THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 779/2019

In the matter between:

MINISTER OF PUBLIC WORKS APPELLANT

and

ROUX PROPERTY FUND (PTY) LTD RESPONDENT

Neutral citation: Minister of Public Works v Roux Property Fund (Pty) Ltd (779/2019) [2020] ZASCA 119 (1 October 2020)

Coram: WALLIS, MOCUMIE, MOLEMELA and NICHOLLS JJA and MATOJANE JJA

Heard: 7 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 9.45 am on 1 October 2020.

Summary: Civil procedure – non–compliance with s 3(1) the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 – application for condonation in terms of s 3(4) – whether s 3(4) permits condonation for non–compliance with the provisions of ss 3(1) and 3(2)(*b*) – whether the respondent's non–compliance with s 3(1) ought to be condoned in terms of s 3(4) – whether the court a quo misdirected itself in relation to requirements of s 3(4)(*b*) – whether condonation should have been granted.

ORDER

On appeal from Gauteng Local Division, Pretoria (Neukircher J sitting as court of first instance):

1. The appeal is upheld with costs including those attendant on the employment of two counsel.
2. The order of the high court is set aside and the following order substituted for it:

   '1 The application is dismissed with costs including the costs of two counsel.

   2 The plaintiff's claim is dismissed with costs, including the costs of two counsel where two counsel were employed.'

JUDGMENT

Matojane AJA (Wallis, Mocumie, Molemela and Nicholls JJA)

Introduction

[1] The issue in this appeal is whether the failure by the respondent to have timeously given notice to the appellant in terms of s 3(2) of the Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act") ought to have been condoned by the court a quo in terms of s 3(4) of the Act.

[2] The notice was given in respect of an action instituted by the respondent against the Minister in which respondent claimed damages in the amount of R340 million arising from the alleged breach by the National Department of Public

Works ("DPW") of a written lease agreement concluded between the respondent and the DPW.

[3] The Minister of Public Works (the Minister) acts in his capacity as a member of the Executive of the Government of the Republic of South Africa, and the Minister responsible for the National Department of Public Works. Mr Ngwane Roux Shabangu, the deponent to the founding affidavit, is the sole director of the respondent.

[4] The notice under the Act was dated 28 August 2014, the same day as that on which the action was instituted. In October 2014 the Minister filed a special plea asking for the claim to be dismissed on the grounds that notice had not been given timeously and there had been no application for condonation. The respondent did nothing about this until it launched the present application on 24 April 2017. Condonation was granted by Neukircher J. This appeal is with her leave.

[5] The appellant contended that the power of condonation in terms of s 3(4) of the Act is only available in respect of non-compliance with the provisions of s 3(2)(a) and does not extend to non-compliance with s 3(1). The appellant argued further that the application for condonation did not satisfy the requirements of s 3(4)(*b*) and that the court in the exercise of its discretion ought to have refused condonation due to the delay by the respondent in bringing the application.

Background facts

[6] On 20 July 2010, the respondent as lessor entered into a written lease agreement with the DPW, as lessee. In terms of the lease agreement, the DPW agreed to lease premises from the respondent for the use of the South African Police Service for 9 years 11 months commencing on 1 November 2010 and terminating on 30 September 2020. Two addenda to the lease agreement were subsequently entered into in December 2010 and January 2011 respectively. The first addendum on 1 December 2010 increased the area and rent payable and the second one on 5 January 2011 altered the period of the lease from 1 April 2011 to 28 February 2021.

[7] The DPW did not take occupation of the leased premises on the commencement date of 1 April 2011, or at any time thereafter, nor did it ever pay any rent for them. It denied the validity of the lease on the grounds of the lack of authority of the DPW officials who concluded the lease. It also contended that various statutory requirements pertaining to procurement of goods and services for an organ of state were not complied with.

[8] On 11 April 2011, the respondent defaulted on its mortgage bond repayment to Nedbank, the bondholder and on 21 April 2011 Nedbank instituted action against respondent for the accelerated outstanding balance of the mortgage bond.

[9] On 13 September 2011, the appellant instituted motion proceedings against the respondent in the Gauteng High Court to declare the lease agreement void a*b initio.* The respondent regarded this Act as a repudiation of the lease agreement.

[10] On 7 November 2011, Nedbank obtained a judgment against the respondent in the foreclosure action for payment of the sum of R248, 589, 308.49 plus interest. Leave to execute was also granted. On 14 August 2013, the property was sold by the sheriff at a sale in execution and was bought by Nedbank.

[11] On 28 August 2014, the respondent issued and served a summons on the appellant claiming damages arising from the breach and repudiation. The damages claimed represented an amount in respect of the value of the lost ownership of the property and the future benefit of the respondent being the owner of the property at the end of the lease without the property being encumbered by a mortgage bond or any liability.

Condonation

[12] The legal requirements for giving notice of the intention to institute proceedings before issuing summons against an organ of state to recover a debt, are fully set out in s 3 of the Act which specifies that:

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

1. (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

2. (b) the organ of state in question has consented in writing to the institution of that legal proceeding(s)-
   (i) without such notice; or
   (ii) upon receipt of a notice which does not comply with all the requirements set out in subs (2).

(2) A notice must-

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

2. (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'.

[13] In terms of s 3(4)(*a*) of the Act, if an organ of state relies on a creditor's failure to serve a notice in terms of subsec (2)*(a),* the creditor may apply to a court having jurisdiction for condonation of such failure. Section 3(4)(*b*) determines that a court may grant an application for condonation 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."

These three requirements are conjunctive, and the court must be satisfied that the requirements have been met before it can exercise its discretion and condone non-compliance with the Act.[1]

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

[14] Counsel for the applicant submitted that the power of condonation in terms of s 3(4) is limited to failure to give timeous notice and that a court cannot condone the failure by the creditor to give notice. This court in *Minister of Safety and Security v De Witt*[2] considered and rejected this interpretation of s 3(4) and held:

'In *Legal Aid Board* Theron J concluded that because s 3(1**)** is couched in peremptory terms, a court has no power to condone a failure to serve a notice prior to the creditor's institution of action. Her finding that 'The court does not have the power to condone the institution of legal proceedings in circumstances where the provisions of s 3(1) have not been complied with" is in my view incorrect. It fails to take into account the purpose of condonation which is to forgive non-compliance or faulty compliance provided that the criteria in s 3(4)(b) are met, and does not accord with an earlier statement in the judgment that s 3(4)(a) 'confers upon the creditor the right to apply for condonation of the failure to comply with the provisions of s 3(1).'

[15] Counsel submitted that this was *obiter* as that case's facts did not require a consideration of the power to condone non-compliance with s 3(1). Whether that is correct – and it might well be said that this was an integral part of the reasoning and therefore part of the *ratio decidendi* – it is a fully considered view of this court not lightly departed from. None of the grounds for departing from an earlier decision of the court were advanced or are present. Counsel's point must be rejected.

[16] The respondent's non-compliance with s 3 in having failed to serve notice within the six month period provided for in s 3(2)(*a*) and only having served the notice on 1 September 2014 after service of the summons on 28 at this 2014, may accordingly, subject to the requirements of s 3(4)(*b)* being satisfied, be condoned by a court.

[17] This court in *Madinda v Minister of Safety and Security*[3] has held that the test for the court being satisfied that the requirements mentioned in s 3(4) are present involves, not proof on a balance of probabilities but, 'the overall impression made on a court which brings a fair mind to the facts set up by the parties. According to the judgment the first of these requires 'an extant cause of action'. Prescription is a mixed

[2] *Minister of Safety and Security v De Witt* para 17.
[3] *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) para 8.

question of fact and law. It is not a matter of impression, unlike the questions of good cause and prejudice in the other sub-sections. The court must therefore be satisfied that the claim has not prescribed in order to grant condonation.

[18] The second requirement of 'good cause' involves an examination of 'all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice', and may include, depending on the circumstances, '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.'

[19] The court held that good cause for the delay is not 'simply a mechanical matter of cause and effect' but involves the court in deciding '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'; and in this process, strong merits may mitigate fault; no merits may render mitigation pointless.[4]

[20] As regards the third requirement it is not all and any prejudice that precludes the grant of condonation. It is only unreasonable prejudice. The availability of witnesses and records will be of particular importance under this head, but other features may also be relevant.

Prescription

[21] The respondent's cause of action is founded on the alleged repudiation of the lease agreement by DPW on 13 September 2011 when it instituted motion proceedings seeking an order declaring the lease agreement void *ab initio.*

[22] In terms of s 12(1) of Act 68 of 1969 prescription commences running 'as soon as the debt is due'. The term ‘debt’ in the section is wide enough to include any liability arising from or owing under a contract. A debt only becomes due when the

[4] *Madinda* para 12.

creditor acquires a complete cause of action and prescription commences to run as soon as the debt is due[5]. The respondent had knowledge of its damages claim long before the applicant brought the application to have the lease declared void ab initio. In paragraph 10.4 of its particulars of claim respondent pleaded that:

"Had the defendant not remained in breach of the lease agreement, had the defendant not repudiated its obligations arising from the lease agreement, and had the defendant made payment of the rental which it was obliged to pay in terms of the lease agreement, the plaintiff would have been in a position to avoid judgment being taken against it by Nedbank".

[23] According to the respondent, the damages claimed represents an amount in respect of the value of the lost ownership of the property and the future benefit of its being owner of the property at the end of the lease without the property being encumbered by a mortgage bond or any liability.

[24] When Nedbank instituted action on 21 April 2011 claiming the full outstanding balance of the loan and seeking a judgment against the respondent and an order declaring the property specially executable, it was inevitable that the respondent would lose the ownership of the property and the future benefit of being an owner at the end of the lease period. This followed from the fact that the respondent had no defence to the claim.

[25] Therefore, the respondent acquired a complete cause of action on 21 April 2011. On the limited facts that the respondent chose to put up in support of its application it must have been apparent by 21 April 2011 that the appellant was not going to occupy the premises or pay the rent, with the consequence that it was going to lose the property. This was a clear repudiation of its obligations under the lease. It was therefore apparent by then that the respondent was going to suffer the damages that are claimed in this action.

[26] The respondent knew the identity of the appellant and the facts upon which its cause of action was based. Summons in the action was served on 28 August 2014 being after the expiry of the relevant three year prescription period which ended on

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[5] See *Haskins & Sells Consulting (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532G approved in *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) para 13, note 16.

20 April 2014. The respondent did not satisfy the court that the claim has not prescribed.

Good cause

[27] It is trite that as a party seeking condonation is seeking a court's indulgence, a full explanation for non-compliance must be given, and the explanation must be reasonable enough to excuse the default.[6] The respondent's explanation for the delay in serving the notice was that it only became aware of the claim after retaining the services of new attorneys in August 2014. Its erstwhile attorneys did not advise of its damages claim and of the need to give notice in terms of s 3(1). The respondent does not explain the delay from October 2014 to May 2018 after it engaged the services of new attorneys.

[28] This explanation is wholly inadequate. Its erstwhile attorneys defended the Minister's application to declare the Lease Agreement invalid *ab initio*. The only reason for doing so was in order to establish the lease's validity in order to pursue a claim for damages against the DPW. No other reason for defending the case occurs to us and counsel was unable to suggest any other reason for doing so. The respondent alleged that substantial fees were paid to its erstwhile attorneys in this regard but did not explain what the fees were for and what advice it received from its previous attorneys and the extent to which the respondent itself contributed to the delay.

[29] By 10 October 2014 when the special plea was filed the respondent was aware that the appellant relied upon non-compliance with the provisions of s 3 of the Act. One would have expected it to bring an application for condonation immediately. Instead it delayed for over three years. The respondent does not explain why over three years elapsed before it could bring the condonation application and what efforts it took to expedite the claim.

[30] There is no explanation of any basis for saying that the officials who concluded the lease agreement were authorised to do so and that the lease agreement was valid in law and binding on the Minister. The application to set aside the lease set out in detail the grounds upon which the respondent said that the officials lacked

[6] See *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) para 23.

authority but the founding affidavit did not say on what basis this could be rebutted. The same affidavit gave details of the non-compliance with mandatory procurement requirements, but the respondent has failed to explain why the lease agreement was not concluded in compliance with the requirement of s 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000, s 38(1)(a) (iii), 44(1)(a), s 66 of the Treasury Regulations and the appellant's supply chain management policy as the lessee was an organ of state, and the procurement involved a considerable amount of public monies. No lawful excuse for non-compliance was proffered.

[31] The respondent has failed to meet the criteria established for condonation in terms of s 3(4) as its explanation is not full enough to enable the court to understand how the default came about and to assess its conduct and motives.[7] Nor does it set out facts that demonstrate that it has a strong case. All that was said in the founding affidavit was that 'if [the allegations in the particulars of claim] are found to be correct, the plaintiff's clam will be successful'. No facts were advanced to suggest that those allegations could be substantiated. Good cause was not established.

Prejudice

[32] The third requirement for condonation is for the respondent to prove that the appellant did not suffer unreasonable prejudice due to the delay. Heher JA in *Madinda* explained that:[8]

'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

[7] See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (AD) at 352G,353H.
[8] *Madinda* para 10.

achieved by putting the court to the task of exercising 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.'

[33] The applicant has pointed out that key personnel who were involved in the negotiation and conclusion of the lease agreement are no longer in the employ of the applicant, and the trial will require oral evidence by everyone who was involved. It mentions that the former acting Director-General who deposed to the founding affidavit supporting the appellant's application for an order declaring the lease invalid has, after disciplinary charges were brought against him, deposed to an unsolicited affidavit in the same matter changing his version.

[34] The applicant avers that if the application is granted, it will be prejudiced in conducting the trial without its key witnesses who have since been dismissed from its employ. Undeniably, an inordinate delay of more than three and a half years between the time the respondent was aware that it was required to bring the condonation application and the time that it brought the application is prejudicial to the applicant. Long delays in litigation are not in the interest of justice as memories of witnesses may fade, documents may get lost and changes in administration may result in a high turnover of senior staff.

[35] Accordingly, the respondent has failed to satisfy the court that the applicant has not been unreasonably prejudiced by the failure to serve the notice timeously.

Conclusion

[36] Because the respondent did not meet the three requirements for condonation in terms of s 3(4)(b) no question of the court exercising a discretion to grant condonation arose. The parties agreed that in that event there was no purpose in the

matter returning to the high court and that the order we grant should dismiss the action.

[37] The following order is granted

1. The appeal is upheld with costs including those attendant on the employment of two counsel.
2. The order of the high court is set aside and the following order substituted for it:

   '1 The application is dismissed with costs including the costs of two counsel.

   2 The plaintiff's claim is dismissed with costs, including the costs of two counsel where two counsel were employed.'

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K MATOJANE

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant	J Peter SC (with him M Mokotedi) Instructed by: State Attorney, Pretoria and Bloemfontein
For respondent:	P T Rood SC Instructed by: Etienne Naude Attorneys, Pretoria Symington & De Kok Attorneys, Bloemfontein