FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4837/2007

In the matter between:-

KATUSHYA SECURITY SERVICES (PTY) LTD Applicant

and

DIHLABENG LOCAL MUNICIPALITY Respondent

CORAM: H.M. MUSI, JP

HEARD ON: 5 NOVEMBER 2009

DELIVERED ON: 19 NOVEMBER 2009

JUDGMENT

H.M. MUSI, JP

[1] This is an application brought in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) for condonation of the failure by the applicant to serve a notice on the respondent of its intention to institute legal proceedings against the respondent in terms of section 3(2) of the Act. The notice must be served within six months of date on which the cause

of action (debts) became due. The applicant served such notice out of time.

[2] It will be helpful to sketch the background to the application. The applicant was awarded a tender by the respondent municipality to provide security services to the respondent. The tender was awarded on 18 June 2003 and was to run for a period of five years. However, by letter dated 22 December 2005 the respondent informed the applicant that its council had resolved to resile from the contract with effect from 23 January 2006. Despite protestations from the applicant, the respondent persisted with the cancellation of the contract and ultimately the applicant stopped work on the contract on 24 January 2006.

[3] Prior to cancellation of the contract, the applicant had instituted action against the respondent claiming arrear payments for services rendered under the same contract. This action was, however, withdrawn on 25 January 2007 for reasons not disclosed in the papers (the applicant indicated only that it was on advice of counsel). Thereafter and on 23 August 2007 the applicant's attorneys served a notice in

terms of section 3(1) of the Act informing the respondent of the applicant's intention to institute action for damages arising from the repudiation of the contract. A copy of the particulars of claim of the intended action was annexed to the letter.

[4] Summons was subsequently issued on 11 October 2007 and duly served. The respondent opposed the action. A full exchange of pleadings took place and the matter was enrolled for trial on 18, 19 and 21 August 2009. In its plea filed on 14 December 2007, the respondent had raised the objection that there had not been compliance with the provisions of section 3(2) of the Act but the applicant did nothing about this until 15 July 2009 when its attorneys addressed a lengthy letter to the respondent's attorneys in which the respondent was requested to consent to the out of time notice in terms of section 3(1). It appears that the respondent did not respond to such letter but it can be accepted that it declined to accede to the request. Quite clearly the applicant could not proceed with the trial under those circumstances and it was duly postponed to enable it to launch the instant application, which it did on 8 July 2009.

[5] The requirements for the grant of condonation under section 3(4) of the Act are set out as follows in subsection 4(b):

> "The court may grant an application referred to in paragraph (a) if it is satisfied that-
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> (i) the debt has not been extinguished by prescription;
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> (ii) good cause exists for the failure by the creditor; and
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> (iii) the organ of state was not unreasonably prejudiced by the failure."

[6] In **MADINDA v MINISTER OF SAFETY AND SECURITY** 2008 (4) SA 312 (SCA), which is a leading case on section 3(4)(b), the SCA highlighted two issues that should be taken into account when considering an application of this nature. The first is that it is not required of an applicant to prove these requirements on a balance of probability. It is only required of the court to be satisfied that the requirements have been met. The matter was put as follows in **MADINDA** at 316 C – D:

> "[8] The phrase 'if [the court] is satisfied' in s 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."

[7] Another aspect is that a distinction must be drawn between two periods. The period within which the notice in terms of section 3(2) must be given is critical. The applicant must explain his/her failure to act within this period. Any delay after this period is irrelevant to the requirement of good cause. But is does not mean that an applicant is exempt from giving an explanation for the subsequent delay, for instance, in applying for condonation; for this is a factor that may influence the court's exercise of its discretion to grant condonation.

[8] With that prelude, I now turn to consider whether the applicant had satisfied the requirements of section 3(4)(b). It is not in dispute that the applicant's claim has not prescribed. The critical question is whether good cause has been shown for the failure to give timeous notice.

[9] The deponent to the founding affidavit, who is the financial and operational director of the applicant, says that he had

not been aware that notice had to be given. This may be so, but the fact is that his company had entrusted the matter to an attorney, who could not claim ignorance of the notice requirement. Indeed the attorney, Mr. M.H. Henning, confirms that the notice in terms of section 3(2) had been served on the respondent when the withdrawn action was instituted. It seems to me that the real reason for the default is the misconception on the part of the applicant's attorneys that it had not been necessary to serve the notice, since they had already served one when they instituted the earlier action. Mr. De Bruin, for the respondent, criticised the manner in which this lapse is explained in the founding affidavit and I think that the criticism has merit. One would have expected Mr. Henning to have put some muscles in the bones contained in the founding affidavit. On the contrary, his confirmatory affidavit merely confirms the bare averments contained in the founding affidavit.

[10] Be that as it may, the circumstances of the case seem to support the averment that the attorneys acted under a *bona fide* misapprehension of the law. In this regard, it should be noted that the earlier action involved the same parties and

was based on the same contract, the cancellation of which gave rise to the subsequent action. It is not a coincidence that the notice was only sent on the eve of the issue of the summons. It can be accepted that at this point the attorneys had briefed counsel who then pointed out that this was a separate cause of action requiring service of a fresh notice. Paragraph 10.3 of the founding affidavit confirms that it is counsel who alerted the attorneys to the default and by that time the six months period within which the notice should have been sent, had elapsed. A strong factor that has to be taken into account is that the applicant had made it clear all along that it would sue for damages by virtue of the repudiation of the contract. The letter of 10 January 2006 makes this clear.

[11] Prospects of success of the action are also a consideration. It is noteworthy that the applicant does not pertinently deal with this aspect in its founding affidavit. I broached this issue in argument and Mr. De Bruin indicated that he would accept that this issue has been sufficiently covered in the founding affidavit based on the contents of paragraph 8 thereof.

[12] In my view, the applicant has made out a *prima facie* case for purposes of this application. The fact is that there was a contract and it has been repudiated by the respondent. Whether the repudiation was warranted would be for the respondent to show at the trial. Taking all the above factors together, I agree with the submission made by Mr. Daffue, for the applicant, that good cause has been shown to exist in this matter.

[13] The requirement that the organ of state must not be unreasonably prejudiced by the non-compliance with section 3(2) can readily be disposed of. It was pointed out in **MADINDA** at 320 H – J paragraph [21] that although an applicant bears the onus of bringing its case within the terms of the statute, it has to be borne in mind that the question whether the respondent will be unreasonably prejudiced is a matter essentially within its knowledge. I have perused the respondent's averments in this regard and they do not disclose prejudice. What the respondent complains about are problems normally encountered in trials: the fact that witnesses may disappear, that memories fade with time etc,

etc. At any rate, whatever prejudice may be there the respondent will not be unreasonably prejudiced thereby.

[14] Finally, I have noted that the applicant was alerted to the need to bring a condonation application as early as 14 December 2007. Yet one year and eight months elapsed before such application was launched. Even when the out of time notice in terms of section 3(1) was sent to the respondent on 23 August 2007, no request for consent in terms of section 3(1)(b) was made. It is only when the trial date was approaching that a belated request was addressed to the respondent to waive objection to the default. The result is that the trial had to be postponed. Now this is an issue that implicates the discretion whether to grant condonation and there is no explanation for it. Nonetheless, I think that it will be unfair to deny the applicant its day in court. However, the applicant deserves disapprobation for this. The applicant or its attorneys have been dragging their heels, with the result that the matter has become protracted to the respondent's detriment and I think that the respondent was entitled to oppose the unreasonably delayed application.

In this regard, I agree with Mr. De Bruin that the applicant should be mulcted with costs.

[15] In the result, the following order is made:

1. Condonation is granted for the applicant's failure to give timeous notice in writing to the respondent of its intention to institute legal proceedings as is required by section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.
2. The applicant is to pay the costs of the application, including opposition thereto.

H.M. MUSI, JP

On behalf of the applicant:	Adv. J.P. Daffue SC Instructed by: McIntyre & Van der Post BLOEMFONTEIN
On behalf of the respondent:	Adv. J.P. de Bruin SC Instructed by: Naudes BLOEMFONTEIN

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