

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

CASE NO. 315/2018

In the matter between:

N[...] M[...] obo

L[...] N[...] M[...]

Applicant

and

**MEC FOR HEALTH, EASTERN CAPE
PROVINCIAL GOVERNMENT**

Respondent

JUDGMENT

LAING J

[1] This is an application for condonation of the applicant's non-compliance with sections 3(1) and (2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ('the Act'). The applicant has instituted proceedings as the mother of a boy who has spastic quadriplegia.

Background facts

[2] In her founding affidavit, the applicant states that she had an uneventful pregnancy and obtained antenatal care at a community clinic. She went into labour on 17 June 2014 and was admitted to the Butterworth Hospital. She alleges that she was subjected to sub-standard maternal and foetal monitoring and labour

management before giving birth to her son, L[...], during the course of 18 June 2014. The medical staff at Butterworth Hospital failed to detect, timeously, the onset of foetal distress and to take appropriate steps to deal with same, resulting in intrapartum birth asphyxia and consequent brain damage. The applicant avers that her son's condition was caused by negligence on the part of the medical staff in question.

[3] Subsequently, in 2017, the applicant consulted with a medical specialist, who examined L[...] and explained his injuries to her. She goes on to aver that it was only after she had read the specialist's report and after it was discussed with her by her attorneys that she acquired knowledge of the facts giving rise to the claim, as well as the identity of the debtor. The applicant points out that she has brought the claim in her representative capacity and that prescription does not begin to run until L[...] attains the age of majority.

[4] The applicant alleges that a letter of demand was sent within six months of the date upon which the debt became due.

[5] The respondent opposes the application for condonation. To that effect, the respondent argues that the applicant failed to take the court into her confidence by making a full disclosure of all relevant details, including the dates of consultations with the specialist and her attorneys. Moreover, the specialist's report was never attached to the applicant's founding affidavit. In the absence of such information, asserts the respondent, the court cannot make a proper determination for purposes of granting or refusing condonation.

[6] Consequently, the applicant seeks leave to file a supplementary affidavit, dealing with the shortcomings that the respondent has highlighted. She states that at the time that she filed her founding affidavit she was not aware that the additional information was required.

[7] In her supplementary affidavit, the applicant alleges that L[...]’s achievement of various growth milestones had been delayed. However, the applicant failed to acknowledge or appreciate the situation properly and attributes this to her youth. She had only been 18 years old at the time of her son's birth. When she took him to a

clinic on 4 August 2016, the staff confirmed that ‘something was seriously wrong’, prompting her to approach attorneys on 8 August 2016 for purposes of obtaining advice about whether there was a cause of action; at that stage, the applicant was still uncertain about whether she could claim damages as a result of the negligence of the respondent’s medical staff. Her attorneys attempted to obtain copies of the hospital records and advised her to approach a medical specialist in the interim. The applicant was only able to obtain sufficient funds in April 2017, allowing her attorneys to secure an appointment with an obstetrician and gynaecologist, Dr Burgin, on 27 June 2017. He (or she)¹ examined L[...] and provided the applicant with his (or her) report on the same day. It was on this date, alleges the applicant, that she became aware that she had a claim.

[8] Subsequently, the applicant’s attorneys served on the respondent, on 27 November 2017, an application brought in terms of the Promotion of Access to Information Act 2 of 2000 (‘PAIA’). The applicant does not indicate what became of the application, other than to aver that her attorneys had still not obtained copies of the hospital records by 27 February 2018, which is when she instructed them to issue the letter of demand. As a result of an oversight on the part of the applicant’s attorneys, the letter was only posted on 13 March 2018. The applicant observes, too, that the letter was addressed to the respondent and not the Head of Department, as required under the State Liability Act 20 of 1957, and that her summons was issued prematurely. She seeks condonation in this regard.

Issues to be decided

[9] The issues to be decided by the court are centred on the requirements of section 3 of the Act. For ease of reference, the contents are set out in full below:

3. Notice of intended legal proceedings to be given to organ of state.—

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

¹ The full identity of Dr Burgin is not apparent from the affidavit.

(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 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) briefly set out—

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(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) 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] The applicant has brought her application in terms of section 3(4)(a). Before the court can decide whether to grant the application, however, it is necessary to

determine precisely when ‘the debt became due’,² after which the court can consider the requirements of section 3(4)(b).

Admissibility of supplementary affidavit

[11] At this stage, it is necessary to pause briefly so as to deal with the admissibility of the applicant’s supplementary affidavit. The application was brought on 22 July 2019, the answering papers were delivered on or about 21 August 2019, the supplementary affidavit was delivered on or about 8 June 2021. The respondent correctly contends that the last-mentioned was delivered exceptionally late. The applicant has nevertheless sought leave to file same. In terms of rule 6(5)(e), the court has a discretion to permit the filing of further affidavits.

[12] Here, the founding affidavit was sparse and insufficient on its own to allow the court to make the determinations contemplated under section 3(4)(b) of the Act. The applicant’s claim pertains to the condition of her son; needless to say, the quantum of the claim is substantial and the outcome of the main action will have a profound effect on both the life of L[...] and that of his mother. The supplementary affidavit places a more comprehensive set of facts before the court, allowing the necessary determinations to be made.

[13] The respondent has had ample time within which to deal with same but has elected not to file any further affidavit in response; it could have done so. It cannot be argued that the respondent has suffered any real prejudice and the court exercises its discretion to permit the filing of the supplementary affidavit in question.

When the debt became due

[14] Returning to the question of when ‘the debt became due’, the respondent argues that the applicant had knowledge of the identity of the organ of state and the facts that gave rise to the debt when she gave birth to her son on 18 June 2014, rather than the date upon which she received the report from Dr Burgin, 27 June 2017.

² See section 3(2)(a) of the Act.

[15] The question as to when a debt becomes due, within the context of the Prescription Act 68 of 1969, was considered in *Truter and another v Deyse* 2006 (4) SA 168 (SCA), where the court held, at [16], that

‘A debt is due... when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place, or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.’

[16] The court went on to quote the learned writer, Loubser, at [17]:

‘A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative fact, harm, unlawfulness and culpability or fault.’³

[17] At [19], the court observed that

“Cause of action” for the purposes of prescription thus means... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’⁴

[18] The subject was addressed shortly afterwards, again, in the decision of *Minister of Finance and others v Gore NO* 2007 (1) SA 111 (SCA), where the court

³ Loubser, *Extinctive Prescription* (Juta & Co Ltd, Kenwyn, 1996), at 80-1.

⁴ The court quoted from *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16, at 23.

held that mere opinion or supposition was not enough to trigger the running of prescriptive time; there had to be justified, true belief.⁵ The court remarked that:

'It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less is vehemently controverted allegation or subjective conviction.'⁶

[19] In the present matter, the applicant's cause of action is founded on the principles of delict. These require sufficient allegations of fact from which a court may find that the necessary elements of delict are present to justify the relief sought, viz. harm caused to the plaintiff, conduct by the defendant which is wrongful, a causal connection between such conduct and the harm suffered, and fault or blameworthiness on the part of the defendant.⁷ The nature of claims based on medical negligence is notoriously complex. More specifically, a plaintiff such as the applicant, here, would need to have at her disposal an adequate set of facts, taken from the circumstances leading up to and present at the time of the birth of her son, from which, *inter alia*, wrongful conduct, causality and fault could be established.

[20] The Constitutional Court encapsulated the challenge that faces a plaintiff in the matter of *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 (5) BCLR 656 (CC), where Zondo J (as he was then) held, at [45], that

'In a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action. Negligence and, as this Court has held, causation have both factual and legal elements. Until the applicant had knowledge of facts that would have led him to think that

⁵ At [18].

⁶ At [19].

⁷ JR Midgeley, 'Delict', in *LAWSA* (LexisNexis, Vol 15, 3rd ed, 2016), at para 3.

possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in section 12(3).⁸

[21] The applicant did not have copies of the hospital records at any time prior to receipt of the report from Dr Burgin. She was not in possession of any evidence with regard to sub-standard maternal and foetal monitoring and labour management during her stay in hospital. This much is not disputed. Whereas her visit to the clinic confirmed that 'something was seriously wrong' with L[...], she, as a layperson, would have remained none the wiser about the details and possible causes thereof. It cannot be said that she had a complete set of facts upon which to establish a cause of action. At best, she held a mere opinion or supposition that the respondent's staff were responsible for the condition of her son.

[22] The examination and report of Dr Burgin changed the picture. From the information supplied by the applicant, Dr Burgin commented as follows:

'It appears that the monitoring of the labour was substandard. The patient states she was not seen once during the night of 17 June – 18 June 2014. The membranes ruptured at 07h00, and the second stage may have been prolonged. In the absence of any records it is difficult to comment about this.

However it is certain that the child has cerebral palsy probably due to anoxia in late labour which caused cerebral damage.'

[23] The conclusions drawn by Dr Burgin and the advice received from her attorneys would have been sufficient to convert the applicant's mere opinion or supposition to a justified and true belief that the conduct of the respondent's staff was wrongful, probably the cause of the harm suffered by L[...], and gave rise to fault or blameworthiness.

⁸ The reference is to section 12(3) of the Prescription Act 68 of 1969.

[24] It could possibly be contended that, even at that stage, the applicant lacked a complete set of facts to institute proceedings in the absence of copies of the hospital records. However, the applicant appears to accept that ‘the debt became due’ on 27 June 2017 and the court will proceed on that basis for purposes of applying the provisions of section 3(2)(a) of the Act, meaning that notice must have been given by no later than 26 December 2017.

[25] The applicant alleges that the notice was sent by registered post on 13 March 2018.⁹ Consequently, the court is required to decide whether there is a basis upon which to grant the application in circumstances where the notice was slightly less than three months out of time. To that effect, it is necessary to consider the requirements of section 3(4)(b) of the Act.

The requirements of section 3(4)(b)

[26] A court may grant an application for condonation if it is satisfied that the three requirements listed at sub-sections (i), (ii) and (iii) have been met. The meaning of this does not encompass proof on a balance of probabilities but rather the overall impression made on the court. See *Madinda v Minister of Safety and Security* [2008] 3 All SA 143 (SCA).¹⁰

[27] The reason for notification to be given to an organ of state prior to the institution of proceedings is described in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), where the court held, at [9], that

‘With its extensive activities and large staff which tends to shift it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.’

⁹ In argument, counsel for the respondent took the point that the notice had not been attached to the applicant’s papers; counsel for the applicant pointed out that a copy thereof was nevertheless provided in response to the respondent’s rule 35(12) notice. Nothing more seems to turn on this.

¹⁰ See, too, *Die Afrikaanse Pers Bpk v Neser* 1948 (2) SA 295 (C), at 297.

[28] It is common cause that the debt has not been extinguished by prescription. The applicant's son is still a minor. The issues that must be decided are, therefore, whether good cause exists for why the applicant failed to give notice in terms of section 2(a) of the Act, and whether the respondent was not unreasonably prejudiced by such failure. These will be examined in turn.

Good cause

[29] As a starting point, the decision in *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] 3 All SA 537 (SCA) remains pertinent. Here, Majiedt AJA held as follows:

[35] In general terms, the interests of justice play an important role in condonation applications. 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.'

[36] "Good cause" within the meaning contained in section 3(4)(b)(ii) has not been defined, but may include a number of factors which will vary from case to case on differing facts. Schreiner JA in dealing with the meaning of "good cause" in relation to an application for rescission, described it thus in *Silber v Ozen Wholesalers (Pty) Ltd*:¹¹

"The meaning of 'good cause' in the present sub-rule, like that of the practically synonymous expression 'sufficient cause' which was considered by this Court in *Cairn's Executor's v Gaarn* 1912 AD 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an

¹¹ 1954 (2) SA 345 (A).

explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives.”¹²

[37] The prospects of success of the intended claim play a significant role- “strong merits may mitigate fault; no merits may render mitigation pointless.”¹³ 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. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of an intended action, e.g. where an expert report central to the applicant’s envisaged claim is omitted from the condonation papers.’

[30] It is clear from the case law that has developed in relation to section 3(4)(b)(ii) that an applicant who seeks condonation must, for purposes of demonstrating ‘good cause’, play open cards with the court. There must be no suggestion that the applicant is concealing certain information that would raise the suspicion that no good cause exists. Ultimately, however, each case depends on its own facts. See *Premier of the Western Cape Provincial Government NO v BL* [2012] 1 All SA 465 (SCA), at [17].

[31] The deficiencies in the applicant’s founding affidavit were largely ameliorated in the supplementary affidavit, where a more comprehensive account for the delay was provided. Nevertheless, an honest assessment of the applicant’s explanation would reveal gaps in what happened from when Dr Burgin provided his (or her) report on 27 June 2017 until the dispatch of the notice on 13 March 2018. There appears to have been an attempt to compel the respondent to provide access to the hospital records by way of the institution of PAIA proceedings on 27 November 2017 and it is clear that, certainly by 27 February 2018, the attorneys had a mandate to

¹² At 352H-352A.

¹³ The court quoted Heher JA in *Madinda*, at [12].

pursue the action on behalf of the applicant. Whereas there is no suggestion at all that the applicant has concealed vital information from the court or that the delay was not *bona fide*, the exact reasons for why notice was not provided by 26 December 2017 are not entirely apparent from the applicant's papers.

[32] The prospects of success with regard to the main claim must also be taken into consideration. See *Madinda*, at [10]. It has already been observed that the nature of medical negligence claims is notoriously complex. Here, the court has no access to copies of the hospital records; the only expert report made available is that of Dr Burgin, which was allegedly compiled purely on the basis of the applicant's history. In the circumstances, it is impossible to ascertain the prospects of success; there may be merits to the applicant's claim, there may not be.

[33] What can be said, however, is that from as far back as 8 August 2016 the matter lay in the hands of the applicant's attorneys.¹⁴ The applicant was 20 years old at the time that she first sought legal advice. As a layperson, residing in a rural area,¹⁵ the applicant was clearly faced with the difficulties usually posed to a litigant in her position. Issues of geographical remoteness, the applicant's youthfulness, funding constraints, a lack of sufficient medical and legal knowledge and oversights on the part of her attorneys¹⁶ would have been genuine hurdles to the applicant's successful compliance with the provisions of the Act. Ultimately, despite shortcomings in the applicant's explanation for the delay and the uncertainties in relation to the prospects of success, the interests of justice require the court not to exclude good cause for her failure to have given notice by 26 December 2017.

[34] That, however, is not the end of the enquiry. It is still necessary to decide whether the respondent was not unreasonably prejudiced.

Prejudice

¹⁴ This is confirmed by Mr Luxolo Peko in his confirmatory affidavit, attached to the applicant's supplementary affidavit.

¹⁵ The applicant states in her founding affidavit that she resides in the Ndakana Administrative Area, Nqamakwe. This is not disputed by the respondent.

¹⁶ At the least, the applicant's attorneys confirm that an oversight on their part led to the delay in the dispatch of the notice, by registered post, on 13 March 2018. See paragraph 8.11 of the supplementary affidavit and Mr Peko's confirmatory affidavit, at 26 and 35 of the record, respectively.

[35] In *Madinda*, Heher JA held, at [12], that

‘...There are two main elements at play in section 4(b), viz. the subject’s right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Sub-paragraph (iii) calls for the court to be satisfied as to the latter. Logically, sub-paragraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits...’

[36] The court drew a clear distinction between the enquiries, remarking, at [15], that the separate requirements of good cause and absence of unreasonable prejudice may have been intended

‘to emphasise the need to give due weight to both the individual’s right of access to justice and the protection of state interest in receiving timeous and adequate notice.’

[37] In the present matter, the respondent has not placed any evidence of unreasonable prejudice before the court. No mention is made to that effect in the answering papers.

[38] The respondent did, notwithstanding, take the point in argument, asserting that the notice was delivered to the respondent directly and not to the Head of Department, as required under section 4(1)(a) of the Act.¹⁷ This was admitted by the applicant in her supplementary affidavit.¹⁸ The respondent argued that where notice is given to the incorrect organ of state, the purpose of prior notification is defeated and clear prejudice results. The decision in *Mfundisi Gcam-Gcam v Minister of*

¹⁷ The provisions of section 4(1)(a), read with Schedule 2 of the Act, stipulate that notice must be served on the Head: Health with regard to any proceedings to be instituted against the Department of Health in the Eastern Cape.

¹⁸ See paragraph 9, at 26 of the record.

Safety and Security (Case No. 187/11, Eastern Cape High Court, Mthatha, unreported)¹⁹ was cited as authority.

[39] It cannot be contended that notice was sent to the incorrect organ of state. Notice was sent to the Department of Health, which is represented by the respondent and which is the employer of the medical staff allegedly liable for the damages claimed by the applicant.

[40] Furthermore, the decision in *Gcam-Gcam* concerned a situation where the defendant had raised, in a special plea, the plaintiff's non-compliance with the Act. Pleadings closed and it was only when the matter had reached trial stage that the issue came for determination by way of a stated case, in terms of which the plaintiff argued that there had been substantial compliance with the relevant provisions. The court, *per* Mbenenge ADJP (as he was then), held that it was imperative for the plaintiff to have served notice on the Head of Department, whose responsibilities include the management of liabilities.²⁰ However, the court went on to observe, at [20], that

‘...the question whether or not the appropriate functionary has been served ought merely to hinge on the facts of each case, the enquiry being purely factual and requiring no exercise of a discretion; considerations of fairness and prejudice should not come into play during this enquiry. Only when condonation is sought in terms of section 3(4)(b) should a discretion, hinging on, *inter alia*, whether the organ of state was not unreasonably prejudiced by the failure to serve the notice on the proper functionary, be exercised.’

[41] The court, in other words, simply made a factual finding with regard to proper service. The plaintiff was barred from proceeding to trial without first having obtained condonation.²¹

¹⁹ The decision was handed down on 12 September 2017.

²⁰ At [19].

²¹ At [23].

[42] The situation here is distinguishable from the facts in *Gcam-Gcam*. Whereas the applicant has, by her own admission, not complied with the requirements of section 2(a), read with section 4(1), of the Act, she has indeed sought condonation from this court. No application to that effect was before the court in *Gcam-Gcam*. The case is of no assistance to the respondent.

[43] The only other point taken by the respondent in this regard is that the applicant's tardiness in prosecuting the application for condonation caused further prejudice. Insofar as there was a delay of a year and four months from when the notice was given until the institution of the current proceedings, the respondent has not furnished any details of the prejudice allegedly suffered. There is no indication of how and to what extent such delay may have compromised the respondent's defence or conduct of the matter overall. The point can be taken no further.

Relief and order to be granted

[44] At this stage, mention must be made, briefly, of the respondent's point, made in argument, that the applicant failed to comply with section 2(2) of the State Liability Act 20 of 1957. To that effect, the applicant is alleged not to have served a copy of the notice on the State Attorney. Aside from the fact that the point was never raised in the respondent's answering papers, the application before the court is for condonation of non-compliance with the provisions of a different piece of legislation altogether. Alleged non-service on the State Attorney has no bearing on the matter at hand.

[45] The requirements of section 3(4)(b) of the Act remain central. It is common cause that the debt has not been extinguished by prescription. Whereas the applicant's explanation for the delay is not perfect and the merits of her claim are not unmistakably discernible, the interests of justice oblige the court to take into account the context of her application and the potential obstacles facing a litigant in her position when required to comply with the procedural requirements of the Act. Mindful of the degree of non-compliance (slightly less than three months) and the nature and magnitude of the applicant's claim and the fact that it concerns the rights of a child, the court is required, at the very least, to ensure that the applicant's

constitutional right of access to court is not unreasonably thwarted. Taking into account all the considerations necessary, the court is satisfied that good cause exists for the applicant's failure to have complied with the relevant provisions when giving notice and that the respondent has not suffered unreasonable prejudice. The overall impression made on the court is that condonation must be granted.

[46] The question of costs remains. In that regard, the applicant seeks not only condonation for her non-compliance with the Act but also leave to file her supplementary affidavit. Inasmuch as the applicant's founding papers were inadequate and only remedied by the delivery of the supplementary affidavit, the respondent cannot be criticised for having opposed the application. In the circumstances, the court is not inclined to apply the principle that costs should follow the result, despite the applicant's argument to that effect.²² The parties were *ad idem* that the costs reserved on 3 March 2022 be made in the cause and the court sees no reason to differ.

[47] The following order is made:

- (a) the applicant is given leave to file her supplementary affidavit, dated 7 June 2021;
- (b) the applicant's non-compliance with sections 3(1) and 3(2) of the Act is condoned; and
- (c) costs of the application, including the costs reserved on 3 March 2022, are made costs in the cause of the main action.

JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

²² The applicant cited *Premier, Western Cape Provincial Government NO v Lakay* [2012] JOL 28217 (SCA), where Cloete JA remarked, at [25], that there was much to be said for the view that where an application for condonation is opposed the costs should follow the result.

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Date of hearing: 12 May 2022

Date of delivery of judgment: 26 July 2022