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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2795/2015

In the matter between:

G K obo M K

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH**

Respondent

HEARD ON: 16 MAY 2019

JUDGMENT BY: MEINTJES, AJ

DELIVERED ON: 6 JUNE 2019

- [1] This is an application by the applicant for confirmation that her notice of intention to institute legal proceedings to the respondent, in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002(the Act),was timeously filed, or alternatively for condonation for the late service of her said notice in that legal proceedings were instituted against the respondents(the second defendant is The Head of the Provincial Health Department of the Free State Province) for damages (R5000.00) allegedly suffered by the applicant in her personal capacity and (R10 995 000.00) in her representative capacity as mother and natural guardian of M.

These damages by reason of the averred negligent conduct of the second respondent.

- [2] The first respondent (the respondent) opposes the applicant's application, contending that the claim of applicant in her personal capacity has prescribed in terms of section 11 of the Prescription Act, 68 of 1969, and that as a result thereof, condonation ought not be granted as the purpose for which it is sought, no longer exists, and that in the alternative, applicant has failed to satisfy the requirements of the Act, which would enable condonation.

- [3] The following facts are common cause between the parties and are for purposes of this application, important:

3.1 The relevant alleged negligent conduct on which applicant's claims are funded, occurred on 20 May 2009-23 May 2009.

- 3.2 The combined summons was issued on 12 June 2015 and served on 19 June 2015.
- 3.3 Applicant's claim in her personal capacity, in the normal course, would have been extinguished by prescription on 19 May 2012.
- 3.4 Applicant's claim in her representative capacity as mother and natural guardian of M, has not been extinguished as such, seeing that M is still a minor. Prescription does not run against a person who acts on behalf of a minor.
- 3.5 It is to be accepted that no timeous section 3(1)(a) of the Act notice was given by or on behalf of applicant to the respondent.

A copy of the notice attached (JN2) reveals it is dated 6 October 2014 but received 14 January 2015, well beyond the six (6) months period stipulated by the Act. The notice, with reference to paragraphs 1 and 3 thereof, and as respondent also contended, stating that the legal proceedings, when the notice was sent, were for applicant in her representative capacity and not in her personal capacity.

- [4] The issues to be decided in this matter centre on the Prescription Act, 68 of 1969, and the Act.
- [5] Section 11(d) of the Prescription Act states that civil debts prescribe three (3) years after the debt is due. Section 12(1) thereof, stating that the debt must be immediately payable. There

is no suggestion from any of the parties that the three-year prescription period does not apply in the case of the debt of applicant in her personal capacity.

[6] Section 12 (3) of the Prescription Act, provides:

- “(1) Subject to the provisions of subsections (2),(3),and (4),prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (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 a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”

6.1) From the documents filed and the arguments, there is no basis that applicant was prevented from coming to know about the debt. (Section 12 (2)).

6.2) It seems that section 12(3) imposes a duty on the creditor (the applicant) to exercise reasonable care to obtain knowledge of the debtor (the hospital and personnel) and the facts from which the debt arises. Applicant is not allowed to just postpone the commencement of the running of prescription by her failure to take necessary steps. Nel J, in *Burley Appliances Ltd v Grobbelaar NO & others* 2004(1) SA 602 (C) at 607 G said:”...the declaratory is contrary to the established principle that a creditor cannot by supine inaction arbitrarily and at will postpone the commencement of prescription.’

In *Drennan Maud & Partners v Pennington Town Board* 1998(3) SA 200 (SCA) at p 209F-G, Olivier JA said:

‘(s)ection 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge “if he could have acquired it by exercising reasonable care”. In my view, the requirement “exercising reasonable care” requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a person in his position would have deduced the identity of the debtor and the facts from which the debt arises’.

In *Truter and Another v Deyssel* 2006(4) SA 168 (SCA) at p 175 B Van Heerden JA said: “...Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running-it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) ...”

In *Leketi v Tladi NO & Others* (2010)3 ALL SA 519 (SCA) para 18 Mthiyane LA said: ‘...In order to determine whether the appellant exercised “reasonable care”, his conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge...’

The impact of section 12(1) read with section 12(3) is that prescription starts to run as soon as the creditor has or ought to have knowledge of the identity of the debtor and the facts from which the debt arises.

The incident in which the applicant was involved, took place during 20 May -23 May 2009. Her claim in her personal capacity, in terms of section 11 of the Prescription Act, prescribed on 19 May 2009. From what she alleges in her confirmatory statement,

she was aware of the name of at least one of the hospitals, involved. According to the founding statement of J.M.Nkeli, applicant only consulted with him on 21 April 2013. The records were then obtained and he alleges: "The records were in keeping with the version that the applicant had explained from a factual point of view in regard to admissions to hospital and the final diagnosis." (P6 para 9.11 of the Index to the application for condonation). This nearly 4 years later, but the applicant sooner already well aware of the facts. She stated in the affidavit that she was informed by the doctors at the Mofumhandi Monapo Hospital of M's condition and already after a month that M was born, she realized the severity of M's disability. The Applicant also stated in her affidavit on p 2 para 4: "I did not know who to approach initially, and was wary of approaching any attorney who might not know what to do". She thus was well aware that an attorney can be approached for assistance.

Clearly, by applying the objective standard, applicant failed to exercise reasonable care as required by section 12(3). Applicant's failure to institute action timeously was caused by her inaction and not an inability to obtain knowledge of the identity of the debtor and the facts timeously.

[7] Section 3 of the Act, provides:

'3(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

- (a) A 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
- (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);
- (3) For purposes of subsection 2(a)-
 - (a) A debt may not be regarded as 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 section (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'

[8] Applicant's claim in her personal capacity has prescribed. This debt extinguished by prescription. Condonation therefor cannot be granted. It serves no purpose to grant such for the late, or in this case no (seeing the contents of JN2), giving of a notice in respect of a debt which no longer exists and that cannot be enforced. The purpose of the Act is not to revive debts that have already prescribed. (See *Premier, Western Cape v Lakay* 2012(2) SA 1 on p 11 C).

[9] With regard to applicant's claim in her representative capacity on behalf of M, section 13(1) of the Prescription Act provides:

'(1) If-

(a) the creditor is a minor...

...

(h)...and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a)...has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

Other relevant provisions of the Act to refer hereto are section 2(2) which is referred to in section 3(3)(b)

'2(2) Subject to section 3 and subsections (3) and (4), a debt which became due-

(a) before the fixed date, which has not been extinguished by prescription and in respect of which legal proceedings were not instituted before that date; or

(b) after the fixed date,

will be extinguished by prescription as contemplated in Chapter III of the Prescription Act (1969), Act 68 of 1969, read with the provisions of that Act relating thereto.

(3) Subject to subsection (4), any period of prescription which was applicable to any debt referred to in subsection (2)(a), before the fixed date, will no longer be applicable to such debt after the fixed date.

(4)(a) The expired portion of any period of prescription applicable to a debt referred to in subsection (2)(a), must be deducted from the said period of prescription contemplated in Chapter III of the Prescription Act, 1969, read with the provisions of that Act relating thereto, and the balance of the period of prescription so arrived at will constitute the new unexpired portion of prescription for such debt, applicable as from the fixed date.

(b) If the unexpired portion of the period of prescription of a debt referred to in paragraph (a) will be completed within 12 months after the fixed date, that period of prescription must only be regarded as having been completed 12 months after the fixed date.'

9.1 M is still a minor and this debt has accordingly not prescribed under the Prescription Act.

9.2 Applicant, in her capacity as mother and guardian of M, falls within the definition of 'creditor' in the Act. (See *Premier, Western Cape v Lakau*, *supra* on p10 A) Section 3 (3)(a) does not apply in this case, because of the provisions of section 3(3)(b) read with section 2(2)(a).

Applicant therefor had to give the notice required by the Act. Which she did, but as seen, way beyond the time as prescribed. This notice according to the Act, to be given at an early stage, to enable an organ of state to investigate the allegations upon which a claim is based on.

[10] In considering whether the said notice must be confirmed (the Act does not refer to confirmation) or whether condonation may be granted or not for applicant's failure, regard should be given to section 3(4) of the Act which provides as seen, that a court may grant such application if it is satisfied on three matters:

- (i) That the debt has not been extinguished yet by prescription. I have already found that this debt has not been extinguished by prescription.
- (ii) That good cause exists for the failure by the creditor. Applicant must furnish an explanation for the default sufficiently full to enable the court to understand how it came about, and to assess applicant's conduct and motives. (See *Silber v Ozen Wholesalers (Pty) Ltd* 1954(2) SA 345 A at 352 H-353 A).

Each case must depend on its own facts.

In *Madinda v Minister of Safety and Security* 2008(4) SA 312 (SCA) at p316 para E-F, Heher JA states:

“‘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. In any given factual complex it may be that only some of many such possible factors become relevant. 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."

On p 317 para C the learned Judge states: "There are two main elements at play in s 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 the notice."

- [11] Given the explanation proffered by the applicant in her affidavit, with reference to her background, in all probability not highly schooled, employed as a domestic worker and therefor her explanation that she was unaware of the requirement of the statutory notice, the fact that she was, on her first consultation with the attorney, Mr. Nkeli, told that further investigation would be done by them and the subsequent search for the applicable records and information, applicant's explanation for her failure, is acceptable and applicant had therefor shown good cause exists for her failure to give the notice timeously.

Medical and hospital records and evidence were apparently traced, which in all probability, give the applicant at the least, fair prospects of success in the action.

- (iii) The organ of state was not unreasonably prejudiced by the failure. The deponent to the affidavit filed on behalf of the respondent, pointed to the fact that nine (9) years have passed since the cause of action has arisen, and that due to

this, respondent is prejudiced as certain information pertaining to the case which would have otherwise been available, had applicant instituted her action on time, the case cannot be investigated with precision and that vital pieces of evidence may have been lost. Only 'may'. Counsel for respondent did not point to any definite prejudice or prejudice already been suffered.

In fact, the deponent to the affidavit on behalf of applicant, states that respondent was and still is in possession of the records relating to M's treatment and will be able to consult with the medical and nursing staff applicable. There for, no prejudice.

- [12] All three requirements set out in section 3(4)(b) of the Act have been satisfied and the applicant is entitled to condonation for the late service on respondent of the notice required by the Act, only in relation to the claim in her representative capacity, as mother and natural guardian of M.

ORDER:

1. Applicant's application for condonation for the late service of the notice of her intention to institute legal proceedings in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40/2002, hereby granted, only in relation to the claim in her representative capacity as mother and natural guardian of M.

2. Applicant's application for such condonation in relation to the claim in her personal capacity is not granted and must fail.
3. Costs of this application to be costs in the cause.

MEINTJES, AJ

On behalf of applicant/plaintiff: Adv. D. de Kok
Instructed by: Webbers Attorneys
Bloemfontein

On behalf of respondent: Adv. K.N. Nhlapo
Instructed by: State Attorneys (JMA Engelbrecht)
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