been regarded as an element of good cause in the context of earlier legislation. It was, no doubt, also an element in determining where the interests of justice lay in the terms of s 57 of Act 68 of 1995. But in this Act the legislature has deemed it appropriate to treat absence of unreasonable prejudice as a specific factor of which an applicant must satisfy the court. The identification of separate requirements of good cause and absence of unreasonable prejudice may be intended to emphasise the need to give due weight to both the individual's right of access to justice and the protection of state interest in receiving timeous and adequate notice."

[13] It is trite that whether or not *"good cause"* has been established depends on a

number of factors which will differ from case to case, depending on the differing facts, and there is no exhaustive list (see *inter alia* **C J Rance** at paragraph 36 and **Madinda** at paragraph 10). Factors such as the prospects of success, the length of the delay and the reasonableness of the explanation therefor, as well as the bona fides with which the application is brought are, in my view, dispositive of this leg of the inquiry in the present matter (as it may be in general). Whilst it is so that the allegations of intimidation, through the pointing of firearms, and apparent theft of copper cable are met by a bald denial in the Respondents' plea, and that such conduct, of itself, would *prima facie* be unlawful, in light of what follows, this factor plays a lesser role in my adjudication of the matter.

[14] I am perturbed by the Applicants' *bona fides* with which they seek to present not only Claim A, but this present application in that context. Commencing with the *bona fides* with which Claim A has been put forward: by virtue of the very fact that the Applicants' daughters, were equally purported victims of the allege intimidation that is averred to have occurred on 2 January 2015, the fact that both daughters have not presented confirmatory affidavits to the present application, nor has it been suggested that they too have sought to institute claims against the Respondents, renders the veracity of Claim A highly doubtful. This is further amplified by the fact that if there had been any theft of copper, albeit in an small amount, in the context where such a theft was conducted by Metro police officers who in fact ought to protect the public, one would have expected the Applicants to have lodged a complaint of theft or to have raised a complaint with the Independent Police Investigative Directorate or with the City of Tshwane Metropolitan Municipality itself. But there is not an iota of any such evidence one would have expected from a litigant who seriously had any intent on prosecuting his or her claim.

[15] Touching on the aforegoing, it brings me to the second component that relates to the explanation for the delay:

[15.1] The Applicants in effect, place all the blame on their erstwhile attorneys. They go so far as to expressly accuse their erstwhile attorneys of having acted negligently in failing, despite being armed with full instructions as to the events of 2 January 2015, to have raised such facts in the initial notice. On several occasions, both in the

founding affidavit and in the replying affidavit, the erstwhile attorneys are thrown under the bus.

[15.2] However, the Applicants, in attempting to absolve themselves from any blame, ironically contradicted themselves under oath because, in contrast to the purported negligence of their erstwhile attorneys, they on multiple occasions, in both the founding and replying affidavit, expressly suggest that the initial notice indeed did refer to the events of 2 January 2015 albeit not in the clearest of terms. This repetitive stoic stance of the Applicants is so glaringly untenable when that demand is perused that the inescapable inference is that the Applicants are not *bona fide* in their approach to this court.

[15.3] But the Applicants' difficulties do not end there. If their erstwhile attorneys were indeed negligent as suggested, one would have expected a complaint to have been lodged with the Legal Practice Council. There is no suggestion to that effect whatsoever.

[15.4] I am also dissuaded of any *bona fides* from the Applicants in light of their resort to being ignorant of the requirements of the Act. Whilst they may be lay persons insofar as the law is concerned, attorneys do not act without instructions from their clients. It is untenable that the initial demand had been authored and served on the Respondents without the Applicants' instructions and therefore that they would have been provided therewith or at least the contents thereof prior to instructing their erstwhile attorneys to so serve it. The Applicants need not have had any knowledge of the provisions of the Act to have corrected the erstwhile attorneys as to the absence of pertinent facts in the notice. Too often litigants simply cast blame towards their (often by then erstwhile attorneys) in seeking to avoid responsibility for their own (in)actions. Courts should be studious not to allow its officers to become readily scapegoats.

[16] The importance of the requirement of *bona fides* has been stressed in different contexts by our courts:

[16.1] More than a century ago, Solomon J (as he then was) in **Silverthorne v**

Simon 1907 TS 123 at pages 124 to 125 said the following:

"*Whenever, therefore, there is any really satisfactory explanation of a delay on the part of the defendant, if the Court comes to the conclusion that his application is bona fide, that he is really anxious to contest the case, and believes that he has a good defence to the action, and if, in those circumstances, the order can be made without any damage or injury to the plaintiff other than can be remedied by an order as to payment of costs, I think when those conditions are present in any application the Court should as far as possible assist the defendant and allow him to file a plea in the action. On the other hand, of course, if the Court comes to the conclusion that the application is a mala fide one, that the defendant really has no belief in the justice of his cause, and has no desire to have the case decided on the merits, but that his only object in making the application is to delay the plaintiff in obtaining his just claim, then the Court clearly should not hesitate to refuse to make any order*."

[16.2] **Silverthorne** dealt with a removal of bar. The same requirement has been laid down in the context of resisting an application for summary judgment, the rescission of a default judgment, as well as raising a dispute in liquidation proceedings. It is a separate requirement (see also **Dalhouzie v Bruwer**1970 (4) SA 566 (C) 572C – E). In **Standard Bank of SA Limited v El-Naddaf and Another** 1999 (4) SA 779 (W) at 784C – 786B Marais J stated the following:

"I wish to add something in regard to the sketchiness of the second defendant's affidavit. It is true that in Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) Brink J at 476-7 said that:

'He must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.'

I am aware that this was approved by Zulman AJ (as he then was) in Federated Timbers Ltd v Bosman NO and Others 1990 (3) SA 149 (W) at 155 et seq. I also

accept the statement by Zulman AJ that it is not necessary for the defendant to actually prove his case. Clearly not.

But I find a degree of contradiction in the statement by Brink J that on the one hand the applicant must show that he has a bona fide defence and his statement that it is sufficient if the applicant sets out 'averments which, if established at the trial, would entitle him to the relief asked for'. It seems to me that the question of whether the applicant has shown that he has a bona fide defence must be decided against the background of the full context of the case. In a case such as this, where the applicant for rescission admits having signed a clear suretyship, I feel that it cannot be sufficient to establish bona fides if she baldly states 'the plaintiff misled me as to the contents of the document I was signing' without saying how the plaintiff misled her. I am at a loss to understand how, if so bald and sketchy an averment is made, a court can be satisfied as to the bona fides of an applicant who is in a position to set out much more clearly (without requiring massive detail) how she was misled and by whom on behalf of the plaintiff.

It seems to me that the situation is analogous to that under Rule 32(3)(b) of the Uniform Rules of Court, which requires that the Court must be satisfied that the defendant has a bona fide defence. This subrule was considered in Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T). The relevant portion of the subrule requires the defendant to 'satisfy the Court by affidavit . . . that he has a bona fide defence to the action; such affidavit . . . shall disclose fully the nature and ground of the defence and the material facts relied upon therefor'. It will immediately be seen that the second portion of the sentence contains requirements different to those specifically required in an application for rescission. However, Colman J deals with the requirement that the defendant must satisfy that his defence is bona fide as

(a) separate from the requirement that he must satisfy the Court that he has a defence and

(b) separate from the requirement that he 'shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

At 227 in fine - 228A Colman J says:

'If, therefore, the averments in a defendant's affidavit disclose a defence, the question whether the defence is bona fide or not, in the ordinary sense of that expression, will depend upon his belief as the truth or falsity of his factual statements. . . .'

That paragraph is preceded at 227G-H by the statement that the rule requires that the defendant

'set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence. . . . On the face of it, bona fides is a separate element relating to the state of defendant's mind.'

This makes it quite clear that Colman J regarded the requirement that bona fides be demonstrated as separate and distinct from the requirement that the affidavit 'shall disclose fully the nature and grounds of the defence' etc, even though there would appear to be some inevitable overlapping between the two requirements. That Colman J regarded bona fides as a separate requirement, and was dealing with that only in the last sentence of the following passage, appears from the full passage itself. At 228B-E the relevant passage occurs and it reads:

'Another provision of the subrule which causes difficulty, is the requirement that in the defendant's affidavit the nature and the grounds of his defence, and the material facts relied upon therefor, are to be disclosed "fully". A literal reading of that requirement would impose upon a defendant the duty of setting out in his affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree, subject to one addition, with the suggestion by Miller J in Shepstone v Shepstone 1974 (2) SA 462 (N) at 366-467, that the word "fully" should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if

it is proved at the trial, will constitute a defence to the plaintiff's claim. What I should add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides.'

The last two sentences make it clear that Colman J separates the requirement to show bona fides and the requirement to 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'.

I stress the distinction drawn by Colman J because, since he does not rely upon the other arguments of the Rule when he lays down what is required to demonstrate bona fides, I am satisfied that his remarks regarding what is required to demonstrate that a defence is bona fide are of equal application to applications for rescission where the applicant is also required to demonstrate that he has a defence which is bona fide.

In my view the concluding sentence in the passage that I have quoted is of full application to applications for rescission. In my view, where it is required that bona fides be demonstrated, this cannot be done by making a bald averment lacking in any detail.

Insofar as Grant's case may suggest that a mere bald averment 'which appears in all the circumstances to be needlessly bald, vague or sketchy' is sufficient to demonstrate bona fides, I am of the view that it is clearly wrong and I decline to follow it.

The authority of the judgment of Colman J (and common sense) indicate that bona fides cannot be demonstrated by merely making a bald averment lacking in any detail. To hold that such bald averment is sufficient to demonstrate bona fides is a classic oxymoron. It effectively negates the requirement that the Court be satisfied that the applicant has a bona fide defence. It could with equal validity be held that a mere statement by an applicant that his defence is bona fide would be sufficient, which is manifestly absurd."

[16.3] The aforesaid *dicta* of Marais J has been followed in this division in **Loretto CC & Another v Distillers Corporation Limited** [Case No.: A1090/07 (GNP)] at paragraph 14 and in **M[....] v D[....] and Another** 84951/2019 [2020] ZAGPPHC 677 (25 November 2020) at paragraphs 13 to 14 and approved in **Gap Merchant Recycling CC v Goal Reach Trading CC** 2016 (1) SA 261 (WCC) by Rogers J at paragraphs 23 to 26, as follows:

"[23] Mr Randall reminded me that in the present case the applicant did not accept the bona fides of the respondent in raising its defence. Both bona fides and reasonableness were in issue. With regard to the requirement of bona fides, Mr Randall referred me to the judgment of Marais J in Standard Bank of SA Ltd v El-Naddaf and Another 1999 (4) SA 779 (W). That case concerned an application for rescission. One of the requirements for successful rescission was that the defendant had to demonstrate the existence of a bona fide defence. Marais J referred to the well-known judgment of Colman J in Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) concerning summary judgment. He pointed out that in Breitenbach Colman J held that the requirement of bona fides was separate from the requirement that the defendant satisfy the court that he has a defence, and separate from the requirement that the defendant 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'. Bona fides have to do with the belief on the part of the litigant as to the truth or falsity of his factual statements; it is a separate element relating to the state of the defendant's mind (El-Naddaf at 784G – 785B, quoting from Breitenbach).

[24] Marais J then quoted (at 785D – F) the passage in Breitenbach appearing at 228B – E. In that passage Colman J said, with reference to rule 32(3), that the duty 'fully' to disclose the nature and grounds of the defence was not to be taken literally and that the statement of material facts should simply be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. Importantly, Colman J added the following (and it was this passage in particular which Marais J in El-Naddaf highlighted):
'What I should add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona

fides.'

[25] Marais J said that this explanation regarding the requirement of bona fides applied with equal force to the requirement in rescission proceedings that the defendant demonstrate a bona fide defence, emphasising in particular that bona fides cannot be demonstrated by making bald averments lacking in any detail (at 785H – I).

[26] I see no reason for adopting a different approach when considering, in liquidation proceedings, whether the applicant's claim is bona fide disputed on reasonable grounds. Bona fides relates to the respondent's subjective state of mind, while reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute in law a defence. The two elements are nevertheless interrelated because inadequacies in the statement of the facts underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts. As Hülse-Reutter makes clear, the objective requirement of reasonable grounds for a defence is not met by bald allegations lacking in particularity; and, as appears from Breitenbach and El-Naddaf, bald allegations lacking in particularity are unlikely to be sufficient to persuade a court that the respondent is bona fide."

[17] The present facts differ from the facts in **Madinda**. In the present matter, one can hardly think of a more traumatic event of intimidation than being threatened with a firearm. Over and above such a threat and the obvious affront to one's dignity and sense of safety and security, especially by persons identifying themselves as Metro police officers, a further insult was then purportedly committed through the theft of property. These alleged infringements of constitutional rights are patent and objectively serious. If the matter was at all important to the Applicants, not only would the criticisms that I have demonstrated earlier in this judgment not have arisen, but they would also have approached attorneys prior to the events alleged to have occurred on 20 April 2015. I am therefore not satisfied that the second requirement under Section 3(4)(b) of the Act has been met. Good cause does not exist for the Applicants' failure with due regard of the overall impression of the facts before me.

[18] In addition to the lack of good cause, upon reflection, I am also not persuaded

that the Respondents were not unreasonably prejudiced by the said failure. The initial notice was comprehensive and clearly provided sufficient information for the Respondents to investigate the facts averred therein. This is fortified by the comprehensive plea of the Respondents to the other claims of the Applicants which arose from the events of 20 April 2015. The Respondents have set out why they were unduly prejudiced due to the failure by the Applicants to have provided timeous notice of the alleged events that occurred on 2 January 2015 in the answering affidavit. These were *inter alia* the absence of the number of employees, or their ranks, of the First Respondent that approached the Applicants, whether or not a warrant had been issued to allow the premises of the Applicants to be entered by the unknown employees, the detail of the lawfulness of the possession of the copper and solar batteries purported to have been stolen (in respect of the latter this appears from the belated notice in writing in relation to the alleged events of 2 January 2015). The absence of such facts, the Respondents say, severely prejudices them as they are unable, years later after the alleged event, to verify any of the details or investigate the matters and indeed locate witnesses. In this respect, it is apropos to refer to what was said by the Supreme Court of Appeal in **C J Rance** at paragraphs 13-14:

"[13] In considering whether condonation was rightly granted it is instructive to bear in mind why notices of the kind contemplated in s 3 of the Act have been insisted on by the legislature. Statutory requirements of notice have long been familiar features of South Africa's legal landscape. 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 endeavour to settle them'. From time to time there have been judicial pronouncements about how such provisions restrict the rights of its potential litigants. However, their legitimacy and constitutionality are not in issue.

[14] In Mohlomi the following is stated:
'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the

interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'"

[Footnotes omitted.]

[19] The Applicants' answer to the Respondents' complaints suggest simply, again, that the initial notice was merely vague insofar as the alleged incident of 2 January 2015 was concerned, which was patently not the case as it was clearly not referred to whatsoever. The Applicants continue to seemingly suggest that all the relevant facts were contained in the Particulars of Claim which have been served on 15 December 2016 and that all necessary information could have been gleaned therefrom and from the docket referred to in the initial written notice of 29 July 2015. Belatedly, the Applicants then also in their replying affidavit state that the employees of the Second Respondent who had committed the alleged unlawful acts in respect of the alleged events of 20 April 2015, were the same employees referred to in the Particulars of Claim under Claim A. These allegations of the Applicants are no answer to the prejudice asserted by the Respondents:

[19.1] Firstly, as already pointed out, the initial notice only dealt with the events of 20 April 2015, not with the alleged events of 2 January 2015.

[19.2] Secondly, the docket number referred to in the replying affidavit, being the one recorded in the initial notice, deals only with the events of 20 April 2015 and would not have assisted the Respondents as suggested by the Applicants.

[19.3] Thirdly, the Applicants' attempt to rely on the facts as contained in their Particulars of Claim also does not assist them. The legislature has created a legislative mechanism whereby organs of State are to be notified of such intended

claims. The Applicants' procrastination in prosecuting the action has not been explained and the fact that the Respondents have seemingly only been compelled to plead to the Particulars of Claim nearly 3 years after the action had been instituted supports the Respondents' contention of unreasonable prejudice that they had suffered and certainly cannot negate the requirements of the Act.

[20] Thus, I am not satisfied that the final hurdle of Section 3(4)(b) of the Act has been crossed.

[21] Accordingly, the application cannot succeed. Even if I was wrong in my conclusion in either of the requirements pertaining to *"good cause"* or *"unreasonable prejudice"*, as stated by Heher JA in **Madinda** at paragraph 16:

"The structure of s 3(4) is now such that the court must be satisfied that all three requirements have been met. Once it is so satisfied the discretion to condone operates according to the established principles in such matters, as to which see eg United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A) at 720E - G."
and accordingly if my discretion to condone could be called upon to be exercised based upon the established principles in such matters, I would have declined to do so. *In casu*, the special plea was raised on 23 October 2019. The notice of motion and founding affidavit were dated (and deposed to) on 28 April 2020. The application itself was only served on the Respondents on 30 June 2020. The only explanations pertaining to the periods in between the aforesaid dates were:

[21.1] the purported vagueness in relation to the initial notice was only brought to the Applicants' attention when the Applicants' current attorneys of record obtained an opinion from counsel in February 2020 (*sic*);

[21.2] according to the Applicants, advice was rendered that after the opinion of counsel was obtained, that it was evident that counsel was not provided with all the documents with regards to the matter;

[21.3] after all the documents were supplied to (presumably the same) counsel, on 2 March 2020 a new notice in terms of Section 3(1) of the Act was settled by counsel

and served on the Respondents;

[21.4] according to the Applicants, the Respondents had 30 days from the new notice in terms of Section 3(1) to consent to condonation for the late notice and after no such consent was received, on 13 April 2020, counsel was given instructions to settle the application for condonation;

[21.5] the Applicants' attorneys of record received the complete application from counsel on 17 April 2020;

[21.6] however, due to the Covid-19 epidemic (*sic*), the application could not be issued and served.

[22] It is apparent from the aforegoing that no explanation was proffered by the Applicants for the period of 24 October 2019 to February 2020. In fact, in respect of the latter period, no precise date is even provided (see **M[....] v D[....] and Another** 84951/2019 [2020] ZAGPPHC 677 (25 November 2020) at paragraph 5).

[23] The explanation for the delay for that period is accordingly not only deficient, but it follows, cannot be reasonable. In the replying affidavit, the Applicants, again patently in a contradictory fashion, state that the previous attorneys of record informed them that no condonation was needed due to the Particulars of Claim automatically remedying the purported vagueness in the initial notice in terms of Section 3(1) of the Act of 29 July 2015. This is nonsensical as there was no suggestion, until 23 October 2019, of any supposed vagueness of the said initial notice. Whilst it is not stated when the Applicants' present attorneys of record came on record, the Respondents' plea was served on them on 23 October 2019. It follows that this is an additional basis demonstrative of the lack of *bona fides* in the application for condonation.

[24] Thus, with due regard to the distinction of the difference in assessing the facts for purposes of pre-notification condonation (or rather "good cause") as required in terms of Section 3(4)(b)(ii) of the Act and condonation for the pre-condonation period or post-notification period as illuminated in **Madinda**, the facts that rendered the

separate requirement of *bona fides* for "good cause" is of equal application insofar as condonation would have been required in any event as amplified by what is set out in paragraphs 21 to 23 above.

[25] In addition to the aforegoing, by virtue of the fact that the explanation in the delay is not satisfactory or reasonable, condonation could similarly not be granted as it would not be in the interests of justice under such circumstances.

[26] In conclusion, lest there be any confusion, this judgment extends only insofar as the Applicants' Claim A is concerned. In my view, [and that of counsel who appeared before me] that is the sole issue that I was called upon to determine and it could not have been otherwise as there was clearly due compliance with Section 3(1) of the Act insofar as the Applicants' Claims B to D are concerned.

[27] Accordingly, the application is dismissed with costs.

H P VAN NIEUWENHUIZEN
Acting Judge of the High Court
Gauteng Division of the High Court, Pretoria
Electronically submitted, therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 31 December 2020 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 December 2020.
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