



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

CASE NO: 223/2019

(1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/ NO
(3) REVISED: YES / NO
18/05/22

In the matter between:

M ROETS

APPLICANT

AND

MEC FOR EDUCATION GAUTENG

RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 19 May 2022.

BAQWA J:

INTRODUCTION

- [1] The applicant in this matter seeks an order that her late service of the notice of intention to institute legal proceedings against the respondent be condoned in term of 3 (4) (a) and 3 (4) (b) of the Institution of the Legal proceedings against Certain Organs of State Act 40 of 2002 (The Act) and that she be granted leave to proceed with the legal proceedings which she instituted against the respondent.
- [2] The applicant also seeks costs against the respondent in the event the application is opposed by the respondent.

FACTS

- [3] The applicant was injured on 29 January 2013 when she was accompanying her child to a training session at the respondent's school, Du Pree Van Wyk Primary School. Whilst she was on the school premises she fell into a manhole which was left open and unattended. She sustained a fractured leg, she was admitted at a hospital and spent several months as an in-patient.
- [4] Summons were issued on 26 January 2016 and they were served upon the respondent on 28 January 2016.
- [5] The respondent filed a special plea and plea on 21 December 2016. In the special plea the respondent raised a plea of non-compliance with section 3 of the Act and the applicant is bringing this application for condonation of such non-compliance.

THE LAW

[6] Section 3 of the Act provides 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 its intention to institute the legal proceedings; or*
 - b) *The organ of state in question has consented in writing to the institution of that legal proceeding[s]*
 - I. *Without 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 the purposes of subsections (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 term of section (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

The debt has not been extinguished by prescription;

I. Good cause exists for the failure by the creditor; and

II. 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”.

THE DELAY

[7] The section 3 notice was supposed to have been issued within a period of six months of the date of the incident which was 29 January 2013. Instead, the notice was issued on 25 March 2015, about two years later.

REASON FOR THE DELAY

[8] In her founding affidavit the applicant states that the incident resulted in her being hospitalised for two months and she was on a wheelchair for six (6) months. She had to undergo a further operation at Steve Biko Hospital.

[9] During the time the applicant was on a wheelchair, the time for serving a notice in terms of section 3 had lapsed.

[10] She further states that as a lay person, during the period of her medical treatment she had no one to assist her to institute legal proceedings. It was only when she got better from the emotional and psychological trauma she suffered that she was able to approach and instruct Mashego Attorneys.

[11] During March 2015 she was referred to her attorney of record where she had instructed him to institute the claim against the respondent.

PROSPECTS OF SUCCESS

[12] It is not disputed that the applicant fell into an open manhole at Du Pree Van Wyk Primary School. These are the premises under the control of the respondent and in regard to which the respondent had a duty of care towards the people and individuals present. The workers in the employ of the respondent had seemingly neglected to cover and secure the manhole into which the applicant fell. Whilst this is a matter to be tried and decided when the case is heard, it would seem prima facie that the respondent or his workers failed to exercise their duty of care towards the applicant and ensure her security and safety.

[13] In these circumstances the court merely has to establish whether there is a prima facie case against the respondent and once that it is achieved, prospects of success exist. I therefore find that in the present case there are reasonable prospects that the applicant may succeed.

PRESCRIPTION

[14] The summons in this matter was issued on 26 January 2016, the cause of action having arisen on 29 January 2013, the claim would have prescribed on 29 January on 29 January 2016. The summons was therefore issued within the three-year prescription in terms of the Prescription Act 68 of 1969 read with section 3(4)(b) of the Act. The applicants claim is therefore still enforceable.

PREJUDICE

[15] It has been submitted and I accept that the applicant will be seriously prejudiced in the event of the application for condonation being refused. The applicant suffered serious injuries where she fell into the unguarded manhole and dismissing, the claim on technical grounds would therefore deny her access to dealing with the merits of the claim in court.

[16] The respondent on the other hand would suffer no prejudice in that they will be able to call their witnesses and substantiate their defence in court. It is evident from their answering affidavit that they have a defence to present before the trial court and there is no impediment to their witnesses giving their testimony. In *Madinda v Minister of Safety and Security*¹. The following was said:

"The phrase 'if the court is satisfied' in section 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts. See e.g. Die Afrikaanse Pers Beperk v Neser 1948 (2) SA 295 (C) at 297. I see no reason to place a stricter constitution on it in the present context."

[17] My overall impression is that the parameters set in section 3(4)(b) have been satisfied in the present application

¹ 2008 3 ALL SA 143 SCA para 6.

THE INTEREST OF JUSTICE

[18] The considerations to be taken into account were succinctly summarised by Zondo J (as he then was) in the matter of *Grootboom v National Prosecuting Authority*² when he said:

“The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are unreasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factor are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in Interests of justice”

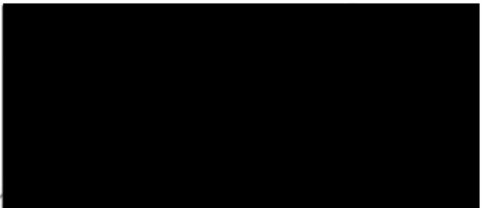
[19] In my view, the delay was not excessive considering the standard of education, the personal and health circumstances of the applicant which cumulatively give credence to the explanation for the delay. It cannot be denied that reasonable prospects of success exist.

² 2014 (2) SA (CC) 2014 (1) BCLR (CC) para 51.

ORDER

[20] In light of the above, I make the following order

1. Condonation for the late filing of the section 3 notice of the Institution of legal Proceedings Against Certain Organs of the State Act by the applicant is hereby granted.
2. The applicant is hereby granted leave to continue with the legal proceedings already instituted under case number 5937/2016 against the respondents.
3. Each party is to pay its own cost.



SELBY/BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 16 May 2022

Date of judgment: 19 May 2022

Appearance

Appearance

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