IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3493/2013

In the matter between:

ERNST HENDRIK VAN DEN BERG Applicant

and

NALEDI LOCAL MUNICIPALITY Respondent

HEARD ON: 12 JUNE 2014

JUDGMENT BY: JAJI, AJ

DELIVERED ON: 30 OCTOBER 2014

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[1] This is an application for condonation in terms of Section 3(4)a of the Institution of Legal Proceedings against certain organs of State Act, 40 of 2002 [“the Act”].

[2] Applicant had failed to send a notice of intention to institute legal proceedings against respondent within the required period of six months in respect of applicants first and second claims as set out in the applicant’s summons under case number 3493/2013.

[3] Applicant claims for costs only in the event the application is opposed by the respondent.

[4] **BACKGROUND**

(i) The applicant (plaintiff) in the main action had issued summons against the respondent for damages sustained as a result of three different claims (fires);

(ii) These claims arising out of the different fires were alleged fires on 08/07/2011, 17/06/2012 and the third one of 01/06/2013;

(iii) The third claim (fire) is irrelevant for the purpose of condonation. The notice in respect of it complied with the requirements of the “Act”;

(iv) The applicant in its Particulars of Claim had claimed to have complied with the requirements of the “Act” especially with regards to first and second claims (fire of 08/07/2011 and 17/06/2012);

(v) It is claimed by the respondent that these allegations were incorrect and untrue to the applicant’s knowledge. The notice of the intention to institute legal proceedings in respect of the three fires was only given on 08/07/2013;

(vi) The respondent denied that there was compliance with the “Act” and proceeded to file a special plea to that effect;

(vii) The respondent prayed for both first and second claims to be dismissed with costs for want of compliance with the "Act'. It claimed that the applicant (plaintiff) was barred from claiming damages from respondent (defendant) as a result of the alleged fires of 08/06/2011 and 17/06/2012 respectively because of the non-compliance with peremptory provisions of the "act" (failure to give the required notice as required).

[5] **THE APPLICATION**

(i) The respondent filed an affidavit with the Notice of motion explaining the aim of the application which was obviously for condonation in terms of the "Act" for failure to send the required notice within six (6) months from the date of the alleged cause of action;

(ii) It annexed to the papers annexure "E4" which is a photo or "clip" of "Google Maps" depicting the area ravaged by the fires.

(iii) The applicant submitted and explained the grounds and reasons for its failure not to institute notice in time as follows:

- That in the last ten years, the same spot of its property had fires almost seven times;
- That through the years, he had tried different attempts through his attorneys to take these up with the respondent;

- That the applicant undertook the talks with the respondent on friendly basis hoping that these attempts to sort the fires would bear or yield positive results and that the respondent would give attention and take steps to sort the problem;

(iv) He claimed that early in 2013, he decided as a result of the two previous fires (08/07/2011 and 17/06/2012) to institute a claim when his attorney advised him that the required notice had not been filed. It attached letter annexure "E12" and "E13 in this regard.

(v) The applicant averred that after the exchange of the letters, he initially decided not to sue but later after the fire of 01/06/2013 and its damages decided to sue. He explained that the reason he did not sue for the first two fires was that he had thought the problem was going to be sorted on a friendly manner (good neighbourliness).

(vi) He had annexed different letters to the respondent from his attorneys dating back from June 2004 advising them of the problem. He further averred that the personnel of the respondent visited the site and respondent has been all along aware of the problem.

[6] **ARGUMENT**

(i) Applicant's counsel argued that the background to these fires was clearly depicted in annexure "E4". The place where the

fire started is a dumping site which is in the border of the respondent's land;

(ii) It was argued that these fires caused heavy, widely smoke and as such could not have escaped respondent's attention;

(iii) It was further averred that the claims had not prescribed when the application was brought before court and this has not been denied by the respondent;

(iv) The problem, it is alleged was brought to the defendant in December 2010 and good neighbourliness was followed for instance visiting and approaching the respondent.

(v) The applicant referred to **Madinda's** case regarding the test of "overall impression". It argued further that condonation could not have been unreasonably prejudicial to the respondent because the matter was brought to its attention. The fact that the fires took place over years has been brought to the respondents' attention.

(vi) Applicant referred to a letter "E26" of the papers addressed to the municipal manager of the respondent. Apparently as per the letter, the municipal manager was going to investigate as per the letter dated 08/11/2012. This letter was allegedly not denied and therefore it was impossible for the respondent to have been unreasonably prejudiced;

(vii) Applicant argued that even though no formal demand was made, something better happened. The respondent was visited within 5 (five) months.

(viii) Applicant claimed that good cause has been shown. The founding affidavit dealt with the manner the matter was addressed over the years through the letters. It claimed that only in the third fire, it realised that this was not working hence it decided to sue. It argued that its good neighbourliness must not be used against it.

(ix) It argued that facts setting out the alleged unreasonable prejudice by the respondent have not been laid out. It claimed that the respondent alleged these only in theory. There were no material facts to substantiate.

(x) It prayed for costs as per the notice of motion.

[7] **RESPONDENTS OPPOSITION**

(i) It submitted that the applicant has failed to advance good cause for its failure, alternatively the reasons advance does not constitute good cause for the failure and secondly the respondent has and will be unreasonable prejudiced in the conduct of the case as a result of the applicant's failure to give timeous and proper notice of its intention to institute legal proceedings.

(ii) It submitted that as per the founding affidavit, applicant intentionally (wilfully) refrained from giving notice of intention to recover the so called “debt” as he never had the intention to recover same:

(iii) The respondent argued that the gist of the application was that the applicant wilfully and intentionally refrained from giving the required notice within six months of his intention to sue as a result of the alleged fires which he holds the respondent liable;

(iv) It claimed that it was not afforded opportunity to investigate the specific instances, to identify potential witnesses and to inspect the alleged damages complained of. The resultant effect was that the applicant who initially did not intend to sue, now, unreasonably prejudiced the respondent with regards to identification of witnesses and obtaining evidence to properly conduct its case.

(v) The respondent argued that the applicant has been assisted by and attorney. The requirements of the “Act” are clear that the applicant had to sue within six (6) months. There is no reason or explanation for non-compliance. It argued that all the three (3) requirements have to be satisfied by the applicant before the court can exercise its discretion. The notice was properly served in November 2013 and the condonation was in April 2014.

(vi) There is no explanation for the further default. The respondent argued that this was not a normal failure to act where you deal with a lay person. The applicant is represented by an attorney of the court. Clearly the applicant did not want to sue but he changed later and decided to sue.

(vii) The respondent stated that the prompt investigation of the fire was necessary. It referred to the case of **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd** 2010 (4) SA 109 (SCA).

> "Prompt investigation of the fire was critical. Changes in climate, vegetation and so form can markedly prejudice any investigation"

(viii) Prejudice in this matter, according the respondent was self-clear; applicant can't argue that the prejudice is not laid down. Applicant has the burden to satisfy the requirements. The respondent says it does not know which fire, how much damages if any sustained by applicant. The application for condonation was only brought after the plea was filed.

[8] The respondent referred the court to **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) as well. It also referred to **Torwood Properties (Pty) Ltd v South African Reserve Bank** 1996 (1) SA 215 (W) AT 227 I – 228F.

"The court looks at the reason for the delay, the sufficiency of the explanation offered, the bona fide of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefore."

(i) Respondent claimed that one of other factors in connection good cause practically synonymous with "sufficient cause" besides the efficient furnishing explanation of his default sufficiently is linked to the failure to act timeously.

(ii) The court was further referred to **Mohlomi v Minister of Defence** 1997 (I) SA 124 (CC) where the court stated the following:

"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".

(iii) The respondent quoted the **CJ Rance's** case where the judge alluded that

"in a case of condonation, the applicant is required to give explanation of the entire period of the delay and must be reasonable".

Further it was required that condonation must be applied for as soon as the party realises that it is required. The court dealt with the prejudice caused by inability to conduct its own investigations etc. In the present matter, respondent was expected to conduct such investigations some three years after the fire. Clearly prejudice is self-evident. The respondent in its opposition, paragraph 19 of the answering affidavit stated that it was not afforded the opportunity to investigate the specific instances, to identify witnesses and to inspect the alleged damages of which applicant complains.

(iv) The applicants delay, it is submitted by respondent was a wilful default. It was intentional not as a result of an oversight. The letters referred to by the applicants conversely prove his intentional refusal to sue instead of assisting him.

(v) The delays after six month period expired, is quite long. The applicant being assisted by attorneys throughout, there is simply no reasonable explanation for the delay before the application was made. The result is that the applicant has failed to satisfy all the requirements to succeed with the application for condonation.

[9] **APPLICANT'S RESPONSE**

(i) It argued that the periods of delay have been explained. The municipal manager was taken to site of the first fire. There

can never be any reasonable prejudice because the place was visited. The applicant argued that he explained why he did not follow the formal approach.

[10] **CONCLUSION**

(i) The applicant did not take action when the "good neighbourliness" approach did not yield positive results. He had an attorney at his side all along. What was the relevance of visiting the municipal manager? Does the law require of him to do so? The law requires of him to serve a notice of intention to sue (6) months from the date when the cause of action arose. The "good neighbourly" approach preferred by the applicant cannot replace legal obligation.

(ii) The court can only exercise discretion once the applicant has satisfied the requirements of the act. There is no explanation why the application for condonation was brought after the filing of a plea. The explanation is terse or no explanation at all. In any event applicant clearly did not want to sue (see paragraph 7.7 of founding affidavit) page 12 of the papers.

"Na aanleiding van daardie skrywes het ek eers besluit om nie daardie eise in te stel nie."

(iii) Applicant did not address to the respondent its formal notice of intention to sue. The respondent contended that as a result it did not investigate. The applicant referred in its

heads of argument to the case of **Premier, Western Cape v Lakay** 2012 (2) SA 1 (SCA) at 9C

"word uitgewys dat die primêre doel was die Wet is dat kennisgewing op 'n vroeë stadium aan 'n staatsorgaan gegee word ……"
"Obviously to enable it to investigate the basis of the proposed claim.…."

(iv) It is stated in the case of **Madinda** that "it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. Clearly as the applicant had conceded in its papers that he did not want to sue on the explanation offered by the applicant regarding delay, it cannot be said that it was an explanation offered sufficiently. There is no explanation for the delay dating back to June 2011 to June 2012 leading to November 2013 up to April 2014.

(v) In the case of **CJ Rance and the Minister of Agriculture and Land Affairs**, it was held that condonation must be applied for as soon as the party concerned realises that is required. In the present case, his attorney advised him early in 2013 that the required notice has not been sent. Strangely the application for condonation was brought in April 2014.

(vi) The letters annexed by the applicant did not assist the applicant's application. The letter annexed E13 (dated 25/04/2013) clearly it corroborates the version of the

respondent that the applicant did not want to sue. Hence it is stated in the letter

"ons bevestig dat ons op die stadium (24/04/2013) nie voortgaan met enige stappe teen munisipaliteit nie…"

The letter, annexure E15 clearly refers to 2013 after the fire, annexure E7 letter dated 08/11/2012 relates to a meeting with the municipal manager. Allegedly he promised to investigate long after the fires (08/07/2011 and 17/06/2012).

(vii) Regarding the reasonable acceptable explanation. In his founding affidavit applicant alleged that it was early in 2013 when his attorney advised him that the notice was not given. "The explanation for the delay is not sufficient. The first fire was on the 08/07/2011, the second one on the 17/06/2012. Even if an explanation of good neighbourliness is accepted for the delay between the initial date of the cause of action, there is no explanation for the delay subsequent to the realization by the attorney that notice was not given. i.e. early in 2013. The application for condonation is only brought in April 2014. In the matter of **Ethekwini Municipality v Ingonyama Trust** 2014 (3) SA 240 (CC) the SCA having decided in favour of the respondent in an application to the Constitutional Court for leave to appeal against the decision which was filed more than two months after the deadline for doing so. The applicant (municipality) asked the constitutional court for condonation for its late lodging thereof. The court restated the requirements for granting

condonation and identified the cause and extent of the delay, as well as the prospects of success as the prominent factors in determining whether condonation should be granted in the case. It held that the application for condonation had to fail for the following reasons.

a) Where the delay was not short, the explanation given must not only be satisfactory but must also cover the entire period of delay. Apart from being unsatisfactory, the explanation furnished did not cover the entire period. Consequently, the applicant had failed to establish that the non-compliance was pardonable. The court further noted that the conduct of litigants to observe the rules of court, was unfortunate and should be brought to a halt. The court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is of the court to require compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded, even in relation to rules regulating applications for condonation. Consequently therefore, the application for condonation and leave to appeal were dismissed with costs.

In the case at hand, the explanation given is insufficient, unsatisfactory and furthermore did not cover the whole period of delay.

(viii) In dealing with an unacceptable explanation for the delay, the court in the matter of **Beweging vir Christelik– Volkseie Onderwys and Others v Minister of Education and Others** [2012] 2 ALL SA 462 (SCA) noted the following:

> "The explanation for the delay was unacceptable. In some instances, no explanation at all is tendered, while in others it is so threadbare as to amount to no explanation. Throughout, there is a dearth of detail and where explanations were offered, they tend to indicate that the appellants dragged their heels throughout and did not take steps to safeguard their interests with reasonable expedition. The delay was lengthy and its cause was the laxity and indifference of the appellants. In summary, no full and reasonable explanation has been given for the entire period of the delay."

The application was dismissed without the merits even being considered.

Similarly in the present matter, applicants clearly stated in his affidavit that the appellants dragged their heels throughout and did not take steps to safeguard their interests with reasonable expedition. Clearly from some of the correspondence addressed to the respondent (E13, letter dated 25/04/2013) stating that the applicant decided not to sue. The respondent clearly was prejudiced as it laboured under the impression that it would not be sued, in any event sued now for matters that arose in 2011 and 2012 respectively. The letter (E13) is dated 25/09/2013. The letter

by the applicant contradicts the averments made in paragraph (7.6, page 11) in his founding affidavit i.e

> "vroeg 2013 het ek dit oorweeg om ten aansien van die vorige twee brande (08 Julie 2011 en 17 Junie 2012) eise in te stel. My prokureur het my egter adviseer dat die nodige kennisgewing nie gegee is nie."

In taking the totality of submissions in context, overall impression and the conduct of the appellant, the court reaches an inescapable conclusion that the applicant failed to satisfy the requirements to succeed with the application for condonation.

The application for condonation is thereby dismissed with costs

[11] Accordingly, I make the following order:

1. The application for condonation is dismissed.
2. The applicant is ordered to pay the costs of the application

N.P. JAJI, AJ

On behalf of applicant: Adv H. Benade
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On behalf of respondent: Adv N. Snellenburg
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