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

CASE NUMBER: 2983/2020

In the matter between:

N[…] M[…] obo I[…] M[…] **Applicant**

and

THE MEMBER OF EXECUTIVE COUNCIL
FOR HEALTH: EASTERN CAPE PROVINCE **First Respondent**

JUDGEMENT

MATEBESE AJ

[1] On 4 September 2020 applicant, acting in both her personal capacity and in her capacity as the mother and natural guardian of I[…], the minor child, instituted action proceedings against the respondent. In the summons and particulars of claim the applicant, plaintiff therein, claims that the minor child was born with foetal distress, hypoxic ischaemic and superadded hypoglycemia giving rise to quadriplegic cerebral palsy and developmental delay.

[2] The applicant further alleges in her particulars of claim that the minor child's condition aforesaid is as a result of the negligence and/or breach of legal and contractual duty on the part of the respondent's employees acting within the course and scope of their employment as such.

[3] In his plea the respondent has raised two special pleas. The first is that the applicant's claim in her personal capacity, has prescribed. The second is that the applicant has failed to comply with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("Act 40 of 2002").

[4] The second special plea is also raised as against the minor child's claim.

[5] Faced with the second special plea the applicant instituted the current application proceedings in which she seeks an order:

5.1 Declaring that the applicant first became aware of a damages claim against the respondent arising from the alleged negligent medical treatment, care and supervision provided to the applicant during the birth of her baby by the staff

of the respondent at Gateway Clinic, Eastern Cape and St Barnabas Hospital, on 29 January 2020;

5.2 Alternatively, in terms of section 3(4)(a) of the Institution of Proceedings Against Certain Organs of State Act 40 of 2002, the applicant's failure to serve her notice dated 20 July 2020, in terms of section 3(1) of the Institution of Proceedings Against Certain Organs of State 40 of 2002 timeously, be condoned.

5.3 In terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, the applicant's defective notice in terms of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 be condoned.

[6] The application is opposed by the respondent. I will deal with the respondent's grounds of opposition later, first I deal with the facts which I consider relevant in the determination of this matter. I mention that these facts are common cause or are not meaningfully denied.

The facts

[7] On 26 July 2016 applicant was admitted at St Barnabas Hospital, Eastern Cape, following the onset of regular and painful contractions. The applicant was pregnant at the time.

[8] On the same day the minor child was born through natural vaginal delivery.

[9] The applicant alleges, in her particulars of claim that the minor child was born with the medical condition described in paragraph [1] above.

[10] She also alleges that she is illiterate with her highest completed educational grade being grade six (6) and that she stays in the rural areas of the Eastern Cape. She further states that she accepted that the minor child's "abnormality" was due to unanticipated and unavoidable event at the time of birth.

[11] She further alleges that during January 2020 her sister in law told her about Nonxuba Attorneys who help people institute medical negligence claims and that after setting an appointment she met Mrs Nonxuba who, after she gave her the history of her pregnancy and the fact that the child was diagnosed with cerebral palsy, advised her that in her opinion the medical staff and the hospital were negligent in caring for her and her baby during labour and delivery.

[12] According to the applicant this was the first time that she became aware that her child's cerebral palsy was caused by the negligence of the nursing and medical staff at the clinic and also at St Barnabas Hospital.

[13] She alleges that Mrs Nonxuba undertook to obtain the relevant hospital records where the applicant was treated and to arrange for the applicant to consult with experts.

[14] On 20 July 2020, the applicant, through her attorneys, served a notice in terms of section 3 of Act 40 of 2002 upon the respondent.

[15] An opinion was later obtained from Dr Murray, an Obstetrician, which confirmed the advice by Mrs Nonxuba. The opinion of Dr Murray is dated 1 September 2020.

[16] As already stated above, summons were issued on 4 September 2020. They were served on the respondent on 19 September 2020.

[17] As already stated above, the application is opposed by the respondent. The respondent, in opposition of the application, argues that the applicant has failed to satisfy the requirements of section 3(4) of Act 40 of 2002 in that:

17.1 The applicant's claim has prescribed.

17.2 The applicant has failed to show good cause for her failure.

17.3 The respondent is unreasonably prejudiced by the applicant's failure.

[18] At the hearing of the matter the parties agreed that the matter be dealt with as an application for condonation in terms of section 3(4) of Act 40 of 2002 and that I need not determine the declaratory relief sought in prayer 1 of the Notice of Motion.

[19] I deal with the respondent's grounds of opposition in turn hereunder. But, first it is necessary to have regard to the provisions of section 3(4) of Act 40 of 2002 and the provisions of section 12 of the Prescription Act 68 of 1969 ("the Prescription Act")

[20] Section 3(4) of Act 40 of 2002 provides:

"(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 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."

[21} Section 12 of the Prescription Act provides:

"12 When prescription begins to run

(1) Subject to the provisions of subsection (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
(2) ...
(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that the creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

Prescription

[22] Regarding the applicant's claim in her representative capacity, the respondent did not advance any argument that the claim has prescribed. Instead, the respondent indicated that he will abide the decision of the court in this regard.

[23] The respondent argued that the applicant's claim, in her personal capacity, has prescribed in terms of section 11(d) read with section 12 of the Prescription Act. This argument was pegged on the following:

23.1 The minor child was born on 26 July 2016 and it was on that day that the applicant's debt became due and the applicant became aware of the condition of the minor child and the identity of the department (the respondent) as a debtor.
23.2 The minor child was the applicant's fifth child with the four (4) previous babies having been born without any abnormalities. The Apgar scores of the minor child at birth were low, an indication of foetal distress.
23.3 On her version, her attorneys were able to advise the applicant on 26 January 2020 that the condition of the minor child was caused by the negligence on the part of the hospital.
23.4 The above, so the submission went, shows that the applicant had facts at her disposal which, had she exercised reasonable care, she would have had knowledge of the identity of the debtor and the facts from which the debt arose as early as 26 July 2016 or soon thereafter.

[24] Even though it is for the applicant to set out a basis why she claims that the debt should not be regarded as due for purposes of prescription under section 3(4)(a)(i), the onus is on the respondent to establish that the applicant was aware or must be regarded as having acquired the knowledge envisaged in section 12(3) of the Prescription Act.

[25] In my view, the respondent has failed to establish, through facts, that the applicant acquired the knowledge of the identity of the debtor and of the facts giving rise to the debt on 26 July 2016 or soon thereafter. What the respondent has sought to do is to draw inferences which, in my view are not consistent with the proved or undisputed facts.

[26] This brings me to the question whether the applicant can be deemed, in the light of the facts, to have the required knowledge in line with the proviso in section 12(3) of the Prescription Act. That is whether he could have acquired it by exercise of reasonable care.

[27] The respondent contends that the minor child is the applicant's fifth baby and there is no indication in the available records that her earlier children had any issues at birth or otherwise.

[28] It may very well be true that the minor child is the applicant's fifth baby and that the previous four had no abnormal conditions. However, that does not place the applicant in a position of knowing, without more, about the facts giving rise to the medical

condition of the baby. In my view it is unreasonable to expect or even suggest that a person, simply by reason that he/she has four children, she is possessed with the knowledge about facts over which only doctors and nurses are privy especially where there is no evidence of her being advised of such facts. I am unable to accept the respondent's argument in this regard.

[29] The respondent also contended that the baby's Apgar scores at birth were low which is an indication of foetal distress.

[30] I find difficulty in accepting this argument or contention especially regard being had to the fact that Apgar scores are usually recorded by doctors and nurses on the maternity records. They also require a certain level of education to read and understand. To suggest that a grade 6 person was in a position to read and understand the meaning of Apgar scores, without evidence that same were explained to her, is, in my view illogical.

[31] Worse, there is undisputed evidence that Mrs Nonxuba, after consulting with the applicant, undertook to obtain the relevant medical records of the applicant where the applicant was treated and to arrange for the applicant to consult with experts thereafter. This was surely after 29 January 2020.

[32] It should follow therefore that when the applicant consulted with Mrs Nonxuba she was not in possession of the medical records. Otherwise, it would not make sense for Mrs Nonxuba to make the undertaking to obtain same when they are readily available and in possession of the applicant.

[33] In my view, the respondent's argument that the applicant was aware of the low Apgar scores, indicating foetal distress, is inconsistent with the admitted facts, speculative and must be rejected.

[34] The argument that the applicant's attorneys advised applicant, on her own version, that the condition of the child was caused by the negligence of the hospital staff on 29 January 2020 and consequently the applicant came to know of the facts giving rise to the claim and the identity of the debtor on 29 January 2020 also does not assist the respondent.

[35] First, if it is accepted to be so, it must follow that the notice served on 20 July 2020 was served within the six months prescribed in section 3(2)(a) of Act 40 of 2002.

[36] Second, and in any event, an opinion by a legal representative is not facts. This is even more in the circumstances of this case where it was given, on the admitted facts, without the benefit of medical records.

[37] The respondent sought to rely on **Loni**[1] in support of his opposition. In my view, Loni is distinguishable from the present case on, *inter alia*, two reasons. First, in **Loni** the plaintiff had clearly visible injury which did not require diagnosis or medical records to identify and understand and the plaintiff therein knew what caused and who caused the injury. In the present case it was simply impossible for the applicant to know what

[1] Loni v MEC for Health, Eastern Cape (Bisho) 2018 (3) SA 335 (CC)

was wrong with the child unless and until a proper analysis of medical records was done and until a diagnosis is made and the outcome thereof is communicated to the applicant.

[38] Second, in **Loni** the plaintiff was in possession of his medical records. In the present case, on the undisputed version of the applicant, it was only after the applicant had consulted with Mrs Nonxuba on 29 January 2020 that the latter advised applicant that she will try and obtain medical records from the place where the applicant was treated, an indication that the applicant was not in possession of same.

[39] The respondent further sought to place reliance on the minor child's clinical records of May 2017 in which it is recorded, *inter alia*, that the child had delayed milestones and is suspected of cerebral palsy. Argument was advanced that the applicant ought reasonably to have been aware of, or on the basis thereof, to have investigated the condition of the minor child and the facts, which gave rise thereto at least from May 2017.

[40] I have difficulty in accepting this line of argument. There is no record that the applicant was advised by the nurses at the clinic or by anyone of the cause of the suspected condition of the child. Besides that, this piece of evidence, especially coming from a Legal Administration Officer of the respondent, is hearsay and highly speculative.

[41] In the circumstances, I am satisfied that on the evidence before me the debt has not been extinguished by prescription.

Good cause.

[42] The applicant argued that she has good prospects of success in the action proceedings. For this argument the applicant relied on the report of Dr Murray, an Obstetrician.

[43] In the report Dr Murray, *inter alia*, states that it seems most likely that the brain injury was caused by intrapartam hypoxia. He gives reasons for his conclusion.[2]

[44] Dr Murray further states that if the combined opinion of experts, on issues identified in the report in respect of which the Dr could not opine, is that the hypoxic brain injury most likely occurred during the course of labour, then the poor monitoring of the second stage of labour should be implicated in the causality.

[45] A challenge was mounted against the applicant's argument aforesaid based on the dictum in **Swissborough**[3]. The argument was that the applicant has failed to identify the portions of the report on which reliance is placed for her case.

[46] It is important to highlight that what we are dealing with here is an opinion by an expert, a medical doctor. It can only be understood in relation to the facts that support it. It follows therefore that the applicant could not have been expected to pick one portion thereof, e.g. the conclusion when the conclusion's cogency and understanding depends on the background facts.

[2] Para.14 of the report

[3] Swissborough Diamond Mines v Government of the Republic of South Africa 1999 (2) SA 279 (T).

[47] In my view, and having regard to the report as a whole, the applicant enjoys reasonable prospects of success in the action proceedings.

[48] On the uncontested or undisputed facts the applicant was not aware of the child's condition and the probable cause thereof.

[49] The catalyst for her action was the discussion that she had with her sister in law who advised her to consult with Nonxuba Attorneys which consultation took place on 29 January 2020.

[50] One may have reservations about her lack of action prior to that. In my view, to expect her to act when she thought everything was normal and before she knew of the problem with the child would in reality be expecting too much from a lay person whose highest standard of education is grade 6.

[51] Accordingly, the explanation for the delay, if there was any, is satisfactory. In any event I hold the view that the delay ought to be calculated effective from the date the applicant got information that something was wrong with the minor child, which was on 29 January 2020 or closer thereto.

[52] I am therefore satisfied that the applicant has shown that good cause exists for her failure to serve the notice as envisaged in section 3 of Act 40 of 2002.

Unreasonable prejudice

[53] The respondent argued that he is unreasonably prejudiced by the applicant's failure because the records relating to this matter are no longer available and so are the witnesses.

[54] The respondent has, however, failed to give details of when and how the records relating to the matter got lost. He has failed to show how the non-availability of the records is related to the failure by the applicant to serve the notice timeously. This applies with equal force to the alleged non-availability of witnesses.

[55] There is accordingly no basis for me to conclude that that the respondent is unreasonably prejudiced by the applicant's failure to serve the notice timeously.

Costs

[56] The general rule is that costs should follow the result. This also applies to proceedings of this nature, especially where the respondent has opposed the application. I find no reason in the present case to depart from that principle.

[57] In the result I make the following order:

1. Condonation for the applicant's failure to serve her notice and for her service of defective notice in terms of section 3(1) of Act 40 of 2002 is granted.

2. The respondent shall pay the costs of the application.

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Z.Z. MATEBESE
ACTING JUDGE OF THE HIGH COURT

APPARANCES:

For the applicant: Adv C. Cremen
For the respondents: Adv A.M. Da Silva

Date Heard: 22 July 2021
Delivered: 03 August 2021