THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 280/2020

In the matter between:

ETHEKWINI MUNICIPALITY **APPELLANT**

and

CRIMSON CLOVER TRADING 17 (PTY) LTD
t/a ISLAND HOTEL **RESPONDENT**

Neutral citation: *Ethekwini Municipality v Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel* (Case no 280/2020) [2021] ZASCA 96 (1 July 2021)

Coram: DAMBUZA, MAKGOKA and MBATHA JJA, GOOSEN and UNTERHALTER AJJA

Heard: 7 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 1 July 2021

Summary: Civil procedure – appeal against an order granting condonation for failure to serve notice in terms of s 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – failure to show good cause for delay – order set aside

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ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (D Pillay J, sitting as court of first instance):

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

2 The order of the high court is set aside and replaced with the following:

'The application for condonation is dismissed with costs, including costs of two counsel, where so employed.'

JUDGMENT

Mbatha JA (Dambuza and Makgoka JJA and Goosen and Unterhalter AJJA concurring)

[1] The pertinent issue in this appeal is whether condonation ought to have been granted to the respondent, Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel, for its failure to serve on the appellant, Ethekwini Municipality, a notice in terms of s 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). The notice serves to notify the appellant, within six months of the debt becoming due, of the facts giving rise to the debt and such further particulars of the debt as are in the respondent's knowledge.

[2] On 8 May 2016, the Island Hotel, owned by the respondent and situated on a spur of land bordered by the Isipingo Estuary and the Isipingo Riverfront, was flooded and extensively damaged. Santam Limited (Santam), the insurer of the respondent, instructed loss adjustors to determine the cause of the incident. On 24 May 2016, the loss adjustors advised Santam that there was a possible recovery action, but they were not certain against whom the action lay. During September 2016, the respondent instructed its attorneys to pursue a claim for damages, who in turn, instructed consulting engineers to investigate the cause of the flooding. By 4 October 2016, the respondent had formed a prima facie view that the flooding was caused by the height of the sand berm at the mouth of the Isipingo River, which prevented the storm water from entering the sea. As will appear below, the respondent formed the view that a claim was to be instituted against the appellant.

[3] On 14 December 2016, the respondent submitted to the appellant a request in terms of the Promotion of Access to Information Act 2 of 2000 (the PAIA), seeking documentation relating to the management and/or maintenance of the Isipingo River and the Isipingo River Mouth and estuary. The appellant furnished the requested information by 24 April 2017.

[4] On 19 July 2017, the respondent served on the appellant a notice in terms of s 3(2). By then it had ascertained that the cause of the flooding was attributable to the Isipingo River mouth being blocked by the said sand bar. The respondent held a view that the appellant was responsible for excavation of the sand bar. The appellant advised the respondent that estuarine management, including the breaching of berms or sand bars in estuaries for the protection of the riparian property owners against flooding, were functions falling exclusively within the purview of the provincial government in terms of part A of Schedule 4 of the Constitution. In support of this stance, the appellant furnished the respondent with a copy of the judgment of this Court in *Abbott v Overstrand Municipality and Others* [2016] ZASCA 68.

[5] On 12 September 2018, the respondent launched its application for condonation for failure to serve the appellant with the s 3(2) notice within the prescribed period of six months. The appellant opposed the application on the basis that the respondent had failed to give an explanation for the delay, and to show good cause. The appellant also complained that the respondent's cause of action had changed over time. In support of that complaint, the appellant pointed out that in the s 3(2) notice the respondent had relied on the failure by the appellant to excavate the sand bar at the Isipingo Estuary mouth, whereas in the condonation application, the respondent relied on the failure by the appellant to

ensure that the storm water management system was functioning as it was designed to.

[6] The application served before D Pillay J. The learned judge noted that there was a considerable and unexplained delay by the respondent. Despite this, the court granted the respondent condonation for the late service of its s 3(2) notice. It found that the appellant, as a public authority, had to ensure that there was a functioning storm water drainage system and that the judgment in *Macsteel Service Centre SA (Pty) Ltd v eThekwini Municipality*,[1] which was relied upon by the respondent, made it clear that there was a storm water drainage problem in Isipingo. The high court also found that an order in favour of the respondent was in the public interest as the appellant had to fix the storm water problem. The high court found that the respondent had shown good cause and that prima facie, there were good prospects of success on the merits. It accepted that there would be prejudice to the appellant due to non-availability of witnesses, but this, the court reasoned, would be ameliorated by the availability of records. Aggrieved by this outcome, the appellant appeals, with the leave of the high court, against the judgment, on the basis that the respondent failed to satisfy the statutory requirements for the court to exercise its discretion to grant condonation in terms of s 3(2).

[7] Condonation for the late service of the notice in terms of s 3(2) is governed by s 3(4), which provides:

(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

[1] *Macsteel Service Centre SA (Pty) Ltd v eThekwini Municipality* Case no 10974/2012 (unreported).

the organ of state wilfully prevented him or her or it from acquiring such knowledge.

(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.'

[8] Section 3(4)*(b)* sets out the factors of which the court must be satisfied to decide whether to grant condonation for the failure to serve a notice in accordance with the requirements set out in s 3(2). Numerous judgments have dealt with the interpretation of these provisions, and found that these factors need to be read conjunctively.[2]

[9] In line with s 3(2)*(a)* and the principles propounded in the various judgments, the time limit for filing the notice in terms of s 3(2) against an organ of state is six months. Therefore, if the creditor is out of time, condonation must be sought within the prescripts of s 3(4). In *Madinda v Minister of Safety and Security*,[3] this Court affirmed that:

[2] See *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* [2010] ZASCA 27; 2010 (4) SA 109 (SCA); [2010] 3 All SA 537 (SCA) para 11; and *Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA) para 13.

[3] *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA); [2008] 3 All SA 143 (SCA) para 8.

'The phrase "if [the court] is satisfied" in section 3(4)*(b)* has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties.'

[10] Furthermore, the factors set out in s 3(4), must be considered in light of the well-settled principles on condonation. In *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd*[4] this Court restated the factors which need to be taken into account when considering an application for condonation as follows:

'A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'

[11] It is not enough for an applicant to merely allege that there is good cause for the granting of the condonation, the applicant must show that there is good cause.[5] To decide whether an applicant has given a reasonable explanation for its failure to timeously serve the notice in terms of s 3(2), it is necessary to consider when the applicant had all the necessary information in terms of s 3(4) to enable it to formulate the notice.

[12] In this case the incident occurred on 8 May 2016. The notice was only served on 19 July 2017. On the facts, it is clear that as of 4 October 2016, the respondent had formed a view as to the cause of the flooding, as instructions were given to the engineers to investigate further and identify the debtor. On

[4] *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) para 26.
[5] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA (A) 345 at 352 G-H.

14 December 2016, the respondent launched a PAIA application against appellant, an indication that the appellant had likely been able to identify the debtor. By 24 April 2017, in terms of the PAIA application, the appellant had provided the respondent with all the documents relating to the management and maintenance of the Isipingo River mouth and estuary. The respondent relied on the four months taken to furnish the requested documents as the main cause of delay, however, it was already in possession of the information relating to the cause of action and the identified debtor before lodging the PAIA application. Once the respondent had this information, the period within which the notice had to be served began to run. The respondent failed to appreciate that legal consequences flowed from these known facts, namely that the period of prescription runs.

[13] The respondent erroneously asserted that it required full knowledge of all the facts giving rise to the cause of action before serving the legal notice. It did not proffer any explanation as to why, whilst awaiting the response from the appellant, it could not, as a cautionary measure, serve the notice on the respondent and other potentially responsible State organs. Though all the documents requested were received by 24 April 2017, the respondent waited yet further for an engineer's final report, which it received on 30 June 2017. All these documents were unnecessary for serving the notice on the appellant, because the facts giving rise to the debt and such particulars of the debtor were already within the respondent's knowledge.

[14] As stated already, the notice was only served on the appellant on 19 July 2017. On 27 October 2017, almost three months after the service of the notice, the respondent sent out letters to various State organs, including the appellant, trying to identify the debtor. The appellant's response, dated 6 November 2017,

suggested that the respondent's identified cause of action concerned the competency of the provincial government, and not that of the respondent. The undisputed facts reveal that the respondent did nothing about that information.

[15] The respondent did nothing until 16 February 2018, when it sought a response to the request for condonation embodied in the notice served on 19 July 2017. This was an unwarranted request as the appellant had denied any liability. The respondent persisted with this request until 10 April 2018, when the appellant advised that it would not grant condonation. It took the respondent another five months to bring an application for condonation. No reasons were given for this undue delay. When one takes into account the period from the date of serving the legal notice, 19 July 2017, it took the respondent over a year to bring the application for condonation. In *Madinda*[6] this Court emphasised that good cause is not a simple matter of cause and effect, but involves a court deciding whether the applicant has produced acceptable reasons for justifying in whole or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. On these facts, there is no acceptable explanation for the inordinate delay. In fact, no reasons had been proffered for the delays by the respondent.

[16] Since the inception of the proceedings, the respondent had failed to take steps to pursue its claim. The *laissez-faire* attitude of the respondent carries consequences. The sparsely drawn and self-accommodative founding affidavit leaves a lot to be desired. The respondent tried to shift the blame to the appellant, whilst failing to explain the long periods of inactivity on its part. The high court erred in finding that the respondent showed good cause for the failure to comply with the requirements of s 3(2).

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[6] See fn 3 above, para 12.

[17] A further feature of this application is that the respondent's legal notice referred to a different cause of action than that relied upon in the application for condonation. No explanation was proffered for this change. This meant that the appellant did not know the case to which it had to respond. Regarding the first cause of action, it was pointed out by the appellant that it was excluded as a possible debtor. Instead of engaging with the appellant the respondent kept quiet. It is trite that a court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of delay as explained by the appellant. The respondent *in casu* also failed to explain the discrepancy in the two causes of action.

[18] In the circumstances, the high court misdirected itself when it granted the condonation on the basis of the legal principles advanced by it, which fell outside the pleadings that were before the court. The learned judge expressed the view that there was a responsibility on public authorities, whoever they may be, to ensure that there was a proper storm water drainage system. In addition, I am unable to agree with the high court's reliance on the public interest, which was not before it, when there were other more compelling factors, like the unexplained delay, which militated against the exercise of the high court's discretion in favour of granting the condonation. The high court expressed itself as follows:

'You are not here only on your behalf. I want to make that absolutely clear. The reason you are being granted this condonation is because you must put up the case in the public interest. I cannot emphasise enough that Ethekwini [Municipality] needs to defend it. If it has a real problem with storm water, then it must fix it. Do not defend the indefensible because we will continue to have more and more storm water claims. If there are parties who are co-responsible for anything, then join them because that is what dialogical constitutionalism is all about. Read Froneman J's article on dialogical constitutionalism please.'

This was stated against the backdrop of a respondent that had failed to address the court on the prospects of success and whose case had nothing to do with the

public interest. Before the court was a private company pursuing a subrogated claim.

[19] The concept of 'dialogical constitutionalism', on which the high court relied for its public interest approach, has only ever been referred to in four cases – all authored by the same judge as in this case.[7] It is not clear what the concept entails. It could well be that the learned Judge relies on the constitutionally-entrenched principle of cooperative governance dictated by s 41 of the Constitution.[8] Whatever its merits, it is clear that the principle can only be applicable in the sphere of public law involving one or more of the three spheres of government. It certainly has no application to a case such as the present, which concerns a purely private delictual claim against a municipality. A court may not ordinarily formulate its own dispute resolution procedure outside of the rules of court or practice directives. In this case it was engaged by the parties on a pleaded case to adjudicate a defined dispute.

[20] The high court failed to deal with the prospects of success, save to accept that the court in *Macsteel*[9] made it clear that there was a storm water drainage problem in the area of Isipingo, where the hotel is located. The high court therefore found that 'the prospects of success are prima facie fair'. This was an untenable conclusion, given that the cause of action lacked supporting evidence. This stands in contradiction to the *dicta* of this Court in *Mulaudzi*,[10] where it held that:

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[7] *Motata v Minister of Justice and Correctional Services and Another* [2016] ZAGPPHC 1063; [2017] 1 All SA 924 (GP); *Westwood Insurance Brokers (Pty) Ltd v Ethekwini Municipality and Others* [2017] ZAKZDHC 29; and *Hanekom v Zuma* [2019] ZAKZDHC 16.

[8] Section 41 of the Constitution encourages the three spheres of government to cooperate with one another in mutual trust and good faith, and to promote effective intergovernmental relations, ensure effective communication and coordination, respect the constitutional status, institutions, powers and functions of government, and avoid taking their disputes to court.

[9] See fn 1 above.

[10] See fn 5 above.

'[T]he court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.'[11]

[21] Section 3(3) provides that the debt does not arise until the creditor has knowledge of the identity of the organ of state and the facts giving rise to the debt. It reads further that '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'. I should highlight the provisions of s 3(3)*(a)* that refer to the deemed knowledge of the debtor and the cause of action. The section determines when the creditor must lodge the notice with the State organ. It gives the creditor reasonable latitude to determine when they have deemed knowledge of the cause of action and the debtor. Nothing precludes the creditor from explaining that during the prescribed six-month period, they were not yet in a position to identify the facts with reasonable certainty or to identify the debtor. I highlight this as it appears in this matter that the respondent was confused as to when they could be deemed to have knowledge of the debtor and the cause of action. Although this line of argument could have been of assistance to the respondent, it was not pleaded.

[22] The unexplained delay in the delivery of the notice and the change in the cause of action deprived the appellant of the opportunity to investigate the matter timeously, thereby prejudicing the appellant. The administration of justice requires that such matters be dealt with expeditiously and efficiently.

[23] On an assessment of all the facts, I am not satisfied that the respondent should have been granted condonation by the high court. The high court having

[11] See fn 5 above.

found that condonation should have been granted, correctly determined that there should be no order as to costs. However, as we have found that it should not have granted the order, costs should follow the result.

[24] Accordingly, the following order is made:

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

2 The order of the high court is set aside and replaced with the following:

'The application for condonation is dismissed with costs, including costs of two counsel, where so employed.'

Y T MBATHA

JUDGE OF APPEAL

Appearances:

For appellant:	A M Annandale SC (with her S Pudifin-Jones)
Instructed by:	Livingston Leandy, La Lucia Ridge McIntyre van der Post, Bloemfontein
For respondent:	A J Troskie SC (with him J Thobela-Mkhulisi)
Instructed by:	Norton Rose Fulbright SA Inc, La Lucia Ridge Webbers, Bloemfontein.