IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

OF INTEREST

Case no: 1532/2022

In the matter between:

SIYABULELA SIMANGA **Applicant**

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LTD **Respondent**
(Registration Number: M1998/009584/30)

JUDGMENT

Govindjee J

Background and facts

[1] The applicant was injured in a motor vehicle accident on 20 May 2019 on the N6 road between Cathcart and Stutterheim ('the N6'). He instituted action for damages for head injuries caused when he drove over a pothole, alleging negligence

on the part of employees of the respondent ('SANRAL'). SANRAL filed a special plea alleging non-compliance with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act, 2022 ('the Act').[1] The opposed application for condonation followed.

[2] The founding affidavit explains that the applicant received incorrect legal advice that the road on which the collision occurred was a provincial road.[2] That misapprehension was only corrected on 13 May 2022, well outside the prescribed six-month period. A demand for payment was immediately transmitted to SANRAL by email and summons was issued and served a day before the matter prescribed on 19 May 2022.

[3] The blame for the delay is placed on the shoulders of a paralegal working for the applicant's Johannesburg attorneys of record ('Zuma').[3] The founding affidavit suggests that it was only on '23 September 2022' that this individual realised that the collision had occurred on a national road operated and maintained by SANRAL.[4] A further oversight occurred courtesy of the chosen legal representatives. The applicant's demand was not provided to the Chief Executive Officer of SANRAL. He submits, however, that these matters did not prejudice SANRAL whatsoever and, in reply, indicates that he is a lay person with no legal knowledge.

[4] SANRAL acknowledges the 'timeous' service of summons. Nonetheless, it persists in raising an *in limine* prescription point on the basis that various failures in respect of the provision of notice rendered the summons defective, so that the claim had prescribed. SANRAL also denies that the applicant was injured in a motor vehicle collision as claimed, and further denies any obligation to compensate him for

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[1] Act 40 of 2002.
[2] He consulted with his Johannesburg attorneys 'soon after' being discharged from hospital, although that date is unspecified. His affidavit reveals that he was unaware as to whether the N6 was a national road.
[3] Zuma erroneously advised the applicant that the N6 was not a national road, so that the focus was on a claim against the MEC, Department of Roads and Transport Eastern Cape ('the MEC'). This is evinced by an action launched against the MEC and only withdrawn on 20 October 2022.
[4] This in circumstances where the applicant confirms, in his founding affidavit, that his attorneys received information four months previously that '[the N6] may not have been a provincial road and that it could have been a national road it being a matter of common cause that [SANRAL] was responsible for the maintenance of all national roads … and that as a matter of fact it would have been liable to me for payment of my damages'. It is difficult to square these averments.

injuries sustained, highlighting non-compliance with ss 3 and 4 of the Act. While SANRAL does not dispute the averment that the applicant's representatives only realised the status of the N6 on 23 September 2022, it notes that this delay 'leaves much to be desired' and that Mr Siyabulela may have a claim against them for negligent conduct. In particular, SANRAL argues that the applicant has failed to plead or prove its prospects of success in the main action and further failed to account for 'the delay of 35 months' in serving the s 3(1) notice. It alleges prejudice on the basis that, as an organ of state, it must be afforded a 30-day period within which it may consider such a claim, and because it has been forced to engage its own legal representatives in order to oppose a claim with minimal prospects of success.

[5] The applicant argues that it is apparent that SANRAL, even on its own version, has suffered no recognisable prejudice because of the failure to serve proper notice in terms of the Act, and that there are good prospects of success so that it is in the interests of justice for condonation to be granted.

The condonation requirements

[6] The application is premised on s 3(4) of the Act.[5] Interpreting the requirements stipulated in the Act requires appreciation of s 39(2) of the Constitution, so that a generous and purposive interpretation may be given. Refusing the application would adversely implicate the applicant's constitutional right to access to court in order to advance the merits of his claim. This is an important consideration, particularly where the entire basis for the need to apply for condonation is the ineptitude of the applicant's chosen representatives. This is not to suggest that proper compliance with the set requirements may be overlooked. The requirements to be considered before a court may be 'satisfied' that condonation ought to be granted are conjunctive and are to be established by the applicant.[6]

[5] In essence, no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given that organ of state notice in writing of the intention to institute legal proceedings. The notice must be served on the organ of state within six months from the date on which the debt became due. A court may grant an application for condonation if it is satisfied that: i) the debt has not been extinguished by prescription; good cause exists for the creditor's failure; and the organ of state was not unreasonably prejudiced by the failure.

[6] See *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) ('*Rance*') para 11.

[7] The first requirement is that 'the debt has not been extinguished by prescription'. In *Minister of Safety and Security v De Witt*[7] ('*De Witt*), the SCA considered the question whether a court could condone the failure to give notice, or the giving of defective notice, after legal proceedings had been instituted but before the expiry of the prescription period. This included consideration of service, before the prescriptive period had ended, of a notice not in compliance with s 3(2) of the Act.

[8] A strict approach to interpretation was held to lose sight of the purpose of condonation.[8] The SCA concluded that either a complete failure to send a notice, or the sending of a defective notice, entitled a creditor to make application in cases where the state relied on the creditor's failure to comply with the Act.[9]

[9] 'Good cause', the second requirement, is linked to the failure to act timeously.[10] It requires consideration of all factors impacting on the question of fairness of granting condonation, bearing in mind 'the proper administration of justice'[11] and the 'interests of justice'.[12] Relevant factors, to be assessed in a balanced fashion, 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.[13]

[10] As will be illustrated, the case turns on the court being satisfied that good cause exists for the applicant's failure. A survey of decisions of the SCA, in particular, offers guidance on the point. In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*,[14] the court *a quo* granted condonation in circumstances where it

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[7] *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) para 5.
[8] Ibid para 10.
[9] Ibid para 10.
[10] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) ('*Madinda*') para 14.
[11] Ibid para 10.
[12] *Rance* above n 6 para 35.
[13] *Madinda* above n 10 paras 10, 12. The fact that the applicant is strong in certain respects and weak in others must be borne in mind in the evaluation of whether the standard of good cause has been achieved: *Madinda* above n 10 para 13.
[14] *Rance* above n 6.

was satisfied that there was good cause for a two-year delay in service of the notice and based on the respondent's failure to demonstrate any prejudice. This decision was overturned by the SCA, partly on the basis that the company had erred by fixating on the three-year prescription period when it could have acted with greater alacrity in its investigations as to the identity of the debtor.[15]

[11] The cases reveal that courts are generally loathe to penalise a litigant on account of the conduct of his legal representative.[16] There is, nonetheless, a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered.[17] In *Madinda v Minister of Safety and Security* ('*Madinda*'),[18] the court *a quo* refused condonation on the basis of 'complete disinterest' in the conduct of the appellant's case and the consequent failure to maintain contact with her attorney for a period in excess of a year.

[12] In *Ferreira v Ntshingila*,[19] the SCA was confronted with an application for condonation (based on non-compliance with the Uniform Rules) premised on an affidavit filed by a candidate legal practitioner.[20] The court bemoaned the failure of the supervising attorney to file an affidavit explaining the level of oversight that had been provided, or omitted, in respect of the work at hand.[21] The question remained whether condonation should be granted in circumstances where the merits of the matter were strong. The outcome was that condonation was refused on the basis of the failure to provide a full and satisfactory explanation for the delays that had occurred. This in circumstances where the attorney had acted with gross negligence to the extent that the prospects of success became immaterial.[22]

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[15] *Rance* above n 6 para 41 and following.
[16] See, for example, *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) at 23.
[17] See *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141B – D, a case dealing with condonation of non-observance of Rules of Court.
[18] *Madinda* above n 10.
[19] *Ferreira v Ntshingila* 1990 (4) SA 271 (A).
[20] It must be noted that principles emerging from cases dealing with non-compliance with court procedure should not be applied uncritically to the requirement of good cause in s 3(4) of the Act: *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) ('*Lakay*') para 14.
[21] *Ferreira* above n 19 at 280E – F.
[22] Ibid at 281G – 282B.

[13] Finally, in *Shange v MEC for Education, KwaZulu-Natal*,[23] notice had been sent by the applicant's attorney to the national Minister of Education, rather than the respondent, in circumstances where the applicant was unaware of the error and the attorney took responsibility for the oversight. Both the High Court and SCA, in *MEC for Education, KwaZulu-Natal v Shange* ('*Shange*'), had no difficulty in holding that good cause had been established. This in the following circumstances: 'a devil's brew of mistakes, failures and delays in the prosecution of applicant's case' could not be attributed to the applicant, and where those responsible for looking after his interests had 'failed him miserably'; the applicant was not an ordinary litigant but was a minor seeking to advance a legitimate claim; the applicant was bona fide and enjoyed strong, uncontested prospects of success; and where the importance of the case to the applicant was manifest.[24]

[14] It is expected that the party seeking condonation will furnish a sufficiently full explanation of their default, so that the court is able to assess the manner in which it arose, and the defaulter's conduct and motives.[25] The explanation must cover the entire period of the delay and must be reasonable.[26] As Heher JA explained in *Madinda*:[27]

'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.'

[15] This necessarily includes consideration of prospects of success.[28] A case without merit may render mitigation of fault pointless:[29]

'…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

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[23] *Shange v MEC for Education, KwaZulu-Natal* 2012 (2) SA 519 (KZD).
[24] Ibid paras 35, 37, 38; *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA) ('*Shange*') para 16 and following.
[25] *Madinda* above n 10 para 11, citing *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H – 353A. In *Lakay*, the SCA referred to 'an explanation of the default sufficiently full to enable the court to understand how it really came about …': *Lakay* above n 20 para 17.
[26] *Rance* above n 6 paras 35, 48.
[27] *Madinda* above n 10 para 12.
[28] *Rance* above n 6 para 37.
[29] *Madinda* above n 10 para 12.

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.'

[16] The court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant:[30]

'A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of an intended action, eg where an expert report central to the applicant's envisaged claim is omitted from the condonation papers.'

[17] Beyond this, determination of good cause in each case depends on its own facts.[31]

[18] The third leg of the enquiry is separate and specific. It requires the applicant to satisfy the court that SANRAL had not been unreasonably prejudiced by the failure to serve the notice timeously:[32]

'This must inevitably depend on the most probable inference to be drawn from the facts which are to be regarded as proved in the context of the motion proceedings launched by an applicant. The approach to the existence of *unreasonable* prejudice (not simply any level of prejudice …) requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.'

Analysis

Has the debt prescribed?

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[30] *Rance* above n 6 para 37.
[31] *Lakay* above n 20 para 17.
[32] *Madinda* above n 10 para 21.

[19] It may be accepted that the claim for damages is a claim for the recovery of 'a debt' as defined in s 1 of the Act.[33] The Act defines a 'creditor' to mean a person who 'intends to institute legal proceedings' or 'who has instituted such proceedings'. There is nothing to gainsay the applicant's averment as to the date of the collision. The applicant has already instituted proceedings and is a 'creditor' for purposes of the Act. While SANRAL relies on the papers on his failure to serve a valid notice before proceedings were instituted, *De Witt* confirms that he may apply for condonation in these circumstances. It also establishes that the reference in s 5 to a bar to service of process before the expiry of a period of 30 days after the notice is inapplicable to cases where notice has been served out of time, as in the present instance.[34] *Ms Memela*, for SANRAL, rightly did not press the point. The result is that SANRAL's point *in limine* must be refused.[35] Considering the papers, and SANRAL's acceptance of timeous service of summons, I am satisfied that the debt has not been extinguished by prescription.

Does good cause exist?

[20] Summons having been issued and served before the end of the prescriptive period, the court enjoys a discretion to condone the late service of the notice.[36] The notice was served approximately 30 months outside that stipulated by the Act. To be 'satisfied', in terms of s 3(4)*(b)* requires a decision based on the 'overall impression made on a court which brings a fair mind to the facts set up by the parties'.[37] It does not require proof on a balance of probability.

[21] The applicant was injured while driving a motor vehicle and sought legal advice soon after being discharged from hospital. Little more could have been expected. It is accepted that the applicant is a lay person, prone to errors consistent with everything that term implies. He received dubious advice from the outset, but

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[33] The cause of action is a delictual claim for damages relating to SANRAL's alleged omission to have acted in terms of its statutory obligations, as detailed in the particulars of claim. SANRAL is an organ of state.
[34] *De Witt* above n 7 para 20: nothing in s 5 overrides the court's power to condone the giving of defective notice.
[35] Ibid paras 14, 15. To emphasise the point, the judgment adds that condonation might be granted even in cases where no notice has been served whatsoever: para 18.
[36] *Madinda* above n 10 paras 11, 21.
[37] Ibid para 8.

would not have had any reason to question what he was told, for example in respect of the alleged duty on the part of the MEC, Department of Roads and Transport Eastern Cape ('the MEC') and the subsequent institution of proceedings against the MEC during March 2022.[38] Initiating those proceedings would have required, inter alia, giving instructions and consulting with his chosen representatives, and some level of activity on his part. Likewise when he was informed, during May 2022, that the road was a national road to be maintained by SANRAL. At least his legal representatives then acted with haste in ensuring the swift issue of summons.

[22] That the legal representatives were convinced that the MEC was the responsible entity is evinced by the fact that the present action was instituted against the MEC and SANRAL and, in respect of the MEC, was only withdrawn on 20 October 2022. Disconcertingly, despite being aware of the existence of the Act, and presumably having considered its provisions as persons trained in law, the representatives appear to have been persuaded that its requirements were completely inapplicable. This position persisted even once the application for condonation was launched, the applicant being advised by Mr Kobrin, it must be accepted, that his claim fell outside the purview of the Act. The reason advanced for this position beggars' belief:

'As my claim in this action is a delictual claim in which I claim damages from the Second Defendant, I am advised that it cannot be regarded as a debt within the meaning of the Act as liability and the quantum of my claim can only be determined by the above Honourable Court at the trial of this action and the claim only becomes a debt on the date of its determination by the above Honourable Court on trial of this action.'

[23] *Mr Knott*, for the applicant, swiftly, and correctly, distanced himself from this argument. The incongruous implication would be that a court must determine, in favour of the applicant, both liability and merits in respect of an action launched against an organ of state for delictual damages, before the applicant will deign to issue a notice in terms of the Act. This in circumstances where the Act makes it clear

[38] As an aside, the papers fail to explain what transpired between 19 May 2020, when a letter was seemingly drafted holding the MEC accountable, and including reference to the Act, and precisely one year later, when it was sent.

that a 'debt' means 'any debt arising from any cause of action (a) which arises from delictual … liability'.[39]

[24] Implausible as it may appear to be, the papers reflect that this was the advice that was consistently given to the applicant. The implication of this is that it must be accepted that the reasons for the delay must be laid at the door of the applicant's legal representatives, rather than the applicant himself. The representatives' fixation with this erroneous approach is borne out by the inclusion of a footnote to the founding affidavit, clearly at the instance of the applicant's representative, to a decision of the Gauteng Local Division of the High Court in support of the position adopted. Untenable as that position is, it cannot be denied that the applicant has provided a full explanation of the reasons for the delay. He has done so bona fide and the explanation offered is assessed as being sufficient and, in respect of his own conduct, reasonable. Upon careful scrutiny, and as was the case in *Shange*, the papers reveal that the responsibility for the delay has been caused entirely by the conduct of other persons. There is simply no basis to find that the applicant was himself responsible for any part of the delay, which was based on persistent adherence to an incorrect understanding of law. To answer the question posed by *Madinda*, the applicant has produced acceptable reasons for nullifying in whole any culpability on his part which attaches to the delay in serving the notice timeously.

[25] There is a paucity of information which makes it difficult to assess the prospects of success with any precision.[40] I accept *Ms Memela's* argument that, considering the failure to provide sufficient detail about the pothole in question, it cannot be said that the prospects are good. The risk of deficiencies in this respect lies with the applicant. Added to that, on the applicant's own version an oncoming vehicle caused him to swerve his vehicle immediately prior to hitting the pothole which he alleges caused him serious injury. Considering the level of detail provided in the particulars of claim, and in the absence of supporting documentation, the prospects of success are even at best.

[26] At first blush, a survey of the cases suggests that the applicant must suffer the consequences of the conduct of his representatives. A more considered approach on

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[39] S 1 of the Act.
[40] See *Rance* above n 6 para 50.

their part would have obviated the need for these proceedings. Unlike *Madinda*, however, it cannot be said that the applicant himself demonstrated complete disinterest in his case, or that there would have been any basis to expect him to have cause for concern as to the pace or manner of the litigation from the time he first gave instructions. This also distinguishes the present proceedings from *Rance*. The decision in *Ferreira* must be considered in the context of a failure to comply with the Uniform Rules where the respondent's interests in the finality of a judgment already obtained was a crucial factor. Following *Shange*, it is unnecessary to devote too much attention to detailing the problems with the way the case was handled in circumstances where there is no basis for attributing this to the applicant. As in *Shange*, the applicant would have been unaware of the errors and the legal representatives, in essence, take responsibility for the oversight. What is of concern, and must be noted, is that the papers have been crafted in a manner that places the bulk of the blame on Zuma. As in *Ferreira*, Mr Kobrin, the attorney, has not explained the level of supervision provided to Zuma, or any independent attention to the matter, including how it came about that it took some three years to realise that the N6 is a national road for which SANRAL is responsible. This impacts on the costs order to follow.

[27] Considering the relevant factual complex in a balanced fashion, and despite the limited assessment of the prospects of success, it would be unjust to deny the applicant a trial on the merits. The court enjoys a wide discretion which is exercised in favour of the applicant in the interests of justice.

Is there unreasonable prejudice?

[28] I am mindful of the Act's rationale to ensure that state organs, with their extensive bureaucracy, are afforded sufficient opportunity to investigate and consider cases launched against them. Very little prejudice, if any, has been alleged by SANRAL on the papers. What is cited is certainly not the kind of prejudice that constitutes 'unreasonable prejudice'. Complaining, as an organ of state, that legal practitioners have had to be briefed to oppose these proceedings, and highlighting the obvious benefits of timeous notice, falls short of the test. As in *Shange*, the

complaint of prejudice is general and unspecified and unrelated to any facts that indicate prejudice.[41] My overall impression is that SANRAL was not unreasonably prejudiced by the applicant's failure.

The discretion to condone

[29] Having assessed the three requirements for condonation, the court is in a position to consider whether to exercise a discretion to grant condonation according to the established principles.[42] This includes an assessment of the combined weight to be attributed to the three elements of s 3(4)*(b)*[43] and consideration of unexplained periods of delay in instituting condonation proceedings after the notice was *de facto* given.[44] Despite the suggestion in the Act that a creditor may await correspondence from an organ of state, confirming its intention to take the point, before launching an application for condonation, upon which *Mr Knott* relied, this is not the position of the SCA. The period between May 2022, when the notice was sent, and November 2022, when the application was launched, should have been fully explained. This is because the application should have been brought as soon after the default as possible in order to alleviate possible further prejudice to the other party.[45] As in *Madinda*, however, such delays cannot fairly be ascribed to disinterest on the part of the applicant. But the failure to have brought the application earlier is a further reason to censure the applicant's legal representatives.[46] I intend to do so in respect of costs.

Costs

[30] An application for condonation in terms of the Act is unrelated to court procedure. The applicant seeks permission to enforce a right. Where such an application is opposed, costs will typically follow the result.[47]

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[41] *Shange* above n 24 para 22.
[42] *Madinda* above n 10 para 16.
[43] Ibid para 29.
[44] Ibid para 20.
[45] Ibid para 28; Cf *Shange* above n 24 para 24.
[46] Ibid.
[47] *Lakay* above n 20 para 25.

[31] It is unnecessary to repeat the various concerns raised about the quality of legal representation that has been provided to the applicant by his attorneys. At the very least, this warrants no order as to costs, which is the order to be made.

Order

[32] The following order is made:

1. Condonation is granted for the applicant's failure to serve the notice contemplated in s 3(1)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ('the Act') within the period laid down in s 3(2)*(a)* of the Act.

2. Condonation is granted for the applicant's failure to serve notice on the chief executive officer of the respondent in terms of s 4(1)*(e)* of the Act.

3. There is no order as to costs.

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A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 07 September 2023

Delivered: 12 September 2023

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