THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 293/09

Minister of Agriculture and Land Affairs — Appellant

and

C J Rance (Pty) Limited — Respondent

Neutral citation: *Minister of Agriculture and Land Affairs v C J Rance (Pty) Limited*(293/09) [2010] ZASCA 27 (25 March 2010)

Coram: Navsa, Lewis JJA, Hurt, Griesel et Majiedt AJJA

Heard: 2 March 2010

Delivered: 25 March 2010

Summary: Condonation in terms of section 3(4)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – rationale for notice period discussed – factors to be considered for condonation – statutory requirements not met.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Tlhapi AJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and substituted with the following:

'1 The application for condonation in terms of paragraphs 2 and 3 of the Notice of Motion is dismissed with costs, including the costs of two counsel.

2 The respondent's application to strike out the replying affidavit, with the exclusion of paragraphs 26, 27, 28, 45 and 84 is granted with costs, including the costs of two counsel.'

JUDGMENT

MAJIEDT AJA (Navsa, Lewis JJA, Hurt et Griesel AJJA)

[1] The respondent company, CJ Rance (Pty) Ltd (the company), gave notice to the appellant, the Minister of Agriculture and Land Affairs (the Minister), of intended legal proceedings. The notice was delivered after the six month period prescribed by s 3(2)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Act).

[2] The present appeal against that decision is before us with the leave of the court below. The appeal turns on the application of the provisions of the Act, the material parts of which will be dealt with in due course.

[3] The company conducts a sawmilling business and relies on the Kubusi plantation for the supply of pine logs. The company averred

that on 1 September 2003 a fire destroyed a standing crop of trees on the Kubusi plantation, depriving its sawmills of its source of supply and that it consequently sustained a loss of profits. It alleged that the fire originated on 31 August 2003, on land owned and/or controlled by the Minister. In seeking to hold the Minister liable, the company relied, inter alia, on the provisions of s 2 of the National Veld and Forest Fire Act 101 of 1998 (the FFA).

[4] The provisions of the FFA impose a number of obligations on owners to prevent fires originating from or spreading from their land. 'Owner' is defined in s 2 of the FFA as including, in relation to the State, the Minister, the Government department, or the member of the executive council of the provincial administration exercising control over State land or a person authorised by any one of the aforegoing.

[5] Section 34 of the FFA assists the company, in that it creates a statutory presumption of negligence. It provides that in civil proceedings, where a plaintiff proves that he or she suffered loss from a veldfire, which the defendant caused or which started or spread from land owned by the defendant, the latter is presumed to have been negligent in relation to the veldfire until the contrary is proved. In its particulars of claim the company specifically relies on this presumption.

[6] Almost two and a half years passed before the company served notice on the Minister of its intention to institute proceedings against the latter. Notice was served on 16 February 2006. Summons was served on 29 August 2006 (shortly before the expiry of the applicable three year prescription period). This prompted the filing of a special plea by the Minister, in terms of which the Minister asserted that the company's failure to give notice within the prescribed period was fatal to its claim, and the Minister sought an order that the claim be dismissed with costs. In consequence the company launched the condonation application and sought, in the alternative, a declarator that its letter of 16 February 2006 constituted compliance with s 3(1) and (2) of the Act, and further alternatively, that its summons and particulars of claim served on the respondent on 29 August 2006 were valid in terms of s 3(1) of the Act.

[7] The applicant's primary contention in support of its application

for condonation was to the effect that, despite its best efforts, it was not able to ascertain prior to February 2006, first, the identity of the owner and then of the relevant organ of State which controlled it. In this regard it placed reliance on s 3(3)(a) of the Act.

[8] The court below was 'satisfied' that there was good cause for the delay. It held that the company had 'failed to show that it was prejudiced by the delay'. The court below granted condonation. It did not rule on the declaratory order. At this stage, it is necessary to consider the applicable statutory provisions.

[9] The applicable provisions of s 3 of the Act read 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) ……..

(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) . . . .'

[10] It is not in issue that the envisaged claim for damages is a claim for the recovery of 'a debt' as defined in s 1 of the Act and that the respondent represents the Department of Land Affairs, an organ of State.

[11] As can be seen, s 3(4)*(b)*circumscribes a court's power by requiring that it be satisfied that: (i) the debt has not been extinguished by prescription; (ii) good cause exists for the failure by the creditor, ie to serve the statutory notice according to s 3(2)*(a)*or to serve a notice that complies with the prescripts of s 3(2)*(b)*; and (iii) the organ of State was not unreasonably prejudiced by the failure.[1]These requirements are conjunctive and must be established by the applicant for condonation.

[12] The first requirement, namely that the debt has not been extinguished by prescription, does not arise. I intend to deal mainly with the condonation granted by the court below, purportedly in terms of s 3(4)(*b)*of the Act and to consider whether the court below could rightly be satisfied that the statutory requirements had been met. That is the decision appealed against. I intend to do so mainly on the basis of the company's version of events.

[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

[1] See also in this regard *Madinda v Minister of Safety & Security* 2008 (4) SA 312 (SCA); [2008] ZASCA 34 para 6.

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'.[2]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 is not in issue.[3]

[14] In *Mohlomi*the following is Stated:[4]

'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.'

[15] I turn to the facts of the present case. The statutory notification period of six months afforded the applicant as a creditor by s 3(2)*(a)*of the Act, would, in the normal course of events, if taken from the date that the fire destroyed the Kubusi plantation, have expired at midnight on 1 March 2004.

[16] It is of some significance that the principal deponent in support of the company's case is its attorney, Du Plessis, who set out the steps taken over the years to identify the owner and/or controller of the land on which the fire is alleged to have originated. The

[2] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 9.
[3] *Mohlomi* para 9.
[4] Para11

description of events and the explanations for the delay as provided by Mr du Plessis are set out in the paragraphs that follow.

[17] On 1 September 2003 when the fire raged through the Kubusi plantation the company had no knowledge of the origins of the fire, save that it was evident that the fire approached from the north-west. It was clear that the fire had its origins several kilometres away. The company could trace no direct eyewitnesses to the time and the origins of the fire.

[18] The company turned to an internationally renowned expert in the field of forestry related fire investigations who was based in South Africa, namely, Dr Cornelis de Ronde, who commenced his investigations into the origins of the fire on 10 September 2003. It is important to note that De Ronde was not instructed to determine who was the owner and/or controller of the land on which the fire originated. His brief was to identify the spot from which the fire originated.

[19] It took De Ronde approximately six months to finalise his report, which he presented to the company on 7 April 2004. Du Plessis provided no reason for this long delay, nor does he State that from the commencement of the investigation he or the company urged De Ronde to be expeditious.

[20] It is necessary to record that the plantations that sustained fire damage are collectively known as the Amathole pool of plantations and included the Kubusi plantation. The commercial forestry enterprise on the Kubusi plantation is conducted by the Amathole Forestry Company (Pty) Ltd (AFC), which also acquired certain forestry enterprises, including the Amathole pool of plantations from the South African Forestry Company Limited (SAFCOL). The

company is a_of AFC. Before November 2001 DWAF[5] and SAFCOL, which is a State owned enterprise, conducted all State forestry enterprises in the Amathole pool of plantations.

[21] According to Du Plessis, De Ronde's report provided in April 2004, beyond the six month period contemplated in s 3(2) of the Act, indicated that the fire that destroyed the Kubusi plantation originated on the southern slope of a hill to the north of what was referred to as the Cata plantation. The following excerpt from the report was quoted:

'. . . the fire started along a footpath winding down the mountain slope, at the (State ?) property (according to report probably belonging to DWAF) above the Cata plantation.'

Unfortunately and inexplicably, De Ronde's report was not supplied.

[22] Du Plessis Stated that De Ronde's report was the first indication of the origins of the fire. The land on which the fire originated is described as neither being fenced-off, nor accessible by formal road infrastructure. There are no buildings, no road signs and no identifying nameplates.

[23] Du Plessis averred that Mr John Rance, the company's director of operations, has lived in the affected area for more than 50 years, speaks isiXhosa, and is acquainted with the local inhabitants. Rance, subsequent to De Ronde's report, apparently had no success in establishing from the local inhabitants whether anyone had ever laid claim to the land on which it was alleged the fire had originated. There is, however, a commercial forest situated to the south of the land on which the fire originated which is known as the Cata

[5] 'DWAF' is a commonly used acronym for the Department of Water Affairs and Forestry.

plantation. It is common cause that the area in question is hilly, uninhabited terrain with very dense vegetation.

[24] According to Du Plessis, enquiries by him and Rance subsequent to De Ronde's report, yielded a 'guess' that the land in question might be owned by the State and that it was probably controlled by DWAF. We know that De Ronde's report had already, in April 2004, indicated as a matter of probability that the land in question was owned by the State and more particularly by DWAF. By all accounts DWAF signage abounds in the neighbourhood in which the fire originated and spread. According to Du Plessis his enquiries with DWAF in April 2004 in relation to land ownership 'led to a dead end'.

[25] Du Plessis, 'in order to establish with more certainty who owned and/or controlled the land on which the fire originated', subsequently consulted a collection of State plantation and forest maps compiled by SAFCOL in conjunction with DWAF.

[26] The SAFCOL map book identified the land in question as 'Cata 12', 'Nyameni Cata' and 'Nyameni'. Deeds office searches were done in Pretoria for information relating to 'Cata 12', 'Nyameni Cata' and 'Nyameni', but yielded no results. A second search later in the same Deeds Office revealed that this particular land was unregistered State land. This later information was obtained in January 2006. There is no indication about when this information was solicited.

[27] Du Plessis is also the attorney for SAFCOL and, because SAFCOL and DWAF formerly controlled all State forests and

plantations in the area, he thought the former was '*the most likely*to have information pertaining to ownership and control of land in and around plantations and forests'[6](my emphasis). He consequently approached SAFCOL and discussed the matter with a general manager, Mr Johan Raath, who offered to make enquiries. Towards the end of January 2006, Raath informed Du Plessis that the land might well be under the control of the Department of Land Affairs ('DLA').

[28] Armed with this information, a letter was addressed by Du Plessis on behalf of the company on 16 February 2006 to the DLA, purportedly in compliance with s 3(2)(b)(i) and (ii) of the Act.

[29] Subsequently Du Plessis entered into extensive correspondence with the State Attorney acting on behalf of the DLA. Du Plessis' efforts were directed at obtaining an admission by the DLA that it owned and/or controlled the land on which the fire allegedly originated. In April 2006 a site inspection was arranged on that land. This site inspection was attended by representatives of both parties, but yielded no tangible results (the accusations on both sides apportioning blame to the other for this futile exercise take the matter no further and does not warrant any further discussion).

[30] A further flurry of correspondence from Du Plessis to the DLA and the State Attorney ensued, all of which remained unanswered. It was only after summons was issued on 28 August 2006 that the State Attorney responded to this correspondence.

[6] Du Plessis' law offices are located within the SAFCOL building.

[31] In her plea the Minister averred that the land in question is controlled by the Amazizi Traditional Community. This took Du Plessis by surprise. Investigations followed, including research into relevant legislation which led Du Plessis to the Ciskei Administrative Authorities Act.[7]This Act appeared to confirm that the Cata 12 land was under the control of the Keiskammahoek North Tribal Authority (for the Amazizi Tribe). Du Plessis averred that the obscurity and ambiguity of this information itself constitute 'good cause' within the meaning envisaged in s 3(4)b)(ii) of the Act.

[32] It is uncontested that the DLA controls approximately 17 million out of 25 million hectares of State owned land. A significant proportion of this land is rugged and inaccessible. As a consequence administration is difficult. The principal deponent on behalf of the Minister complained that the company's reluctance to share its own information and aerial photographs contributed to the delay in identifying whether the DLA owned the land. The company supplied De Ronde's report to the DLA for the first time in February 2008.

[33] In terms of s 3(4)*(b)*a court may grant condonation if it 'is satisfied' that the three requirements set out therein have been met. In practical terms this means the 'overall impression' made on a court by the facts set out by the parties.[8]

[34] It was submitted on behalf of the company that it took all the necessary steps within its power to identify the owner and/or controller of the land in question. Counsel contended that such steps

[7] 37 of 1984, repealed by the Eastern Cape Traditional Leadership and Governance Act 4 of 2005.
[8] See *Madinda* para 9.

as had been taken by or on behalf of the company were reasonable and constituted 'good cause' within the meaning of that phrase in s 3(4)*(b)*(ii) of the Act. He submitted further that the Minister's uncooperative attitude and the inaction of the DLA's bureaucrats were what created prejudice for the Minister rather than the delay in serving the notice. The Minister's servants failed to signpost the land nominally owned by the Minister and they were totally unresponsive to those affected by the fire. Whilst Du Plessis labelled the Minister and those representing her as being obstructive, counsel representing the company was rightly constrained to concede that at its worst for the Minister her bureaucrats were inept rather than wilfully obstructive.

[35] In general terms the interests of justice play an important role in condonation applications.[9]An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.[10]

[36] 'Good cause' within the meaning contained in s 3(4)*(b)*(ii) has not been defined, but may include a number of factors which will vary from case to case on differing facts. Schreiner JA in dealing with the meaning of 'good cause' in relation to an application for rescission, described it thus in *Silber v Ozen Wholesalers* (*Pty) Ltd*:[11]

'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

[9] *Van Wyk v Unitas Hospital & Another* (Open Democratic Advice Centre as *Amicus Curiae*) 2008 (2) SA 472 (CC) para 20, and cases referred to there.
[10] *Van Wyk* para 22.
[11] 1954 (2) SA 345 (A).

sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives'.[12]

[37] The prospects of success of the intended claim play a significant role – 'strong merits may mitigate fault; no merits may render mitigation pointless.'[13]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. 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.

[38] Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant. Whereas good cause primarily concerns the applicant's conduct and its motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the protection of its interests by receiving timeous notice. The DLA serves as a good example in the present case as to why this requirement must be met. It has a large staff component dealing with many matters relating to the vast tracts of land it administers on behalf of the State. It plainly requires adequate time to sift, analyse, prioritise and decide on matters before entering into litigation.[14]

[39] Condonation must be applied for as soon as the party concerned realises that it is required.[15]The onus to satisfy the court

[12] At 352H-353A.
[13] Per Heher JA in *Madinda* para 12.
[14] Cf *Mohlomi* para 9.
[15] *Madinda* para 14.

that all the requirements under s 4(b) of the Act have been met, is on an applicant, although a court would be hesitant 'to assume prejudice for which (a) respondent itself does not lay a basis'.[16]

[40] As stated above, in deciding the present appeal, I will have regard principally to the company's version of events. The company, as Du Plessis correctly observes, 'had to search for its defendant' in the intended action for damages arising from the devastation allegedly wreaked by the fire. While there can hardly be any quarrel with the enlisting of De Ronde's services fairly soon after the fire, the investigation into ascertaining the identity of the landowner had a distinct lack of urgency about it.

[41] Counsel representing the company submitted that the lack of urgency can best be explained on the basis that the company took the view that the three year prescription period was the outer time limit within which it had to conduct and finalise its investigations. In my view, it is that attitude that was the company's undoing.

[42] De Ronde's brief was most certainly not to ascertain the identity of the debtor – his sole mission was to locate the origin of the fire because that is where his expertise lay. The company failed to provide any explanation for the period of inaction until De Ronde's report was received at the end of April 2004. Aerial photographs which could easily be obtained and which it had in its possession would have assisted at an early stage to identify the surrounding farms and plantations, the ownership and/or control of which could have been investigated at an earlier stage.

[43] As stated above, the approach to SAFCOL and in particular to Raath appears to have been made for the first time in January 2006.

[16] *Madinda* para 21.

On Du Plessis' own version of events, SAFCOL because of its history and operations in the area was the most likely profitable source of any investigation into ownership of surrounding land. No reason suggests itself (and none was advanced before us) why the company did not, during this period of more than six months while De Ronde was busy executing his specific mandate, approach SAFCOL or Raath. On Du Plessis' own description of the steps he took to ascertain the identity of the owner or controller of the land in question he left the most probable source of information as his last, rather than first port of call.

[44] Rance only started his enquiries after De Ronde's report was obtained. With his local knowledge and ability in isiXhosa one would have expected a prompt investigation rather than the delays referred to above.

[45] The State featured very strongly at a very early stage as the most likely landowner. Even though the DWAF reared its head as the most likely contender the only other likely State department, given the nature of the area, is that headed by the Minister. A notice to one or both of these departments would have placed the company in a much stronger position in arguing its entitlement to a condonation order.

[46] I have alluded to the six month period of inaction while De Ronde was doing his investigations. The applicant's inertia continued beyond this period and, troublingly, to an even greater extent. After the first unsuccessful enquiry to the Pretoria Deeds Office on 15 July 2004, nothing at all happened until 30 January 2006. This lengthy lull of some seventeen months is not explained at all by the applicant.

[47] A 70-year lease agreement between AFC and the State was concluded on 1 April 2005. In an attached schedule the leased property is described as, inter alia, 'CATA plantation' and 'portion of the farm Nyameni' and the DLA was reflected as the owner of the land. Apart from denying that the lease applied to the land in question, Du Plessis complained in reply that the agreement is almost two hundred pages long. But that misses the point. Du Plessis knew very well what he was looking for – the identity of the landowner. The land in question lies alongside the leased land and this would have been a strong indicator that the DLA was the likely owner. Du Plessis did not have to peruse the entire document (if this was too burdensome an exercise), since the relevant information was contained in the schedule. Moreover, AFC as the owner of the Kubusi plantation also had a pending claim for damages arising from the same fire and was being represented by the same firm of attorneys as the applicant (viz Du Plessis' firm). Du Plessis Stated that AFC's claim was being investigated simultaneously with that of the applicant. There is no reason why the applicant could not, by exercising the necessary diligence, have given notice shortly after 1 April 2005 when the information in the lease had become available.

[48] Du Plessis' affidavit lacks the necessary detail to qualify as a full and detailed explanation for the delay in relation to which the company sought condonation. A few examples suffice:

(i) He avers that, at an early stage in the investigation, he had visited the scene on more than one occasion. He does not provide any dates of these visits.

(ii) In the same vein, he does not say when exactly he and Rance made numerous enquiries in the Stutterheim district and in the surrounding area.

(iii) No dates are furnished in respect of Du Plessis' consultation of SAFCOL's State forest and plantation maps.

(iv) There is no explanation why De Ronde's investigations took more than six months to complete.

[49] Counsel for the company submitted that its investigations were not directed solely at identifying the owner of the land in question but that it stretched beyond that to determine who controlled the land in question. It is clear from the relevant provisions of the FFA that ownership ought to be a primary focal point.

[50] On the paucity of information supplied by it the company's prospects of success cannot be measured even on the most preliminary basis. This is exacerbated by the problems attendant upon a claim for loss of profits based on the destruction of the property of another. That is an issue on which I do not intend to say anything further.

[51] For all the reasons set out above the company failed to establish good cause for condonation in terms of s 3(4)*(b)*(ii). The court below did not properly apply its mind to the factors set out above. For that reason alone condonation ought not to have been granted.

[52] An applicant who seeks condonation in terms of the Act must show that the relevant organ of State was not unreasonably prejudiced by its failure to give timeous notice.[17]The court a quo that the respondent failed to show that it was prejudiced by the delay. This is a material misdirection as the court below reversed the onus.

[53] The respondent set out in some detail the unreasonable prejudice it had allegedly suffered as a consequence of the delay. These relate primarily to its inability to conduct its own investigations into the cause and origin of the fire. It was common cause that, in the course of his investigation, De Ronde had collated extensive

[17] Section 3(4)*(b)*(iii) of the Act; *Madinda* para 21.

information in respect of, inter alia, the prevailing weather conditions at that time, the origin and direction of travel of the fire, satellite imagery, aerial photographs and charts, temperature and humidity histograms, wind speed and direction, fuel model maps and fire simulation runs. De Ronde's report containing this information was, notwithstanding repeated requests by the respondent, only made available to the respondent after the condonation application had been launched. This information would quite obviously have been of considerable use to the Minister’s own experts in conducting their investigations. The company's response that this information was in the public domain is not persuasive.

[54] The applicant alludes to the site inspection to support its submission in relation to the absence of prejudice to the Minister. The site inspection arranged by the company's representatives proved to be of no assistance. The land in question was observed from a distant hilltop and no proper inspection was held. As the respondent correctly points out, prompt investigation of fire claims are critical. Changes in climate, vegetation and so forth can markedly prejudice any investigation. The respondent would, as is contended on her behalf, in all likelihood have engaged the services of her own fire expert to collate and analyse data obtained. In the present matter it was expected of the respondent to conduct such investigations some three years after the fire. The prejudice is self-evident.

[55] The applicant succeeded in the court below in its condonation application. The declarator sought in the alternative was therefore not necessary. As pointed out above, it was the granting of the condonation order that was the subject of the present appeal. However, the reasons propounded above in respect of the good cause requirement hold good for the contention that the applicant's letter of 16 February 2006 constituted compliance with the relevant legislative requirements. More particularly, it cannot be said, having regard to the provisions of s 3(3)*(a)*that the company could not, by exercising reasonable care, have acquired knowledge earlier of the

identity of the relevant organ of State. As set out above, Du Plessis could have obtained the relevant information if he had acted sooner and more diligently. The contention that the six month period started running only in January 2006, when the information as to DLA being the probable landowner was gleaned from Raath, is without merit and can be rejected without more.

[56] One aspect remains, namely the striking out order by the court below. The parties were agreed that, whatever the outcome of the appeal, the said order remains extant.

[57] For all the reasons set out above, the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court below is set aside and substituted with the following:
'1 The application for condonation in terms of paragraphs 2 and 3 of the Notice of Motion is dismissed with costs, including the costs of two counsel.

2 The respondent's application to strike out the replying affidavit, with the exclusion of paragraphs 26, 27, 28, 45 and 84 is granted with costs, including the costs of two counsel.'

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S A MAJIEDT

ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant: E A S Ford SC
S Rugunanan

Instructed by:
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Port Elizabeth and Bloemfontein

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