IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: **63060/2018**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: 20/8/2023
DATE: 5 September 2023
SIGNATURE

In the matter between:

JAN JOACHIM JANEKE **APPLICANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **FIRST RESPONDENT/ DEFENDANT**

THE MEC FOR ROADS AND PUBLIC TRANSPORT. GAUTENG **SECOND RESPONDENT/ DEFENDANT**

Delivered :This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploaded on caselines electronic platform. The date for hand-down is deemed to be 5 September 2023.

JUDGMENT

YENDE AJ

Introduction

[1] On 21 October 2013 Bosielo AJ[1], writing for the majority in the Constitutional Court noted the following in paragraph 32:

> " *I need to remind practitioners and litigants that the rules and court's directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' roll, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive "* .

[2] He continues to note at paragraph 33 that:

> *Recently this Court has been inundated with cases where there have been disregard for its directions. In its efforts to arrest this unhealthy trend, the Court has issued many warnings which have gone largely unheeded. This year, on 28 March 2013, this Court once again expressed its displeasure in eThekwini[2] as follows:*
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> *" The conduct of litigants in failing to observe Rules of this Court is unfortunate and should be brought to a halt. This term alone, eight of the 13 matters set down for hearing , litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warnings issued by this Court in the past. In [Van Wyk[3]], this Court warned litigants to stop the trend".*

The Court said:

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[1] Grootboom v National Prosecuting Authority and Another (CCT08/13) [ZACC 37; 2014 (2) SA 68 (CC);2014 (1) BCLR 65 (CC); [2014]1 BLLR 1 (CC); (2014 35 ILJ 121 (CC) (21 October 2013)
[2] eThekwini Municipality v Ingonyama Trust [2013] ZACC 7; 2013 (5) BLR 497 (CC)
[3] Van Wyk v Unitas Hospital and Another (Open Democracy Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 CC; 2008 (4) BCLR 442 (CC)

" There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits . In some cases, litigants either did not apply for condonation at all or if they did, they put up flimsy explanation. This non-compliance with the time limits or the rules of Court resulted in one matter being postponed and the other being struck from the roll. This is undesirable .This practice must be stopped in its tracks".

[3] Earlier in paragraph 30 of that same judgment he noted that

" There is another important dimension to be considered. The respondents are not only ordinary litigants. They constitute an essential part of government. In fact , together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to " assist and protect the courts to ensure the Independence, impartiality, dignity, accessibility, and effectiveness of the Courts"[4].

[4] At the commencement of proceedings the Court had to deal with non-compliance with the **Judge President's Consolidated Directive 2 of 2022**[5] by the Applicant as well as non-compliance with the Order of this Court by the Second respondents , the order granted on the 26 January 2021 by Tlhapi J[6]. In terms of the Court Order, it was ordered that;

" The Second Respondent is granted an opportunity to file an application to condone the late filing of its answering affidavit delivered on 7 October 2019 with 20 days from date of this order, being by no later than 24 February 2021[7]".

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[4] Section 165 (4) of the Constitution of the Republic of South Africa Act 108/1996.
[5] The Judge President's Consolidated Directive dated 08 July 2022 (Directive 2 /2022) in respect of the opposed motion court provides as follows: " 152.2. The parties shall endeavour to agree about whether the matter may be disposed of without oral argument;" "153. If no agreement is reached about foregoing oral argument, that must be communicated to the Judge in a practice note uploaded to Caselines and sent by e-mail, not later than 5 Court days from the date on which the matter is set down." " 155 .The joint practice note should be uploaded to the case file on Caselines…no later than 5 Court days prior to the hearing date…" "159. The Applicant remains dominus litis and is ultimately responsible for the efficient disposal of the application".
[6] See caselines paginated pgs. 003.1-2-003.1-2
[7] Id.

[5] The second respondent had to bring a condonation application for the late filing of its answering affidavit by no later than 24 February 2021 instead of complying with same, the second respondent only served and uploaded on Caselines two days prior to the hearing of the main application (27 May 2023) its Affidavit which it seek the Court to consider in condoning its non – compliance with the order granted on the 26 January 2021 by Tlhapi J.

[6] The second respondent contends that due to an oversight in the Office of the State Attorney, the application for condonation of the delay in delivery of its answering affidavit in the application brought by the applicant for condonation of the failure on his part to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 was not enrolled for hearing in the unopposed motion court. The Second respondent continues to allege that he suffered from hypertension and on his doctor's orders, he was unable to attend office during March 2020 until 5 April 2022 on which date the Covid-19 National State of Disaster was terminated. In essence the second respondent contends that no one in the State attorney's Office could deal with this matter but himself.

[7] The second respondent further argues that the interest of justice demands that the application brought by the second respondent for the delay in delivery of its answering affidavit be heard prior to the adjudication of the main application for condonation of the failure to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40/2002.

[8] The applicant in the main application opposes that the court should not condone this delay by the second respondent in delivering its answering affidavit in that the second respondent by the order of this court had to bring a formal condonation application, that without a formal application for condonation the second respondents answering affidavit is not properly before the Court .

[9] The second respondent argues further that the joint practice note *in casu* was uploaded to Caselines on the 25 May 2023 only, being 2 days from the date on which the matter was set down. It submitted that if the Court is not willing to

condone its delay in delivery of its answering affidavit to the main application, the Court might as well remove this main application from the roll for non- compliance with the Judge President's Revised Consolidated Directive 2 of 2022.

[10] As adumbrated *supra*, the Court is perturbed in the manner that the litigants in spite of the Constitutional Court pronouncement on its displeasure with the trend of litigants not complying with the directives of the Court and more importantly with the Orders of this Court. Both the litigants in casu have demonstrated a clear disregard of the Order of this Court as well as the Judge President's Revised Consolidated Directive 2 of 2022. I plead with the litigants to halt this unbecoming practice.

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[11] In light of the age analysis of the matter, the cause of action having aroused on 24 May 2014. I found that in the interest of justice the Court will condone the late delivery of the second respondent's answering affidavit.

Nature of the Proceedings

[12] This is an opposed application for condonation, the applicant approaches the Court for the following orders that:

[12.1] the applicant's failure to comply with the provisions of section 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Act") be condoned;

[12.2] the Applicant's failure to comply with the provisions of section 4(1)(a) of the Act be condoned;

[12.3] service of the summons in the action before the expiry of a period of 30 days after giving notice of the intended legal proceedings, as required by section 5(2) of the Act, be condoned.

EPHEMERAL FACTUAL MATRIX

Applicant's Case

The applicant's relevant sequential facts and/or events are herein below restated.

[13] The cause of action aroused on 24 May 2014. During August 2014 the applicant gave a mandate to Mr Bosman of A S Bosman Attorneys to advise him on the prospect of success of any claim that he may have against any person or entity. During or about 31 January 2015, Mr Bosman arranged a consultation with counsel. Upon the advice of counsel, a notice in terms of the Act was prepared by Mr Bosman, giving notice to the Minister of Transport and the second respondent of the intention to institute proceedings. Mr Bosman then, during March of 2015 sent the notice to counsel for the purpose of having it settled as discussed at our prior consultation. In May 2015 Mr Bosman followed up with counsel, pressing upon him the urgency of the matter. By July 2015 Mr Bosman had decided that he could not wait any longer and decided to deliver the notice. The notice in terms of Section 3 of the Act in respect of the Minister of Transport was delivered to the Minister on 15 July 2015. The same notice in terms of Section 3 of the Act in respect of the Minister was also served on the South African National Roads Agency on 28 September 2015.

[14] On 27 July 2015, Mr Bosman received a letter from The Department of Transport on behalf of the Minister, acknowledging receipt of the notice in terms of Section 3 and advising that the Minister is not responsible for maintenance of National, Provincial or Municipal Roads. The notice in terms of Section 3 of the Act in respect of South African National Roads Agency Ltd was delivered on 28 September 2015. On 29 September 2015 Mr Bosman received an email from the South African National Roads Agency Ltd questioning a number of facts concerning his claim, specifically against them, causing a reinvestigation and reconsideration of the basis of my claim. On 22 October 2015 and in view of the difficulties being experienced with the claim at that stage, the applicant was advised by Mr Bosman to approach Macrobert Attorneys, the applicants' current attorneys of record, to pursue the claim. Summons was served on the respondents on 22 May 2017 prior to the date on which the claim may have prescribed. The second respondent on 20 September 2017 filed its plea and special plea alleging that the applicant failed to file a notice in terms of Act 40 of 2002 and took issue with the notice.

[15] The notice of the applicant's intention to institute proceedings was given on 17 May 2017. It is contended that the applicant is a lay person who was not aware of the requirement to serve notice in terms of the Act, within 6 (six) months from date of the accident[8].

Contention by the applicant in support of the application;

[16] The applicant contend that its claim is one of delict and has not prescribed, the prescription being 3 years[9].

[16.1] That Summons having been issued on the 22 May 2017 and served on the same date the debt has not been extinguished by prescription[10].

[17] That the respondent has admitted that it is responsible for the maintenance of the road in the area of the accident , as the road falls under its jurisdiction.

[17.1] That the applicant has set out his *prima* facie case against the respondent in his founding affidavit.

[17.2] That in support of its application the Court in the **Maruma[11]** case referred to the **Madinda[12]** case where the Supreme Court of Appeal held that: **'good cause'** requires consideration of those factors which bear on the fairness of granting relief as between the parties and as affecting the proper administration of justice. These factors may include 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, therefore[13].

[17.3] That the court in the **Maruma** case further held that:

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[8] See Caselines paginated pgs.001-5 to 001-10
[9] Id Caselines paginated pgs. 001-5
[10] Id Caselines paginated pgs. 001-5
[11] Maruma Tshepang Queen v Minister of Police (The Maruma Case) (37401/2011) [2014] ZAGPPHC 640 (25 August 2014)
[12] Madinda v Minister of Safety and Security (153/2007) [2008] ZASCA 34 (28 March 2008)
[13] See the Maruma Case (f/n11 above) at para 6. See the Madinda case (f/n 12 above) at para 18.

"...In my view the plaintiff's ignorance accounted for her failure to file the section 3 notice timeously. The court found that her explanation with regards to the failure to file timeously (ignorance) together with the fact that she made out a prima facie case was adequate and that she indeed showed good cause for failing to file the section 3 notice within the prescribed time[14].

[17.4] The court in **Madinda** and **Marumo** further held that once the attorney of record is aware of the rejection of the notice in terms of section 3 and an application for condonation is brought at a later stage, that factor does not contribute to the '**good cause'** requirement. Nor can such a delay be fairly ascribed to disinterest on the applicant's part[15].

[18] The applicant further contends that the second respondent being an organ of state has not been unreasonably prejudiced by the failure to serve the notice on time in that it has the duty to keep records and registers in terms of Section 77- 79 of the National Road Traffic Act , Act 93 0f 1996[16].

[18.1] That the second respondent had ample time and opportunity to investigate the incident and in the event that the did not investigate the incident they should have records and registers which is evident from the fact that the respondent have been able to produce the terms of the contract between the second respondent and Dreyken (Pty) Ltd the contractor[17].

[18.2] The applicant further averred that the prejudice it stand to suffer should the application for condonation not be granted, far outweighs the prejudice the second respondent stand to suffer as the doors of the court will be closed to the applicant.

[18.3] It was further submitted on behalf of the applicant that the late bringing of the application for condonation did not contribute to any prejudice suffered , that the second respondent does not suffer more prejudice because of this delay, that there is no reason for the court not to grant the application.

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[14] See the Maruma Case (f/n11 above)
[15] See the Maruma Case (f/n11 above) at para 7. See the Madinda case (f/n 12 above) at para 20.
[16] Id Caselines (f/n 8 paginated pgs. (001-8)
[17] Id Caselines (f/n 8 paginated pgs. (001-9)

Second Respondent's case

The second respondent's relevant sequential facts and/or events are herein below restated.

[19] On 4 November 2013 (prior to the accident having occurred May 2014), Dreykon (Pty) Ltd was appointed by the Department in terms of Tender No D[...] as the Contractor for the rehabilitation of the R25 Bronkhorstspruit/Bapsfontein attach as Annexure "RN2". After the tender was awarded to Dreykon (Pty) Ltd, the site was duly handed over on 21 November 2013, prior to commencement of the works on 22 November 2013. The completion date for the works was accordingly 20 May 2015 (within 18 months of the site being handed over)[18].

[20] In terms of the Contract Data, Dreykon (Pty) Ltd, independent contractor, was responsible for the total length of the road reserve from 'Site Hand-over' to 'Contract Completion'. This was so for the following reasons[19];

[20.1] In terms of Tender No D[...] (as appears from Annexure "RN3", page C-16, under the heading 'Contact Specific Data'), the conditions of contract were the General Conditions of Contract for Construction Works (2010) published by the South African Institute of Civii Engineering;

[20.2] Clause 8 of the General Conditions of Contract for Construction Works (2010) provides as follows:

'8. RISKS AND RELATED MATTERS

8.1 Protection of the Works

8.1.1 The Contractor shall ...so arrange his operations that they pose no danger ...to the public and/or to vehicle and pedestrian traffic. For this purpose, he shall,

[18] Caselines paginated pgs. 004-91
[19] Id Caselines paginated pgs. 004-92

inter alia, provide and maintain sufficient Temporary Works, road signs, ... as may be necessary, or required by any act, regulation, including the South African Road Traffic Signs including the South African Road Traffic Signs Manual…"

[21] In the light of paragraphs 19 - 20 above, on the date on which the accident giving rise to the Applicant's claim against the second respondent arose (24 May 2014), Dreykon (Pty) Ltd was an independent contractor responsible for the intersection between the M6 road and the R25 Bronkhorstspruit/Bapsfontein road.

Contention by the second respondent in opposition to the application;

[22] The second respondent strongly opposes this condonation application by the applicant . Although the second respondent admits that the debt has not been extinguished by prescription, it denies that there exist 'good cause' for the condonation of non- compliance with the provisions the Act. For purposes of section 3(4)(b)(ii) of the Act [20].

[23] The second respondent also denies that the Department of Roads and Transport, Gauteng, for the Bronkhorstspruit region has not been unreasonably prejudiced, for purpose of section 3(4)(b)(iii) of the Act, by the applicant's failure to comply with the provisions of the Act[21].

[24] The second respondent has submitted that, for purposes of section 3(4)(b)(iii) of the Act, it has been unreasonably prejudiced by the failure on the part of the applicant to give notice of intended legal proceedings timeously. This is so given that by reason of the applicant having given notice of intended legal proceedings on 17 May 2017 only, the Department of Roads and Transport, Gauteng ("the Department") was required to conduct investigations into the cause of the accident 3 years after the accident had occurred, by way of having been denied the opportunity to conduct a prompt investigation into the cause of the accident.

[20] See Caselines paginated pgs. 006-7
[21] Id Caselines paginated pgs. 006-18

[25] The second respondent contended that it was prejudiced in having been required to conduct investigations into the cause of the accident 3 years after the accident had occurred due to the delay in giving notice of intended legal proceedings, the second respondent was not in a position to submit the applicant's claim arising out of the accident to Dreykon (Pty) Ltd for referral to the underwriter in terms of the agreement of insurance which Dreykon (Pty) Ltd (as the Contractor for the execution of the road works) had concluded in respect of third party liability arising out of the execution of the road works.

[26] The second respondent further contends that the applicant does not make a proper case for condonation for his failure to comply with the provisions of section 4(1)(a) of the Act; that likewise the applicant does not make out a proper case for condonation of his failure to comply with the provisions of section 5(2) of the Act , that equally the applicant does not make out a proper case for condonation of his failure to comply with the provisions of section 3(2)(a) of the Act .

[27] The second respondent contends further that the applicant had two (2) years and eleven (11) months to give notice of intended legal proceedings prior to the service of summons, that it failed to do so[22].

[27.1] That in terms of the provisions of section 4(1)(a) of the Act, notice of intended legal proceedings against the second respondent was required to be served on the Head of Department: Roads and Transport, Gauteng (being the incumbent of the post contemplated in section 4(1)(a)) and the applicant failed to do so[23];

[27.2] that It is not correct (as alleged by the Applicant) that non-compliance with the provisions of section 4(1)(a) of the Act "was not raised by the second respondent in their special plea". In terms of the special plea, it was pleaded as follows[24]:

(a) "The Plaintiff did not give the required notice in terms of Act 40 of 2002" (paragraph 2 of the special plea);

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[22] Caselines paginated pgs. 006-12
[23] Id Caselines paginated pgs., 006-9
[24] Id Caselines paginated pgs., 006-10 to 006-11.

(b) “If the notice was given, which is still denied, the notice did not comply with the provisions of Act 40 of 2002” (paragraph 3 of the special plea)

(c) “The Plaintiff is precluded from instituting legal proceedings against the Defendant”.

[25.3] that the applicant does not show ‘good cause’ for the failure to comply with the provisions of section 5(2) of the Act.

[27.4] That the notice of intended legal proceedings was required to be given on or before 23 November 2014 (within six months after the accident occurred on 24May 2014). Notice of intended legal proceedings was given by the Applicant on 17 May 2017, some 3 years after the debt became due[25].

[27.5] It is settled law that the onus to satisfy the court that all the requirements of section 3(4)(b) of the Act have been met is on an applicant. An applicant who seeks condonation in terms of section 3(4) of the Act must accordingly, for purposes of section 3(4)(b)(iii), show that the organ of state was not unreasonably prejudiced by the failure to give timeous notice of intended legal proceedings, although a court would be hesitant to assume prejudice for which the organ of state does not lay a basis[26].

[27.6] That the second respondent has, for purposes of section 3(4)(b)(iii) of the Act, been unreasonably prejudiced by the failure on the part of the Applicant to give notice of intended legal proceedings timeously. This is so given that[27];

(a) by reason of the applicant having given notice of intended legal proceedings on 17 May 2017 only, the Department of Roads and Transport, Gauteng (“the Department”) was required to conduct investigations into the cause of the accident 3 years after the accident had occurred, by way of having been denied the opportunity to conduct a prompt investigation into the cause of the accident;

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[25] Caselines paginated pgs. 006-13
[26] See: Madinda v Minister of Safety and Security, supra, at para [21]
[27] Caselines paginated pgs. 006-18 to 006-19

(b) the Department was prejudiced in having been required to conduct investigations into the cause of the accident 3 years after the accident had occurred;

(c) due to the delay in giving notice of intended legal proceedings, the Department was not in a position to submit the Applicant's claim arising out of the accident to Dreykon (Pty) Ltd for referral to the underwriter in terms of the agreement of insurance which Dreykon (Pty) Ltd (as the Contractor for the execution of the road works) had concluded in respect of third party liability arising out of the execution of the road works. The second respondent prays that the application be dismissed with costs, including the costs of two counsel[28].

Legal framework and General Principles.

[28] Section 3(4)(b) of the Act[29] provides that the court may grant condonation of an applicant's failure to comply with the provisions of the Act if it is satisfied that:

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the applicant; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

[28.1] Generally, the following principles are applicable in determining whether an applicant shows 'good cause' for purposes of section 3(4)(b)(ii) of the Act.

[28.2] " 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. … These may include 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"[30];

[28] Caselines paginated pgs. 006-20
[29] Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Act")
[30] See: Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at para [10].

[28.3]"An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable"[31];

[28.4] "The prospects of success of the intended claim play a significant role – ' strong merits may mitigate fault; no merits may render mitigation pointless'. The court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant"[32];

[28.5] "Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant"[33].

[29] Section 4(1) of the Act provides as follows:

"4 Service of notice

(1) A notice must be served on an organ of state … , in the case where the organ of state is-

(a) a national or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation 103 of 1994), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department;"

[29.1] In terms of the provisions of section 4(1)(a) of the Act, notice of intended legal proceedings against the second respondent was required to be served on the Head of Department: Roads and Transport, Gauteng (being the incumbent of the post contemplated in section 4(1)(a)).

[28] Section 5 of the Act prior to the amendment thereof by the Judicial Matters Amendment Act with effect from 2 August 2017 provided as follows:

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[31] See: Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at para [35]
[32] Id at para [37] see also f/n 27 at para [12]
[33] See Rance matter supra at para [38]

"5 Service of process

(1)(a) Any process by which any legal proceedings contemplated in section 3(1) are instituted must be served in the manner prescribed by the rules of the court in question for the service of process.

(b) …

(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of 30 days after the notice, … , has been served on the organ of state in terms of section 3(2)(a)".

[30] Section 3(2)(a) of the Act provides that notice of intended legal proceedings against an organ of state (as required by section 3(1)(a)) must be given within six months from the date on which the debt became due.

Application of the law to the facts.

[31] I will now foreground and focus in the main on the legal principle applicable to this application before Court. At the onset, it is apposite to observe and to mention that the facts regarding the delay in giving notice of intended legal proceedings to the second respondent in *casu* can in principle not be distinguished from the facts in the ***Supreme Court of Appeal matter of Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*** regarding the delay in giving notice of intended legal proceedings and thus distinguishable from ***Madinda*** matter

[32] It is an incontrovertible fact that the cause of action arouse on 24 May 2014, it being a delictual claim, the prescription is three years, and the claim has not prescribed. What bedevils the court is the following same restated from the second respondent's answering affidavit.[34];

[32.1] Summons were issued on 22 May 2017 and the notice of intended legal proceedings was given by the Applicant on 17 May 2017, some 3 years after the debt became due. By way of an explanation for the failure to comply with the provisions of section 5(2) of the Act, the applicant states that " *necessity dictated*

[34] See Second respondent's answering affidavit (Caselines paginated pgs.004-107 to 004-122)

otherwise at the time due to the fact that the claim was close to prescribing on 23 May 2017". This explanation the court found to be far from being a reasonable explanation, accordingly, is wanting in the extreme given that in order to avoid prescription the applicant had two(2) years eleven (11) months to give notice of intended legal proceedings prior to service of summons .

[32.2] The assertion that the applicant is a lay person who was not aware of the requirements to serve notice in terms of the Act, within 6 (six) months from date of accident it *appears to be like snatching at the bargain* this is because no explanation is given for the failure to serve the notice on the Head of Department of the Roads and Transport. The applicant does no more in this regard than state that " *the notice was served on the Second Respondent at its business address, namely Sage Life Building , North Tower, 12th Floor , 41 Simmonds Street Johannesburg*.

[32.3] Section 3(2)(a) of the Act provides that notice of intended legal proceedings against an organ of state (as required by section 3(1)(a)) must be given within six months from the date on which the debt became due. Notice of intended legal proceedings was accordingly in *casu* required to be given on or before 23 November 2014 (within six months after the accident occurred on 24 May 2014). Notice of intended legal proceedings was given by the Applicant on 17 May 2017, some 3 years after the debt became due. The explanation proffered in my view falls well short of covering the entire period of the delay (being a period of some 2 years and 6 months after the period of six months provided for in section 3(2)(a) of the Act).

[33] The applicant (as appears from paragraph 17 under reply) approached AS Bosman Attorneys in August 2014 for legal advice on the prospects of success in a claim for damages for bodily Injury as a result of the accident. Mr Bosman thereupon advise the Applicant (as stated in paragraph 17.3 under reply) that "*it was probable that the authority responsible for the particular road on which the accident took place was to blame, but that it would have to be established who this authority was*". According to Mr Bosman (as stated In paragraph 17.4 under

reply), “having regard to the facts of the case and the place where the accident took place, there were a number of possible defendants”.

[34] It is worth noting that It is not stated in the founding affidavit, read together with the confirmatory affidavit of Mr Bosman (Annexure “JJJ5" to the founding affidavit) what steps, if any, were taken during the August 2014- January 2015 to establish which authority was responsible for the M6 road and the R25 Bronkhorstspruit/Bapsfonteln road. Irrespective of whether the roads fell under the Jurisdiction of the Department, the Minister of Transport, or the South African National Roads Agency (which is itself an organ of state as defined in section 1(1) of the Act), notice of intended legal proceedings was required to be given. One would accordingly have expected a measure of urgency in identifying the responsible authority.

[35] It would have been a straightforward enough matter to establish whether the M6 road and the R25 Bronkhorstspruit / Bapsfontein road fall under the jurisdiction of the second respondent. To this end, a letter addressed to the second respondent would have elicited the response that the roads do fall under the jurisdiction of the second respondent, indeed, the simple expedient of a telephonic query in this regard would have sufficed;

[36] In any event, it is no easy matter to comprehend why notice of intended legal proceedings was not given to the second respondent, as one of the potential authorities under whose jurisdiction the M6 road and the R25 Bronkhorstspruit / Bapsfontein road fell, already in August 2014. Were it to have transpired that the roads did not in fact fall under its jurisdiction, the second respondent would simply have advised Mr Bosman to this effect. Accordingly, no harm would have been done in giving notice of intended legal the second respondent in August 2014.

[37] It is stated by the applicant (in paragraph 18.1 under reply) that, after he had approached Mr Bosman in August 2014, *“(in) the beginning of the following year, during or about 31 January 2015, Mr Bosman arranged for us to consult counsel*”. (over and above the difficulties confronting the applicant as mentioned *supra* that the contents of paragraph 18 under reply are, for purposes of 'good cause' in

terms of section 3(4)(b)(ii) of the Act, the death-knell for the explanation offered by the applicant for the delay in giving notice of intended legal proceedings to the second respondent.

[38] Notwithstanding that the second respondent, as early as January 2015, had been pertinently identified as an authority which was potentially liable to the applicant for damages, notice of intended legal proceedings was served on the MEC for Roads and Transport on 17 May 2017 only. The matter accordingly allowed to drag on for a period of 2 years 4 months after the second respondent had been identified (together with the Minister of Transport) as an authority which was potentially liable to the Applicant for damages;

[39] During the period January 2015 until July 2015 (a period of 6 months), save for the e-mails to counsel dated 27 March 2015 and 21 May 2015 which are attached to the founding affidavit as Annexure "JJJ6" and Annexure ‘JJJ7”, it appears that no steps were taken to expedite the giving of notice of intended legal proceedings to the second respondent.

[40] As adumbrated *supra* , It is the court’s firm view that the applicant has failed to show ‘ good cause’ for condonation in light of the delay of some 2 years and 6 months, after the six (6) month period provided for in section 3(2)(a) of the Act had expired, giving notice of intended legal proceedings to second respondent .

[41] It is settled law that the onus to satisfy the court that all the requirements of section 3(4)(b) of the Act have been met is on an applicant. An applicant who seeks condonation in terms of section 3(4)(a) of the Act must accordingly show that the organ of state was not unreasonably prejudiced by the failure to give timeous notice of intended legal proceedings, although a court would be hesitant to assume prejudice for which the organ of state does not lay a basis.

[42] The reason for demanding prior notification of intention to institute legal proceedings against an organ of state is that, with its extensive activities and large staff which tends to shift, an organ of state needs the opportunity to investigate claims

against it timeously, and to consider them responsibly, before getting embroiled in litigation at public expense.

[43] The applicant gave notice of intended legal proceedings against the Department on 17 May 2017. Accordingly, the second respondent was required to conduct investigations into the cause of the accident 3 years after the accident had occurred. This being the case, the second respondent was denied the opportunity to conduct a prompt investigation into the cause of the accident, that per se is self-evident of prejudice to the second respondent .

[44] As mentioned *supra*, on the date on which the accident giving rise to the Applicant's claim against the second respondent arose being (24 May 2014), Dreykon (Pty) Ltd was an independent contractor responsible for the intersection between the M6 road and the R25 Bronkhorstspruit/Bapsfontein road. In terms of the Contract Data provided by the second respondent, Dreykon (Pty) Ltd as the Contractor was *inter alia* required to take out insurance against claims arising out of the works[35].

[45] Pursuant to time extension of 3 months having been granted for completion of the works (as appears from Annexure “RN4", first page), practical completion of the works was achieved on 28 August 2015, on which date the Contractor vacated the site. This was 1 year 9 months before notice of intended legal proceedings against the second respondent was given by the Applicant, by which time retention monies in respect of the works completed had already been paid out by the second respondent.

[46] Due to the delay in giving notice of intended legal proceedings, the second respondent was not in a position to submit the applicant's claim arising out of the accident to the Contractor for referral to the underwriter in terms of the insurance policy (or to withhold retention monies).

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[35] See C-19 of Annexure "RNS" (clause 8.6.1.3). Dreykon (Pty) Ltd duly concluded an agreement of insurance with AC and E Engineering Underwriting Managers. See also “RN13”, a copy of the policy schedule. In terms of the insurance policy, the sum insured in respect of the Contractor's third party liability was R20,000,000.00

[47] The second respondent was accordingly unreasonably prejudiced by the delay on the part the Applicant in giving notice of intended legal proceedings against the second respondent. As the direct consequence of what is mentioned *supra* in the judgment and in particular in paragraph(s) [44] and [45] above, the second respondent, as the principal, cannot be held liable for any negligent acts or omissions on the part of Dreykon (Pty) Ltd, as an independent contractor[36].

[47] In applying the legal principles mentioned *supra ad* ***'good cause'*** showed by the applicant, the Court finds that for purposes of section 3(4)(b)(ii) of the Act the applicant does not show *'good cause*' for the failure to comply with the provisions of the Act.

[48] The Court also finds that the applicant did not comply with the provisions of section 4(1)(a) of the Act ,which requires notice of intended legal proceedings against the second respondent to be served on the Head office : Road and Transport ,Gauteng. Notice of intended legal proceedings by the Applicants was not served on the Head of Department: Roads and Transport, Gauteng. The applicant accordingly failed to comply with the provisions of section 4(1)(a) of the Act.

[49] The Court also finds that the applicant does not show 'good cause' for the failure to comply with the provisions of section 5(2) of the Act as mentioned *supra*. *In casu* summons commencing action was served on 22 May 2017, before the expiry of a period of 30 days after notice of intended legal proceedings had been served on 17 May 2017.

[50] Consequently I make the following order;

[50.1] The application for condonation if refused.

[50.2] The applicant is ordered to pay the costs of this application including the costs of two counsel .

J YENDE

[36] See: Chartaprops 16 (Pty) Ltd and Another v Silberman [2008] ZASCA 115: 2009 1 All SA 197 (2009); 2009 (1) SA 265 (SCA) (Chartaprops).

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Heard: **30 May 2023**

Delivered: **5 September 2023**