



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 527/2022

In the matter between:

CHRISTIAN REVIVAL CHURCH

Applicant

and

**MEC: FREE STATE PROVINCIAL GOVERNMENT:
DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE**

Defendant

In re:

CHRISTIAN REVIVAL CHURCH

Plaintiff

and

**MEC: FREE STATE PROVINCIAL GOVERNEMENT:
DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE**

1st Defendant

**THE HOD: FREE STATE PROVINCIAL GOVERNEMENT:
DEPARTMENT OF PUBLIC WORK AND INFRASTRUCTURE**

2nd Defendant

JUDGMENT BY: REINDERS, J

HEARD ON: 29 FEBRUARY 2024

DELIVERED ON: 28 MAY 2024

This judgment was handed down in open court and distributed to the parties by way of electronic communication.

- [1] This is an opposed application for condonation in terms of Sec 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 ("the Act"). The applicant is the plaintiff in the main action ("the action") under case number 527/2022 and the respondents are the defendants therein. For sake of clarity I will refer to the parties as in the main action.
- [2] The plaintiff instituted action against the defendants on 15 February 2022 claiming certain amounts against the defendants as the replacement value for certain of its assets which were allegedly damaged/removed from a premises that it had rent out to the respondents in terms of a Lease Agreement concluded with the Department of Public Works (Free State Provincial Government).
- [3] On 24 May 2022 the defendants delivered their plea. A special plea was raised denying that plaintiff complied with the provisions of s 3(1)(a) of the Act in that plaintiff failed to give written notice (the notice) of its claim within six months from date on which the cause of action arose as required by the Act. This was followed by an amendment to the plaintiff's particulars of claim on 3 October 2023 with the defendants filing their amended plea on 18 October 2023. It is common cause that the notice was furnished on 13 September 2023, which was outside of the prescribed six months from the date on which the debt became due.
- [4] The deponent to the founding affidavit is the plaintiff's attorney of record. A confirmatory affidavit by the director of the applicant is attached thereto. The plaintiff explains that the Lease Agreement was ultimately terminated by defendant who vacated the premises on 29 December 2020. Prior to this termination, representatives of the parties had been in communication in anticipation of the termination of the lease. As early as 1 October 2019 defendants were advised that repairs would need to be effected prior to vacation of the premises. An itemised list stipulating the applicable repairs required was provided to defendants. A further meeting was held between the parties on 4 November 2020 and pursuant to defendants' vacation of the premises, e-mails were addressed to the defendants informing them that

certain assets were removed from the premises and their return was demanded. Defendant on 11 January 2021 requested a list of the goods removed and, according to the affidavit, the defendants were once again supplied with a list of assets allegedly removed from the premises. Plaintiff conducted various repairs to the premises and ultimately the summons was issued on 8 February 2022. The attorney explains that when the plea was filed he was in the process of leaving the employ of his previous employer and he needed to arrange for transfer to his newly incorporated firm. It was only thereafter and after consultation with counsel that he was advised that the provisions of the Act apply whereas he was previously under the *bona fide* but mistaken belief that the said provisions are only applicable to delictual damages. He admits that this view of his was wrong. The defendants having denied the plaintiff's request for the aforementioned oversight attributable to a misunderstanding of the applicability of the Act, necessitated the plaintiff to issue the application *in casu* on 14 November 2024. In its replying affidavit the plaintiff alluded thereto that the defendants had expressly admitted the conclusion of the Lease Agreement and have not pleaded rectification of any of the terms thereof.

- [5] The defendants, by way of an affidavit deposed to by the Head of Department (HOD) of Public Works and Infrastructure (the first defendant), oppose the application on the basis that the plaintiff has failed to establish good cause for his non-compliance with the Act and has failed to prove that the defendants will not suffer unreasonable prejudice due to the delay in serving them with the required notice. Reliance in particular is placed thereon that plaintiff did not deal fully with the entire time for the delay nor with good prospects of success on the merits of his claim. It is the defendants' contention that the defendants would be unreasonably prejudiced if the late filing of the notice is allowed as plaintiff's non-compliance has denied them the opportunity to investigate the terms and basis of negotiations which influenced the conclusion of the Lease Agreement. The HOD explains that individuals who were involved therein initially are no longer in the employ of the department, and some of the documents which would be needed cannot be traced even after a diligent search.

[6] The legislative framework for condonation is set out in Sec 3(4) of the Act which provides as follow:

- (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) ...

[7] Both parties placed reliance on *Madinda v Minister of Safety and Security*¹ where the Supreme Court of Appeal confirmed that a court may grant an application for condonation if satisfied that the above three requirements have been met. The test in doing so is 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.”**² (emphasis added)

7.1 It was held that the 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'.³

¹ 2008 (4) SA 312 (SCA).

² At para [8].

³ At para [10].

- 7.2 At para [12] Heher JA held that good cause for 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, '[s]trong merits may mitigate fault; no merits may render mitigation pointless'."

See also: ***Minister of Agriculture and Land Affairs v CJ Ranch (Pty) Ltd***⁴.

- [8] Applying the above principles to the merits of the application I am inclined to grant the condonation as prayed for. It is not contested that the plaintiff's claims against the defendants had not prescribed at the time when the action was instituted. The pleadings have been closed, and in my view that the plaintiff's case is not devoid of any merit. The plaintiff's cause of action remains the written Sale Agreement between the parties. In my view therefore the defendants cannot be heard to complain that they have been unreasonably prejudiced due to the fact that most of the parties who were signatories to the Sale Agreement are no longer in the employ of the defendants. It is indeed axiomatic that changes to defendants' employees over the period of time would have been inevitable. However, the parties had been in constant communication over a considerable period of time and the defendants were not unaware of the issues between the parties. The matter ought to be properly ventilated in a court of law. Although criticism against the attorney is warranted, he was in my view not *mala fides* in doing so, nor did he display a flagrant disregard for the provisions of the Act. Moreover, none of the plaintiff's actions (more specifically the communication between the parties in the history of this matter) is indicative of the plaintiff not having an interest in proceeding with its intended legal action against the defendants.

- [9] Relying on ***Premier of the Western Cape v Lakay***⁵ I was urged by counsel for the plaintiff to grant the costs of the application in favour of the plaintiff. The

⁴ 2010 (4) SA 109 (SCA) at para [37].

⁵ 2012 (2) SA 1 (SCA).

filing of the notice was late for a considerable period of time and it remains an indulgence sought from this court. Moreover, the defendants in my view were not unreasonable in opposing the application. In fact, it did so in protection of the public purse. Accordingly, in exercising my discretion in all the circumstances of this application, I deem it just and appropriate that each party be ordered to pay its own costs.

[10] I therefore make the following order:

1. The application succeeds.
2. Condonation is granted for the applicant's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 within the period laid down in section 3(2) of the Act.
3. Each party to pay its own costs.



C REINDERS, J.

On behalf of the Applicant:
Instructed by:

Adv. PJJ Zietsman
Muller Gonsior Inc
BLOEMFONTEIN

On behalf of the Respondents:
Instructed by:

Adv. L Tielai
State Attorneys
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