11/05/2018

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO : A 346/2017
MAGISTRATE'S COURT CASE NO : 6081/2015

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: YES / ~~NO~~

11/05/2018
DATE

SIGNATURE

In the matter between:

STEVEN NTHAMBELENI TUWADUVHANI — **First Appellant** (First respondent/Defendant in the Court *a quo*)

MINISTER OF POLICE — **Second Appellant** (Second respondent/Defendant in the Court *a quo*)

and

EMMY UGO OBGECHIE — **Respondent** (Applicant /Plaintiff in the Court *a quo*)

JUDGMENT

HEYSTEK AJ

[1] The respondent in this appeal is the plaintiff in an action instituted against the first appellant arising from a motor vehicle collision that occurred on 4 March 2014 at the corner of Paul Kruger and Visagie Streets, Pretoria. At the time of the accident,

plaintiff was the driver of a Mercedes Benz ML 350 motor vehicle in respect of which he alleges he at all relevant times bore the risk of damage to, whilst the other vehicle, a 2005 Volkswagen Polo motor vehicle, was driven by the respondent.

[2] The first appellant, as the only defendant in the matter in the Magistrates' Court, did not enter a notice to defend the matter and the plaintiff proceeded to obtain default judgment against the first appellant. However, in an affidavit in support of an ex parte application to stay the execution of a warrant of execution, served upon the respondent's attorneys on 26 January 2017, first appellant alleged that he was at all relevant times employed by the second appellant and at all relevant times acted within the course and scope of his employment. He alleged further that he drove the MEC of Sports, Arts and Culture and that the vehicle was registered with the relevant State department at the time of the collision. It appears from the judgment of the court *a quo* that a rescission application was also served (where the first appellant deposed to an affidavit dated 31 January 2017) and that the rescission was granted in favour of the first appellant on 16 March 2017.

[3] On 2 March 2017 the respondent lodged an application in the Magistrates' Court for the district of Tshwane Central (held at Pretoria) under case number 6081/2015, seeking the following prayer in par 1 of the notice of motion:

"That the Applicant's failure to serve a Notice in terms of Section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002, within the prescribed time period, be condoned in terms of Section 3(4)(a) and (b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002."

The second appellant was cited as the second respondent in the notice of motion: application for condonation.

[4] In his founding affidavit, respondent stated that he was completely unaware of the fact that the first appellant acted within the course and scope of his employment and as duly instructed by the second appellant, and that he only became aware thereof upon service of the first appellant's affidavit in support of an *ex parte* application to stay the execution of the warrant of execution (which was served on 26 January 2017).

[5] The respondent's founding affidavit proceeded to allege that the collision was caused due to the sole negligence of the first appellant and that as a result of the first appellant's allegations of the vicarious liability of the second appellant, he now claims payment of the sum of R 43 450,00 from the second appellant.

[6] The application for condonation was granted by the learned magistrate on 7 June 2017, who further ordered that the costs of the application shall be costs in the action.

[7] The second appellant (second respondent in the court *a quo*) lodged an appeal against the aforesaid judgment and order of the learned magistrate delivered on 22 May 2017, as supplemented by written reasons dated 7 June 2017.

[8] The present appeal concerns a consideration of the following three mains grounds:

[8.1] Respondent impermissibly sought to join the second appellant as a party in the proceedings without having complied with the provisions of Rule 28(2) of the Magistrates' Court Rules;

[8.2] The court *a quo* lacked jurisdiction to decide the issue of condonation in terms of s 3(4)(a) of Act 40 of 2002 as there was no pending action before it between the second appellant and the respondent;

[8.3] It has not been shown to the satisfaction of the court *a quo* that the matter has not prescribed in terms of s 3(4)(b)(i) of Act 40 of 2002 and that it was therefore not competent for the court to grant condonation.

Legal aspects

[9] Section 3 of Act 40 of 2002 read as follows:

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

(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

(b) the organ of state in question has consented in writing to the institution of that legal proceedings—

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must—

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

(b) ...

(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 the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(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."

[10] As stated by Lewis JA in the case of **Minister of Safety and Security v De Witt** 2009 (1) SA 457 (SCA) at par 10, the purpose of condonation is to allow the action to proceed despite the fact that the peremptory provisions of s 3(1) have not been complied with. Section 3 must be read as a whole. First, it sets out the prerequisites for the institution of action against an organ of State: either a written notice or consent by the organ of State to dispense with the notice. Second, it states the requirements that must be met in order for the notice to be valid. And third, it states what the creditor may do should he or she have failed to comply with the requirements of ss (1) and (2): he or she may apply for condonation for the failure. Thus either a complete failure to send a notice, or the sending of a defective notice, entitles a creditor to make the application.[1]

[11] S 3(4)(a) therefore makes it clear that non-compliance with the provisions of s 3(2) may be condoned by a court having jurisdiction. It has been held that the Magistrates' Court does have the requisite jurisdiction to consider applications for condonation brought under s 3(4)(a).[2] 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 probabilities. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties.[3]

[12] The structure of s 3(4) is now such that the court must be satisfied that all three requirements have been met. Once it is so satisfied the discretion to condone operates according to established principles in such matters, such as those set out in **United Plant Hire (Pty) Ltd v Hills & Others** 1976 (1) SA 717 (A) at 720 E-G.[4]

Joinder

[13] In the application for condonation, issued under case number 6081/2015, the respondent (applicant in the court *a quo*) cited the second appellant as the second respondent.

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1 **De Witt**, *ibid*

2 **Ntshingila v Minister of Police** 2012 (1) SA 392 (WCC)

3 **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) at par 8

4 **Mandida**, *supra*, at par 16

[14] The purpose of the application, however, was not to obtain the joinder of the second appellant as the second defendant to the action, but merely to seek the required condonation in terms of s 3(4) of Act 40 of 2002. To that extent therefore the second appellant was cited as the second respondent (not second defendant) in the application.

[15] Once condonation is granted, and further allowed to stand on appeal, it will necessarily follow that second appellant will have to be joined as a defendant in the main action by utilising the provisions of Rule 28.

[16] There is accordingly no merit in this ground of appeal.

Jurisdiction

[17] The second appellant submits that before a Magistrates' Court can have jurisdiction to grant condonation in terms of section 3 there must be a pending action between the parties.

[18] The case of **Minister of Safety and Security and Another v Bosman**[5] relied upon by the second appellant is not on point. In the **Bosman** case the respondent, impermissibly, sought to substitute the Minister of Safety and Security as a party by filing an 'amended summons'. The amended summons was then served only on the attorney representing the appellant and not on the National Minister or the State Attorney. The manner in which the respondent therefore sought to introduce the Minister as a party was held to be wholly inappropriate and accordingly the Magistrates' Court in that matter was correct when it upheld the special plea of non-joinder and when it dismissed the respondent's claim.

[19] Act 40 of 2001 makes it clear that pending legal proceedings between the creditor and the organ of State is not required. The Act defines a creditor to mean "*a person who intends to institute legal proceedings against an organ of State for the recovery of a debt or who has instituted such proceedings ....*". S 3(1) proceeds to state that:

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5 2010 (2) SA 140 (A)

"No legal proceedings for the recovery of a debt may be instituted against an organ of State unless - ....."

[20] In the case of **De Witt** a contrary proposition was advanced, namely that condonation cannot be granted *after* proceedings have already been instituted. Lewis JA held at par 15 that an application for condonation is just that. It does not necessarily embody also an application for leave to institute proceedings. But if it does, then clearly the court may grant such leave. If, however, proceedings have already been instituted, as in that case, then there is no need to provide that the court may grant leave. Lewis JA then concluded by stating at par 15:

> *"Expressly empowering a court to grant leave to sue does not impliedly mean that one cannot sue before applying for condonation."*

[21] The contrary position should also apply, namely that the institution of legal proceedings between the creditor and the state organ is not a pre-requisite for obtaining condonation. That this is *a fortiori* the position appears inter alia from the contents of paras 11 and 17 of Lewis JA's judgment in the **De Witt** case.

[22] H M Musi JP in the **Tshisa** case at 159C therefore held that a condonation application *"is something extraneous to the subject-matter of dispute before the court."*

[23] In the present matter there is litigation pending between the respondent (as the plaintiff) and the first appellant (as defendant). All that was requested from the court a quo was to grant condonation for the respondent's failure to timeously give notice to the State as was required by ss 2(a) of Act 40 of 2002.

[24] As was held by H M Musi JP in the **Tshisa** case at 158H, where s 3(4)(a) says that a creditor may apply to a court having jurisdiction, the legislature must have intended to mean any court having jurisdiction over the main claim (and that would include the Magistrates' Court).[6]

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6 See also the conclusion at par 18 of the judgment as well as the remarks by Zondi J in the **Ntshingila** case at 397B-D and at par 38

[25] I therefore hold that the Magistrates' Court had the requisite jurisdiction to entertain the application for condonation.

Prescription

[26] The respondent's cause of action arose on or about 4 March 2014, which is the date of the collision. The application for condonation was filed on 2 March 2017 and was granted on 22 May 2017. The appellant therefore argues that the matter has prescribed and that it is clear that the respondent gained the requisite knowledge of the debt on or about 14 March 2014 as it appears that he knew the identity of the driver as well as the particulars of the vehicle that he was driving in. It is argued further that this placed the respondent in a position to identify the debtor as prescribed in s 12(3) of the Prescription Act, Act No 68 of 1969.

[27] Section 12(3) of the Prescription Act 68 of 1969 provides that prescription of a debt begins running once the debtor has knowledge of, or is deemed to have knowledge of, the identity of the debtor and of the facts from which the debt arises. As was held in the case of **Minister of Finance and Others v Gore NO** 2007 (1) SA 111 (SCA) as to when the respondent had acquired such knowledge, that mere opinion or supposition was not enough. There had to be a justified, true belief.

[28] The fact that the respondent had the number plate of the vehicle concerned and obtained the identity of the driver would not have placed the respondent in a position to establish, as a matter of course, that the first appellant acted at the time within the scope and course of his employment with the second appellant. There was no duty on him to establish the ownership of the vehicle.

[29] There are no facts to gainsay the respondent's version that he was completely unaware of the fact that the first appellant was instructed by the second appellant to drive the MEC of Sports, Arts and Culture; that the vehicle was a State department vehicle; and that the first appellant therefore acted within the course and scope of his employment. It is also not sufficient to submit, as the second appellant does in the answering affidavit filed on its behalf, that "*this information should be apparent from the statements made to the police after the accident*". It was nowhere alleged that such information does in fact appear from the reports or even that such reports exist.

[30] The conclusion that I arrive at is therefore that the condition in s 3(4)*(b)*(i) of the Act does not operate against the respondent. On the facts, the respondent only became aware, for the first time, that he had a claim against the second appellant as joint debtor when he was informed in the affidavit delivered on 26 January 2017 that the first appellant was employed by the second appellant as at the time of the accident.

Conclusion

[31] As have been held by Lewis JA in the **De Witt** case (*supra)* the discretion to grant condonation may only be exercised if the three criteria in s 3(4)(b) are met, namely that: the debt has not been extinguished by prescription (at issue in this case); that good cause exists for the creditor's failure; and that the organ of State has not been duly prejudiced. The Minister did not rely on either of the latter two criteria in this appeal.

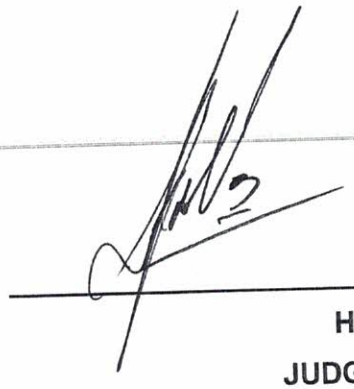
[32] Since I have held that the debt had not prescribed and furthermore since it was not contended before us that the respondent had not shown good cause for his delay, nor that the Minister was unduly prejudiced, condonation was correctly granted by the court *a quo*.

[33] **ACCORDINGLY, I PROPOSE THE FOLLOWING ORDER**:

The appeal is dismissed with costs.

A M HEYSTEK
ACTING JUDGE OF THE
HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

I agree and it is so ordered.



H J DE VOS
JUDGE OF THE
HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE OF HEARING:	11 May 2018
DATE OF JUDGEMENT:	11 May 2018
APPEARANCES:	
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Instructed by:	State Attorney: Pretoria
For the Respondent:	Adv. Z. Marx du Plessis
Instructed by:	VZLR Incorporated