



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

Case No: 5789/2018

In the matter between:

T M

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF HEALTH FREE STATE PROVINCE Respondent

CORAM: MURRAY, AJ

HEARD ON: 21 NOVEMBER 2019

JUDGMENT BY: MURRAY, AJ

DELIVERED ON: 28 NOVEMBER 2019

- [1] This is an application in terms of section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act, Act 40 of 2002 (“the Act”). The Applicant seeks condonation for his non-compliance with section 3(2)(a) of the Act by failing to serve a notice of intention to institute legal proceedings against the Respondent within the specified six months (“the Notice”).
- [2] The Applicant is an unemployed adult male residing in Rocklands, Bloemfontein. He instituted action against the MEC for damages which he claims to have suffered as a result of negligent eye-treatment in National Hospital in January 2016. He avers that it followed upon an alleged work-related incident in which he was hit above the eye by a piece of concrete while working with a grinder.
- [3] The Respondent denied his allegations and, *inter alia*, filed a Special Plea setting out the Applicant’s failure to comply with the provisions of the Act. On the Applicant’s own version his debt became due on 31 January 2016 and the six months which s 3(4) allows for the filing of his Notice expired on 31 July 2016. But the Notice was only served on the Respondent on 20 June 2017.
- [4] Although the Respondent notified the Applicant’s attorney on 27 June 2018 of the need to apply for condonation, and filed its Special Plea regarding the Applicant’s non-compliance on 6 March 2019, this condonation application was only filed on 19 September 2019.

[5] The Respondent submitted that the Applicant failed to make out a proper case for the granting of condonation in that:

- 5.1 He failed to provide adequate reasons for his failure to send the notice timeously
- 5.2 He failed to prove good cause for the granting of condonation
- 5.3 He failed to launch the application for condonation as soon as he realised that he needed condonation; alternatively, within a reasonable time, and
- 5.4 He failed to prove that the Respondent did not suffer unreasonable prejudice due to the delay.

[6] The legal requirements for issuing summons against an organ of state to recover a debt, as *in casu*, are fully set out in section 3 of the Act which specifies that:

- “(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 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 proceeding(s)-*
 - (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.”

[7] The Applicant’s Notice was therefore filed almost a year late and the Respondent did not grant leave to institute summons. In terms of section 3(4)(a) of the Act, the Applicant after having failed to comply with subsections 3(1) and (2), was entitled to apply to a court with jurisdiction for condonation of such failure since the relevant organ of state, the Respondent, relies on such failure. Section 3(4)(b) determines that a court may grant an application for condonation 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] These three requirements are conjunctive and all three of them must be established by the party requesting condonation, as is evident from **Minister of Agriculture and Land Affairs v C J Rance**.¹ Section 3(3)(c) makes it clear that the prohibition in section 3(1) on the institution of such legal proceedings without compliance with section 3(1)(b)(i) and section 3(2) is meant to be enforced unless condonation is asked and obtained in terms of section 3(4)(a). Subsection 3(c) determines that if condonation is granted in terms of subsection (4)(b):

¹ 2010 (4) SA 109 (SCA) at 113A

“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.”

[9] The court therefore has a discretion to grant not only condonation, but also leave to institute legal proceedings if such condonation has been granted.

[10] In **Madinda v Minister of Safety and Security**² the Supreme Court of Appeal made it clear that a court’s power to grant condonation is not unfettered. The use of the word “*and*” instead of “*or*” in section 3(4)(b) is a clear indication that the legislature intended to require compliance with all three of the requirements before a court may grant such condonation. Only once the court is satisfied that all three the requirements set out in s 3(4)(b) have been met, does the discretion to condone come into play. This interpretation is in accordance with what the Appellate Division held in **Madinda** and in **Rance**, *supra*.

[11] The Supreme Court of Appeal has acknowledged that in section 3(4)(b) the phrase ‘if [the court] is satisfied’ sets

“a standard which is not proof on a balance of probabilities but rather an overall impression made on the court which brings a fair mind to the facts set up by the parties”.³

[12] In **Melane v Santam Insurance Co Ltd**⁴ the court held that what was needed was “an objective conspectus of all the facts”

² 2008 (4) SA 312 (SCA) at para [6] at 315 and 316 E - F

³ Madinda v Minister of Safety and Security, *supra*, at para [8] at 316.

and in **Madinda**⁵ the Court cautioned that what should be considered were “all those factors which bear on the fairness of granting relief as between the parties and as affecting the proper administration of justice.”

- [13] Condonation clearly, therefore, is not to be had for the mere asking. In **Grootboom v National Prosecuting Authority and Another**⁶ the Constitutional Court determined that:

“A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rule or court’s directions. Of great importance, the explanation must be reasonable enough to excuse the default.”

- [14] Loubser J in **Van der Merwe v The Minister of Police and the National Director of Public Prosecutions**⁷, referred to the principles that normally relate to condonation, namely the degree of non-compliance, the explanation thereof, the importance of the case and the avoidance of unnecessary delay in the administration of justice.

- [15] Although it is obvious that the attorney(s) played a prominent role in the delay, apart from the few vague references to lack of money and lack of time, and attorneys who were unwilling to take on the Government, the extent to which the applicant

⁴ 1962(4) SA 531 (AD) at 532 E

⁵ *Supra*, at 316 E - F

⁶ 2014 (2) SA 68 (CC) at 76D

⁷ Unreported judgment of the Free State Division, case number 2530/2018 (Delivered 11 July 2019) at par [5]

himself contributed to the delay is not explained. He does not explain how or when or through whom he allegedly became aware of his potential rights, whether he immediately took steps to consult an attorney, why 14 months passed before he did so, and who directed him to Mr Bahlekazi. He does not describe any efforts by himself to expedite his claim after his consultation with Mr Bahlekazi. Certainly his explanation is not 'full' enough to enable the Court to evaluate his contribution to the delay and his *bona fides*.

[16] It is not in dispute that the Applicant passed the first of the three hurdles towards condonation, namely non-prescription of his claim, since his summons was served on 19 November 2018, two months before his claim would have prescribed. What remains to be determined, therefore, is whether the Applicant also met the two remaining statutory requirements, namely '*good cause*' for the delay and proof that there was '*no unreasonable prejudice to the respondent*'.

[17] It is evident from **Silber v Ozen Wholesalers (Pty) Ltd**⁸ that the onus is on the Applicant to prove good cause, not merely to allege it. To determine whether '*good cause*' exists, the court needs to investigate those factors which pertain to the fairness of granting the relief and the proper administration of justice. There is no exhaustive list of such factors, but some relevant ones that have been pointed out are: the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, any contribution by other persons or

⁸ 1954 (2) SA 345 (AD) at 352G, 353H

parties to the delay, the applicant's responsibility for the delay, and the prospects of success in the proposed action.⁹

[18] To enable the court to consider all of the above, the explanation for the delay must therefore be 'full' enough'. Schreiner JA described as the very basic requirement for condonation in **Silber v Ozen**¹⁰ that:

"...the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."

[19] According to Heher JA¹¹, 'good cause for the delay' is not simply a mechanical matter of cause and effect. The court needs to decide whether the applicant has proffered

"acceptable reasons for nullifying, in whole or at least substantially, any culpability on his part pertaining to the delay in serving the notice timeously".¹²

[20] He further refined the requirement of a full explanation for the delay in **Uitenhage Transitional Local Council v SA Revenue Service**¹³ where he made it clear that:

"A full, detailed and accurate account of the causes of the delay and their affects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is places, must be spelled out."

⁹ Madinda v Minister of Safety and Security, *supra*, at para [10] at 316.

¹⁰ 1954 (2) SA 345 (A) at 352H – 353A.

¹¹ Madinda v Minister of Safety and Security, *supra*, at para [11] at 316.

¹² See also: M D Marais v Minister of Safety and Security and the MEC for Roads and Transport, Unreported Free State Division case no 1521/2010 in which Jordaan J held that an explanation should be full and at least sufficient and acceptable.

¹³ 2004 (1) SA 292 (SCA) at 297 H - J

[21] The Constitutional Court confirmed the requirement for a full explanation in **Van Wyk v Unitas Hospital**¹⁴, stating that:

“In addition, the explanation must cover the entire period of the delay.”

[22] In my view the Applicant in the present case patently failed to meet the criteria established for condonation in terms of section 3(4). First of all, he failed to provide a “full” explanation which enables the Court to assess how the delay really came about. In his explanation only two ‘non-specific dates’ were mentioned to account for a delay of 17 months, namely ‘January 2016’ when he was admitted to National Hospital, and ‘March 2017’, when he, upon the directions of an unknown person, consulted an attorney, Mr Bahlakazi, who was willing to take on his case on a contingency basis.

[23] His only explanation for the 14 months that elapsed before he saw the said attorney in March 2017, is a general averment, without substantiation with any dates, names, details or specifics, that he unsuccessfully approached some unnamed private attorneys and an unnamed Legal Aid attorney who all allegedly told him that they did not deal with or litigate against Government; that he did not have money for a private attorney; and that he could not afford to take time off from work to see an attorney. That is a very far cry from a full explanation.

¹⁴ 2008 (2) SA 240 (CC) at par [20]

- [24] No explanation whatsoever was given, either by the Applicant or by his attorney, for the passing of a further 3 months after the said attorney accepted the mandate until the Notice was served on the Respondent. No full explanation was given either as to why his summons was only filed on 19 November 2018, two months before his claim would have prescribed.
- [25] The Applicant also failed to meet the requirement stated in **Rance**¹⁵ that the application for condonation should be lodged without delay as soon as it is realised that there was no compliance with the specified time period. His attorneys were notified in writing on 27 June 2018 of the need to apply for condonation. Furthermore, on 6 March 2019 the Defendant's Special Plea regarding non-compliance with section 3 of Act 40 of 2002 was filed. On both those dates it was clear, therefore, that an application for condonation was needed.
- [26] Instead of immediately applying for condonation,¹⁶ however, such application was only filed on 19 September 2019, which is 15 months after the first reminder. Once again no explanation substantiated with dates and specifics was offered for the inordinate delay other than the bold remark that the firm of his erstwhile attorney dissolved when he

¹⁵ 2010 (4) SA 109 (SCA) at 118 A - B

¹⁶ See: Rance, *supra*, at 118 A – B where the Supreme Court of Appeal determined that “Condonation must be applied for as soon as the party concerned realizes that it is required.”

joined the Bar, while his present attorney took over the firm. No confirmatory affidavit from either of the two attorneys was annexed.

- [27] The most significant flaw in the application in my view is the failure to establish a reasonable prospect of success. Prospects of success on the merits might have an important bearing on the determination of the existence or not of 'good cause'. Exercising a discretion to condone where there is no prospect of success would be an exercise in futility. Whether the merits are shown to be strong or weak, may affect the applicants' explanation for conduct which led to the delay.
- [28] The Applicant's description of the alleged events that triggered the summons is vague and unsatisfactory. There is only a general reference to 'January 2016' when he went to the hospital with the alleged eye injury. He mentioned two doctors by name, but from the hospital records annexed to the Opposing Affidavit, he appears to have erroneously ascribed to them the alleged maltreatment that he relies on, namely an alleged unnecessary operation which damaged his retina and eventually left him partially blind. He does not even identify the eye that was allegedly damaged.
- [29] According to him at National Hospital fluid was withdrawn from his eye for testing. He avers that a certain Dr van Wyk operated on his eye and a certain Dr Botha told Dr van Wyk that he should have waited for the results before operating. An unidentified professor then told him that the operation had

been unnecessary since the eye had shifted and merely needed to be returned to its correct position, but that it had ‘died’ and was not going to work again. According to him, since then he has only limited sight in one eye and is blind in the other one.

[30] The facts set out in his Founding Affidavit in support of the application for condonation, in my view distinctly failed to pass the second hurdle, namely to provide ‘good cause’ for the delay sufficiently full to enable the court to determine what really happened.

[31] It is trite that an applicant must make out his case in the Founding Affidavit. From the Respondent’s Opposing papers, however, it appears that the Applicant has no or an extremely slight prospect of success on the merits. On the Respondent’s version, substantiated with clinical notes and hospital records, the Applicant never presented to National Hospital in January 2016 with trauma or injury to his eye.

[32] Upon his arrival at the hospital on 27 January 2016 his only complaint was loss of vision. The admissions record indicates that he was HIV positive but not using his HIV medication. He was already medically legally blind in his right eye (Vision “6/60”) while his left eye showed signs of severe inflammation, caused by a virus (*“fulminant CMV OS”*) which commonly occurs in patients with diminished immunity.

[33] It appears that Dr van Wyk never operated on him as averred. He only administered one of a series of injections on 11 February 2016. The fluid sample from the Applicant's eye was taken on 18 February 2016 since at the time his eye still showed symptoms of infection. When Dr Marais operated on him on 26 February 2016 he found that the retina of the infected eye showed "total necrosis" with a very poor prospect of recovery. According to the records, on 24 August 2016 his left eye showed complete retinal necrosis due to the infection he was suffering from. He did not attend his follow-up appointment one year later, and only returned 26 months later.

[34] From the Respondent's averments in the Opposing Affidavit, and the clinical records annexed thereto, the *prima facie* impression, furthermore, is that the Applicant was not truthful with the averments in his Application for Condonation or in his Particulars of Claim. *Prima facie* there therefore appears to be no reasonable prospect of success regarding the Applicant's claim.

[35] In the absence of a full, sufficient and acceptable explanation for the apparent 14 months delay in contacting an attorney, except for the vague references to the unnamed attorneys who said they do not litigate against the government, and the lack of any reasonable explanation for the further delay of more than two years until this application for condonation was filed, the court can certainly not find that the applicant,

or his attorneys, made a serious effort to pursue his potential claim.

[36] The third requirement for condonation is for the Applicant to prove that the Respondent did not suffer unreasonable prejudice due to the delay. In **Rance**¹⁷ it was made clear that the “Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant.” And as stated in **Madinda**¹⁸ there are two main elements at play in subsection 4(b), namely the applicant’s right to have the merits of the case tried by a court of law, but also the right of an organ of state not to be unduly prejudiced by delay beyond the statutory prescribed limit for giving notice. Subsection (iii) requires the court to be satisfied that there is no such prejudice.

[37] In **Brümmer v Minister for Social Development**¹⁹ the Constitutional Court pointed out that “Delays in litigation hamper the interests of justice. Documents may be lost. Witnesses may disappear. Memories of witnesses may fade.” Although the Defendant appears to have at least some of the relevant clinical records which show that the Applicant’s version of the events of January and February 2016 are not true, almost four years have passed since his hospital visit. And as the Respondent pointed out, memories fail and the medical staff deal with hundreds of patients every year. Yet they would still need to testify at any trial to disprove the Applicant’s averments and

¹⁷ *Supra*, at 117H

¹⁸ Madinda v Minister of Safety and Security, *supra*, at para [12] at 317.

¹⁹ 2009 (6) SA 323 (CC) at 346 E

would still need to rely on their memories for the details of his complaints and his treatment, apart from what is written in the notes, to refute the Applicant's averments which are contrary to what the clinical notes and hospital records indicate.

[38] Therefore, although the Respondent did not specifically plead prejudice, except to point out the common sense factors above, the Applicant cannot rely on that to aver that it did not suffer prejudice. Nor can it rely on *Mothupi v MEC*²⁰ in which the Respondent was criticised for relying only on a technical point, namely failure to file a section 3(2)(a) Notice timeously.

[39] The Applicant's averments were denied in the Plea and substantively and materially contradicted in the Opposing Affidavit. From the averments in and annexures to the Plea and the Opposing Affidavit it appears, *prima facie*, that the Applicant relies on incorrect facts and circumstances to found his claim. It appears that he never presented with trauma to his eye but throughout presented with inflammation and infection, and that he was already legally blind in his right eye and showed signs of inflammation in his left eye.

[40] It appears, furthermore, that the eventual outcome of the treatment was not due to medical negligence, but to his own HIV status with concomitant problems. *Prima facie* therefore,

²⁰ *Mothupi v MEC* Department of Health Free State (20598.2014) [2016] ZASCA 27 (22 March 2016)

it appears that the Applicant does not have a good prospect of success on the merits which could compensate for the lack of a good explanation for the delay.

[41] Had the letter of demand in terms of Act 40 of 2002 been sent timeously, the Defendant would at least have had an opportunity to investigate the claim while the memory of the Applicant's condition, symptoms and treatment was still fresh in the minds of the doctors and nurses who treated him. In my view the requirement of having to notify state organs within six months of any proposed claim for damages was introduced specifically to prevent this type of situation where an organ of state is called upon to meet a claim regarding which it might be unable to objectively verify all of the circumstances leading to the claim.

[42] Undeniably, therefore, the Defendant suffered prejudice because of the inordinate delay in the filing of the section 3(2)(a) notice and the summons in which the alleged complaints are set out. Accordingly, in my view, the Applicant failed to meet the third leg of section 3(4)(b) as well, namely to satisfy the Court that the Respondent had not been unreasonably prejudiced by the failure to serve the Notice timeously. The requirement of the existence of "*unreasonable prejudice*" rather than simply any level of prejudice, requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent.

[43] Once the court has investigated all the facts, it is in a position to assess the combined weight to be attributed to the three elements of section 3(4)(b)(i), (ii) and (iii) in the context of the discretion to grant or refuse condonation. In view of the patent lack of a sufficiently full explanation for the 14 months delay in notifying the Respondent of the Applicant's proposed claim and the failure to establish a reasonable prospect of success on the merits, the Applicant in my view patently failed to establish 'good cause' for condonation. He also failed to prove that the Respondent suffered no reasonable prejudice as a result of the late filing of the Notice.

[44] The Supreme Court of Appeal has determined that the structure of section 3(4) is now such that the court must be satisfied that **all three** requirements have been met before it can exercise its discretion to condone non-compliance with the Act.²¹ Therefore, in view thereof that the Applicants did not meet the second and third of the three statutory requirements for condonation in terms of section 3(4)(b), the Court is not in a position to exercise its discretion to grant condonation for the Applicants' non-compliance with the requirements of Act 40 of 2002.

[45] I agree with Ms Wright's submission that Applicant was obliged to bring the application for condonation and that the Respondent was entitled to oppose it, and that the Applicant seeks an indulgence and should pay the costs of the

²¹ Madinda v Minister of Safety and Security, *supra*, at para [16] at 317.

application. In **Meyers v Abrahamson**²² the court stated that it is neither reasonable nor fair for the opponent in an application for an indulgence to be put in a position that he opposes the granting of such indulgence at his peril as the Applicant in this application attempted to do by requesting a costs order against the Respondent only if it opposed the application.

[46] The court in **Meyers** then added that:

“It seems to me that the applicant for the indulgence should pay all such costs as can reasonably be said to be wasted because of the application; these costs to include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous.”

[47] The opposition of the application was neither frivolous nor vexatious. I therefore find no reason to deviate from the general practice regarding costs. The prayer for costs to be awarded on an attorney and client scale was correctly abandoned since not all of the fault for the delay can be attributed to the Applicant himself and a punitive costs order is therefore not warranted.

WHEREFORE the following order is made:

1. The application for condonation in terms of section 3(4) of the Institution of Legal Proceedings against

²² 1951 (3) SA 438 (CPD) at 455 F - H

Certain Organs of State Act 40 of 2002 is dismissed
with costs.

H. MURRAY, AJ

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