

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO. 5147/2018

In the matter between:

**ZENANDE ZULU OBO LELETHU
ZULU**

Applicant

And

**M E C FOR HEALTH EASTERN
CAPE PROVINCE**

Respondent

JUDGMENT

TOKOTA J

[1] The applicant instituted a damages' claim against the respondent allegedly arising out of medical negligence of his employees acting within the course and scope of their employment. The respondent raised a special plea that the applicant is time barred in that she has failed to comply with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002 (the Act). This application concerns condonation for failure to comply with section 3(4)(b) of the Act. At the hearing of the matter Mr *Dwayi* appeared for the respondent and I allowed him to hand up his heads of argument.

Factual background

[2] On 25 April 2016 the applicant delivered a baby boy at Mthatha General Hospital, Eastern Cape.

[3] The child did not cry when it was born. It later transpired that the child suffered from cerebral palsy. The child died on 29 April 2018. The death certificate records that it died of natural causes.

[4] On 1 October 2018 the applicant issued summons against the respondent claiming damages in the amount of R500 000.00(five hundred thousand rand) in her representative capacity and R2 million (two million rand) in her personal capacity.

[5] On 7 March 2019 the respondent delivered a plea and raised a special plea that the applicant is time barred by reason of having failed to comply with section 3 of the Act in that she failed to give notice in writing of her intention to institute the legal proceedings in question, against the State and that the State did not consent in writing to the institution of such legal proceedings. This prompted the present application.

[6] The applicant has stated that she is semi-literate having passed grade 10. She stated that she was therefore unaware that she had a civil claim against the respondent. She explains that during August 2016 she was advised by a co-patient at the hospital that she should contact Nkele attorneys to institute a claim for medical negligence against the State.

[7] On 18 October 2016 she consulted with Mr Nkele of T A Nkele attorneys. Mr Nkele advised her that in his opinion she had a claim for medical negligence against the State as the nursing staff were negligent in caring for her during her labour and delivery causing the brain damage of her child. She immediately instructed Mr Nkele to proceed and pursue her claim against the respondent. She subsequently consulted with a specialist one Dr Pohl who also confirmed that she had a claim against the respondent.

[8] On 31 July 2018 Mr Nkele gave notice to the respondent of the intention to institute legal proceedings.

[9] In terms of section 3 of the Act she had to give notice of intended action within six months of becoming aware of the existence of her cause of action or within such

period by which she could have acquired knowledge by the exercise of reasonable care. The six month period expired in April 2017.

[10] The applicant submits that she only became aware that she had a claim against the respondent on 6 February 2018.

[11] The applicant cannot be correct when she says she only became aware of the existence of the cause of action against the respondent in February 2018. From her own version, as far back as August 2016 a co-patient advised her that she had a claim against the State and that she should consult with attorneys to confirm. Furthermore, on 18 October 2016 Mr Nkele advised her that the nursing staff were negligent in handling her baby delivery and that she had a civil claim for damages against the respondent.

[12] The facts giving rise to her claim arose on 25 April 2016. She became aware that she could institute a medical negligence claim on 18 October 2016. It took the applicant one year nine months after she gained legal opinion that she was entitled to claim against the respondent before a notice was issued.

[13] In terms of section 3 of the Act

“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

.....

(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

...

[14] Subject to the provisions of section 3(4) of the Act, if the creditor fails to serve the notice within six months from the date on which the debt became due she is precluded from instituting legal proceedings against an organ of State. The debt becomes due when the creditor gains knowledge of the facts giving rise to a debt and of the identity of the debtor, or from the date on which she must be regarded as having acquired knowledge thereof by reason of exercising reasonable care.

[15] The question to be determined is whether the applicant's failure to serve the notice in terms of section 3 of the Act timeously should be condoned or not. In this regard it must be determined whether or not the applicant was aware of the facts giving rise to the claim and the identity of the creditor or by exercising reasonable care she could have acquired such knowledge before the expiry of the six months' period. In order for the court to exercise its discretion in favour of granting condonation a reasonable explanation must be given for the delay regard being had to the requirements of section 3 (4)(b) of the Act.

[16] It is inconceivable that the applicant could not have known the facts giving rise to her cause of action or the identity of her creditor within the six months' period prescribed by the Act. The applicant contends that she is not *au fait* with the law. This contention flies in the face of the legal advice she obtained on 18 October 2016 from her lawyer. In considering the equities, some weight must be accorded, in the absence of any such explanation, to the *maxim vigilantibus non dormientibus jura subveniunt*. "A man whose allegedly legal interests are threatened should be vigilant in protecting them."¹ He/she is not entitled to expect others to protect them for

¹ Cape Town Municipality v Abdulla 1974 (4) SA 428 (C) at 438

him/her. The law comes to the aid of those who are alert to protect their rights and not those who slumber.

[17] If the applicant has failed to comply with section 3(2) of the Act, subject to good cause being shown, the court still has a discretion to condone such failure.²

[18] As to the first requirement of section 3(4)(b) of the Act the statutory prescription period is three years. In this case the debt became due in January 2016. The summons was served in November 2018. Therefore, the claim had not prescribed by then.

[19] As to the second requirement, the applicant says that she is a layperson in legal matters. Consequently, she did not know if she had a civil claim against the respondent. It has been held³ that considering this leg 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.

[20] The applicant has not addressed the question of the prospects of success except to say that she has 'reasonable prospects of success' without elaborating on that. She has referred to an expert report which she did not attach to the application. The court remains in the dark as to how she came to the conclusion that she has prospects of success. Under this head she states that she was not aware that she had a claim against the respondent until she consulted with her attorney.

² 3(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.

³Madinda v Minister of Safety and Security, Republic of South Africa (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008) para.10

[21] Knowledge of the facts giving rise to the cause of action has been defined in **McKenzie v Farmers' Co-operative Meat Industries Ltd** 1922 AD 16.

*as 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to 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

[22] There is a further problem and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused: c.f. **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 765A-C; **NUM a. o. v Western Holdings Gold Mine** (1994) 15 ILJ 610 (LAC) at 613E.

[23] Where the delay is attributable to a litigant's legal representative's negligence the courts have been reluctant to penalise a litigant on account of the conduct of his/her representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representatives' lack of diligence or the insufficiency of the explanation tendered. **Saloojee a o v Minister of Community Development** 1965 (2) SA 135 (A) at 140H-141D; **Buthelezi a o v Eclipse Foundries Ltd** (1997) 18 ILJ 633 (A) at 638I-639A.

[24] The explanation given for the delay is fraught with unexplained gaps. In this regard the applicant was informed in August 2016 by a co-patient that she had a case but should go and confirm with lawyers. She waited until October 2016 when she met with her attorneys. There is no explanation as to what she was doing in September 2016 till 18 October 2016. Again her attorney confirmed that on the facts she related to him she had a civil claim against the State.

[25] The notice in terms of the Act was given on 31 July 2018. There is no explanation what the applicant or the attorney was doing for the year and nine months before the notice was given.

⁴ See also *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corp* 2020 (1) SA 327 (CC) paras.53-54 and cases referred therein

[26] When an applicant seeks condonation for the delay, a full explanation that covers the 'entire period' must be provided.⁵ Failure to fill up the gaps mentioned above falls short of showing a good cause. Knowledge of the existence of a claim is a conclusion of law and affords no excusable ground for the delay.

[27] In **Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) (1996 (12) BCLR 1559; [1996] ZACC 20)** it was stated:

“[11] Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.”⁶

[28] In **Louw v Mining Commissioner, Johannesburg (1896) 3 OR 190 at 200** it was said that the purpose of the delay rule was to bar a party who wished to '*drag a cow long dead out of a ditch*'. See too Baxter Administrative Law (Juta, 1984) at 715.

[29] In **Road Accident Fund and Another v Mdeyide 2011 (2) SA 26 (CC) (2011 (1) BCLR 1; [2010] ZACC 18): [8]** it was said:

⁵ Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) (2008 (4) BCLR 442; [2007] ZACC 24) para 22; Dept of Transport v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) (2017 (1) BCLR 1; [2016] ZACC 39)

⁶ See also Road Accident Fund and Another v Mdeyide 2011 (2) SA 26 (CC) (2011 (1) BCLR 1; [2010] ZACC 18) (Mdeyide) para 8.

'This court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence.'

[30] The wording of section 3(3)(a) of the Act is, with minor deviations, similar to section 12(3) of the Prescription Act No 68 of 1969. Therefore, cases which interpreted section 12(3) are relevant for the consideration of section 3(3)(a) of the Act.

[31] In my view the applicant's case collapses on the first requirement of s.3 (4) of the Act. I conclude that the applicant had knowledge of the bare minimum facts which gave rise to a cause of action when she was told by a co-patient at the hospital and Mr Nkele in October 2016⁷ The delay for one year nine months has not been explained.

[32] Section 3 of the Act provides that knowledge of the existence of a debt begins when a person acquires knowledge of the material facts from which the debt arises. The notice period begins to run during that period. It does not require knowledge of the relevant legal conclusions.⁸ Such period is not postponed until the creditor has knowledge of the existence of a civil claim against the debtor. The applicant in any event knew the existence of her claim and the identity of the debtor in October 2016 when her attorney advised her that the nursing staff were negligent in handling her

⁷ Minister of Finance v Gore NO 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA 98) para.17;

⁸Mtokonya v Minister of Police 2018 (5) SA 22 (CC) (2017 (11) BCLR 1443; [2017] ZACC 33) para.51 and cases referred to therein.

delivery of her baby. I reject the submission that she became aware in February 2018. I therefore find that no good cause has been shown for the delay.

[33] The prejudice referred to in section 3(4)(b)(iii) of the Act must now be examined. I can do no better than to refer to the dicta of **Mohlomi**⁹ and **Mdeyide**¹⁰ quoted above. Time limit has a legitimate government purpose. When dealing with the global assessment of the delay, the absence of prejudice is a relevant consideration before a court can exercise its discretion. I refer here to both forms of delay, viz delay until the lapsing of the time bar and delay after becoming aware of the need to give notice. In assessing whether unreasonable delay should be overlooked in the context of other discretionary remedies (*inter alia*, in pre-constitutional common-law review), our courts always had regard to whether the other party had been prejudiced by the delay. Prejudice is inherent in every case where there has been an unreasonable delay. Witnesses may have resigned or died by the time the matter comes to court, documentary evidence may have dissipated.

[34] On the facts of this case unlike the case of *Madinda*,¹¹ where the delay was five and half months the delay in the present matter was substantial and lacked a satisfactory explanation thereof. There was no effort by any of the parties to address this leg. The applicant simply submitted that the respondent would not be prejudiced by the application. The respondent simply denied the submission. In my view the application must fail.

[35] The general rule is that costs will follow the results. I see no reason in this case why that rule should not apply.

[35] In the result the following order will issue.

1. The application for condonation for the late service of the notice in terms of section 3 (4)(2)(b) of Act 40 of 2002 is dismissed with costs.

⁹ Para.28 supra.

¹⁰ Para. 30 supra.

¹¹ Footnote 4 supra

B R TOKOTA

JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

E M Matanda

Instructed by

Nkele & Sons Inc.

For the respondent:

N T Dwayi

Instructed by

Smith Tabata Attorneys

Date of Hearing:

5 May 2022.

Date of Delivery:

17 May 2022.