



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

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

Case number: 2196/2017

In the matter between:

**PALESA ASARINAH NTOBO**  
**[previously MOLELEKI]**

Applicant/Plaintiff

and

**THE MEC FOR HEALTH FOR THE**  
**FREE STATE PROVINCE**

Respondent/Defendant

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**JUDGMENT BY:** SNELLENBURG, AJ

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**DELIVERED ON:** 21 SEPTEMBER 2018

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- [1] This matter concerns an application for condonation in terms of section 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 [**the Act**] for failure to timeously deliver a notice of intention to commence legal proceedings against an organ of state in terms of sections 3(1) and (2) of the said Act.

[2] Section 3 of the Act provides as follows:

“3 Notice of intended legal proceedings to be given to organ of state

(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 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

(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 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

(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 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.
- (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.”

[3] Mrs Palesa Asarinah Ntobo (the applicant) gave notice **[the notice]]** on 12 January 2017 to the Member of the Executive Council for the Department of Health in the Free State Province (the respondent) of her intention to institute legal proceedings to claim damages suffered as result of medical negligence by healthcare workers during the period 29 May 2014 to 7 June 2014, which healthcare workers were in the employ of the respondent and who were acting in the course and scope of their employment with the respondent at State hospitals.

[4] After receipt of the said notice the respondent informed the applicant that the notice was not given within the 6 month period as prescribed in the Act. The respondent thus did not consent in writing to the institution of the legal proceedings upon receipt of a notice which does not comply with all the requirements set out in section 3(2).

[5] The applicant subsequently issued summons against the respondent in this Division under civil case cover number:

2196/2017 [**the action**] wherein she claims payment of amounts for special and general damages from the respondent (as defendant).

- [6] The plaintiff made the following allegations pertaining to the delivery of the notice in her particulars of claim:

“11.1 The Plaintiff gave the Defendant notice of intended legal proceedings in accordance with the provisions of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 (“the 2002 Act”) on 12 January 2017.

11.2 Having regard to the following facts, the Defendant should not rely on the Plaintiff’s failure to have given notice within six months of the date on which the Plaintiff’s claim arose, and should condone same:

11.2.1 The fact that the claim has not prescribed;

11.2.2 The fact that good cause for the failure to have given notice within six months of the aforesaid date exists, by virtue of the combination of:

- (a) The fact that no member of the Defendant’s staff advised the Plaintiff that her damages was, or even might be, the result of negligence on the part of staff members of the Defendant’s staff;
- (b) The Plaintiff’s lack of requisite medical knowledge to enable herself [to] arrive at that conclusion, in combination with the difficulties which the Plaintiff will have experienced in arriving at that conclusion without the benefit of expert medical advice, which could only be obtained in the course through the offices of the Plaintiff’s Attorneys; and

- (c) The inherent unreasonableness of expecting a person in the Plaintiff's position, in the situation in which the Plaintiff found herself in the circumstances, to gather information, to arrive at conclusions as to negligence, to seek and obtain legal advice, and to give written notice, all within six months; and

11.2.3 The fact that the Defendant has not been prejudiced, alternatively has not been unreasonably prejudiced, by any delay in this regard."

[7] In its plea to the applicant's particulars of claim the respondent denied that the applicant's claim was competent for want of compliance with the requisite notice requirements contained in section 3(2)(a) of the Act as the notice was delivered after the six month period prescribed in the said subsection. The respondent pleaded that it was prejudiced by the non-compliance. For sake of completeness it is convenient to repeat the content of the special plea in relevant parts:

- "1. The cause of action arose on 29 May 2014.
- 2. The Plaintiff served the Notice in terms of Section 3 of Act 40 of 2002 upon the Defendant on the [sic] 12 January 2017.
- 3. The Plaintiff failed to comply with the provisions of the said Act in that the Plaintiff failed to serve the notice within the six month prescribed period.
- 4. The Defendant is prejudiced by the conduct of the Plaintiff."

[8] The special plea triggered the present application.

- [9] The applicant's notice of motion as served on the respondent provided for the following relief – I have summarised the relief for sake of convenience : (i) a declaratory order confirming that the applicant's notice of 12 January 2018 constituted compliance with the relevant legislative requirements of section 3(2)(a) of the Act; (ii) in the alternative the applicant applies for condonation in terms of the provisions of section 3(4) of the Act in the event of a finding that she did not comply with the section 3 notice requirement; (iii) in the event that the application is not opposed, costs on unopposed basis on attorney and client scale and; (iv) in the event of the application being opposed, then costs occasioned by the opposition on the scale as between attorney and client.
- [10] The respondent's opposition as appears from the answering affidavit is premised on the following overarching grounds, namely (i) that the notice could not constitute compliance with the legislative requirements for a notice in terms of the said section as firstly, the notice was only sent after the period prescribed in section 3(2)(a) and secondly as the notice does not comply with the requirements of section 3(2)(b); (ii) that the applicant has failed to show good cause for the delay; and (iii) that the respondent is prejudiced by the applicant's failure to comply with the prescribed notice requirements.
- [11] At the outset certain observations are called for after considering the manner in which the notice has been dealt with by the parties in their respective pleadings in the action:
- 11.1 The plaintiff did not allege that the notice was delivered within the 6 month period provided for in section 3(2)(a). The plaintiff instead dealt with the reasons, on her version, as to

why the respondent should not rely on her failure to comply with that requirement or why condonation should be granted to her for her non-compliance.

11.2 As far as the special plea of the respondent goes, the respondent only complained of the fact that the notice was delivered after the 6 month period prescribed in section 3(2)(a) and that as result of the aforesaid failure the respondent was prejudiced. The respondent did not in its special plea rely on the ground that the contents of the notice did not comply with requirements of section 3(2)(b). It will be recalled that the respondent after receipt of the notice also only took issue with the fact that the notice was not delivered within the prescribed 6 month time period. It took no issue with the contents of the notice and certainly did not contend that the notice, as far as its contents are concerned, in any manner failed to comply with what is required in terms of section 3(2)(b).

[12] At the outset of the argument on behalf of the applicant her reliance on the main relief was abandoned. This abandonment was properly made. The last email by means of which information pertaining to the healthcare services rendered to the plaintiff, which forms the subject matter of the action and this application, were supplied was dated and received by the applicant's attorneys on 8 July 2016. This date is accepted by the applicant to be the date, on her version, on which the debt became due and thus the date from which the six month period for the notice would run. The applicant's notice is dated 12 January 2017 and was received by

the respondent sometime later, at the very worst for the applicant on the 24<sup>th</sup> of January 2017 (on the respondent's version). Thus, the notice was not delivered within the 6 month period on the applicant's own version and the main relief was not tenable. This is also in line with the allegations in the applicant's particulars of claim.

[13] It remains to determine whether the applicant has satisfied the requirements for condonation in terms of section 3(4) of the Act.

[14] The salient facts underlying the applicant's cause of action can succinctly be summarised as follows:

14.1 On 29 May 2014 the applicant visited the Ladybrand Hospital as a 24 year old expectant female. The health care practitioners indicated that they would do a sonar to determine the expected date of delivery. It is the applicant's case that this sonar was never done. On 4 June 2014 the applicant presented herself at the Mantsopa Hospital. At that stage an ultrasound was done and showed no gestational sack. The applicant was advised to return on 5 June 2014 so that another ultrasound could be done. On 5 June 2014 at 15h10 the applicant arrived at the casualty department of the Mantsopa Hospital with vaginal bleeding and severe abdominal pain. The applicant was taken for a sonar and a pregnancy test was done. The pregnancy test indicated a positive result.

14.2 On 5 June 2014 at 15h55 it was recorded that the applicant had a miscarriage at nine weeks and six days by vaginal speculum. The allegation continues as follows: "Os open and

retained products of conception noted on os.” It was recorded that the plaintiff’s uterus was empty and the negative products of conception noted.

14.3 On 6 June 2014 at 07:49 the applicant reported lower abdominal pain whilst still being hospitalised. She was however discharged on 7 June 2014 without any further treatment.

14.4 On 13 June 2014 the applicant went to see Dr Brits who referred her for emergency surgery following a ruptured ectopic pregnancy. When arriving at Mediclinic, Bloemfontein a laparotomy for the ectopic pregnancy was performed.

14.5 The applicant alleges that she was not informed of what had transpired by any of the health care professionals and was left in the lurch. The applicant complains, in essence, of the negligent misdiagnosis and/or negligent failure to detect and treat the ectopic pregnancy.

[15] The applicant’s husband sought assistance from Workerslife, being an employment legal services programme offered by his employer, on 20 October 2014.

[16] This entity instructed Van Zyl & Le Roux Attorneys, Pretoria to act on the applicant’s behalf. The instruction letter was dated 31 October 2014 and signed at Pretoria.

[17] The applicant states that her first consultation with the said attorneys took place on 8 December 2014. On this day the applicant signed the necessary consent form to authorise the

aforesaid attorneys to have access to and receive copies of all medical records recorded in the consent. The applicant also signed a special power of attorney.

- [18] On the same day the attorneys directed the first of several letters to the Superintendent of the Mantsopa Hospital [**the Superintendent**] to request copies of all medical records of the applicant. The consent, special power of attorney and a copy of the applicant's identity document were appended to the letter and the reasonable costs involved for making copies of the medical records were tendered.
- [19] A further letter to the Superintendent followed on 14 January 2015. In this letter reference is made to various telephone conversations which had transpired and the hospital's banking details are requested for payment of the amount of R546.00 required to obtain copies of the medical records.
- [20] A letter in similar terms was sent to the Superintendent on 17 February 2015. Due to the failure of the hospital to make the medical records available a formal request in terms of the Promotion of Access to Information Act 2 of 2000 [**PAIA**] was made on 16 March 2015.
- [21] Hospital records were filed on 7 September 2015. The records were served on Messrs Honey Attorneys, Bloemfontein.
- [22] These records were forwarded to a certain Mr Joubert for his perusal and consideration and also to a nursing expert to advise regarding the viability of a claim against the parties on the basis of negligence.

- [23] Although not specifically dealt with, it appears that a letter was sent to the Mantsopa Hospital on 15 March 2016 which specifically requested sonar reports of scans that were taken. On 8 July 2016 the Legal Administration Officer, Legal Services, Free State Department of Health addressed email correspondence, pursuant to the request for the said scans, to which email an affidavit of Dr Lethole was appended. In the affidavit Dr Lethole advises that on 5 May 2014 and 4 June 2014 “the Sonar machine did not have a print out”. The applicant contends that this affidavit confirms that the sonar machine was defective in some manner. The reference to 5 May 2014 is apparently erroneous if cognisance is taken of the common cause facts pertaining to the applicant’s medical history underlying the present cause of action, but for purposes hereof nothing turns on this.
- [24] The applicant states that after receipt of this information a brief was prepared for counsel for preparation of the particulars of claim and statutory section 3 notice which notice was duly prepared. The particulars of claim was issued on 5 May 2017 and served on 10 May 2017.
- [25] The applicant states that only after collating all the documentation could the applicant give instructions for drafting of the particulars of claim and the notice. The applicant contends that she only had knowledge of all the facts giving rise to the debt after the email of 8 July 2016.
- [26] The applicant explains that she was contacted by the Pretoria attorneys for a consultation for preparation of this application and that all the necessary annexures were forwarded to counsel for preparation of this application at the end of 2017. Due to the

festive season holidays the application was only attended to in the new year. The application was served on the respondent on 9 May 2018.

[27] The applicant states that the slight delay, if any, was as result of her being in the Free State and her attorneys in Pretoria.

[28] As stated above section 3(4) provides that a court may grant an application to condone non-compliance with the requirements of section 3(1) and (2) of the Act only if it is satisfied that-

28.1 the debt has not been extinguished by prescription;

28.2 good cause exists for the failure by the creditor; and-

28.3 the organ of state was not unreasonably prejudiced by the failure.

The requirements are conjunctive and must be established by the applicant for condonation.<sup>1</sup> In essence the court is to exercise a wide discretion<sup>2</sup> judiciously by considering all the relevant circumstances. Also, in general terms, the interests of justice play an important role in condonation applications.<sup>3</sup>

[29] The first requirement is satisfied. The applicant has proceeded from the basis that the “injury” itself occurred on 29 May 2014. The

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<sup>1</sup> Minister of Agriculture & Land Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA) para 11.

<sup>2</sup> Madinda supra para 8; Premier, Western Cape v Lakay 2012 (2) SA 1 (SCA) para 14 and also see MEC for Education, KwaZulu-Natal v Shange 2012 (5) SA 313 (SCA).

<sup>3</sup> Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) para 20; Rance supra para 35.

summons was issued on 5 May 2017 and served on the respondent on 10 May 2017. The debt has not prescribed.

[30] The second requirement comprised thereof that the applicant must show good cause for the failure. It is well established that good cause may include a number of factors that are entirely dependent on the facts of each case.<sup>4</sup> Equally well established is the fact that an applicant for condonation is required to set out fully the explanation for the delay and such explanation must cover the entire period of the delay and must be reasonable.<sup>5</sup> This entails that the applicant must at least furnish an explanation of her default sufficiently full to enable the Court to understand how it really came about, and to assess her conduct and motives.<sup>6</sup> As far as good cause is concerned, strong prospects of success of the intended claim may for instance mitigate fault whilst no merits may render mitigation pointless.<sup>7</sup>

[31] As stated above, the respondent took issue with the fact that the notice was served after expiry of the 6 month period. The fact that the notice was late is now common cause between the parties.

[32] The respondent, for purposes of the applicant's application for condonation:

32.1 Denies that the applicant has established good cause.

32.2 To this end the respondent takes issue with the applicant's explanation for the delay on the basis that the explanation lacks particularity and is not reasonable according to it.

32.3 The respondent submits that the delay was unreasonable.

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<sup>4</sup> Madinda supra para 10; Rance supra para 36.

<sup>5</sup> Van Wyk supra para 22; Rance supra para 35.

<sup>6</sup> Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A); Rance supra para 36.

<sup>7</sup> Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) para 12.

32.4 Lastly, on this issue, the respondent contends that the applicant has not shown that she has prospects of success. To this end the respondent argues that the applicant's "case is mounted on two important aspects" namely the nursing expert's findings and the affidavit of the doctor confirming that the sonar machine was not working. These contentions are discussed below.

- [33] The respondent in essence argued that the applicant either had knowledge of the facts constituting the debt much sooner than the applicant claims to have acquired those facts, or the applicant would have had knowledge of the facts constituting the debt earlier if she took reasonable care. The respondent thus argues constructive knowledge.
- [34] The respondent referred specifically to the letter of 20 October 2014 by the applicant's husband addressed to Lesaka Legal which creates the impression that he, at least, at that date (some 4 months after the medical treatment) held the opinion that the medical practitioners were negligent (the exact wording is that he "wants to sue the hospital and claim for pain suffered and human dignity for lack of experience").
- [35] The letter must be seen in context. Lesaka is connected to Workerslife Legal Services. This is clear from paragraph 6 of the letter of instruction issued by Workerslife to Van Zyl & Le Roux Attorneys which forms part of annexure G to the founding papers. The letter was apparently written by the applicant's husband with the purpose of motivating the said legal services to come to his

assistance in suing the hospital. The letter also shows that the author did not appreciate the intricacies of what had transpired. He for instance records that Dr Coning informed them that the baby was still inside the applicant's womb, whilst this allegation is improbable and contrary to the pleaded prognosis and the emergency procedure that followed, namely emergency surgery for a ruptured ectopic pregnancy (it is common cause between the legal representatives for the parties that an ectopic pregnancy presents when, in simple terms, the embryo attaches outside the womb/uterus).

- [36] In **Links v Member of the Executive Council, Department of Health, Northern Cape Province** 2016 (4) SA 414 (CC) para 35 the Constitutional Court applied the following dicta by Cameron JA and Brand JA in the **Minister of Finance and Others v Gore NO** 2007 (1) SA 111 (SCA) paras 18 – 19:

"The defendants' argument seems to us to mistake the nature of knowledge that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified.'.....

'It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less, is vehemently controverted allegation or subjective conviction."

- [37] Notwithstanding that the letter at most represents the applicant's husband's opinion, which cannot be equated to the applicant's knowledge, it is clear that not only did the husband not have a proper grasp of the facts that would constitute the debt itself, but he merely held an 'unwarranted' opinion at that stage. It was a

mere suspicion of negligence by the applicant's husband amounting to supposition.

[38] The respondent contends, with regard to the issue of when the applicant ought to have acquired knowledge of the necessary facts constituting the debt, that there are periods during the course of the matter which are simply not dealt with by the applicant. For example, the emergency surgery occurred on 13 June 2014. The applicant is silent on what transpired from then until 20 October 2014 when her husband requested legal assistance and the attorneys were appointed. The respondent also points out the period from receipt of the hospital records during September 2015 to the receipt of the information regarding the sonar machine on 8 July 2016.

[39] The applicant had attorneys appointed for her during October 2014 after the applicant sought assistance through her husband's employment legal services programme. The applicant does state that she was not informed by the medical practitioners of the facts surrounding the treatment and diagnosis which eventually gave rise to her claim. The applicant's attorneys made the first request for her medical/hospital records almost immediately after their appointment was finalised and they had the benefit of consulting with the applicant.

[40] As far as the lapse of time since the receipt of the information until the last delivery of information on 8 July 2016, the following.

40.1 An expert was appointed to assist the applicant in determining whether there had in fact been any actionable

negligence in the diagnosis and/or treatment of her. This conduct was reasonable in the circumstances.

40.2 I have been able to discern that a letter was addressed during March 2016 which specifically requested copies of the sonar images (the Department of Health and the doctor in his affidavit refer to 5 May 2014 and 4 June 2014 as stated above). This request would have been the result of the perusal of the hospital records that had been supplied.

[41] The respondent's answering affidavit did not foreshadow the constructive knowledge argument. The respondent dealt with the applicant's exposition on the history of the matter and specifically the time lapses in between as part of its argument that there was no reasonable explanation for the failure to deliver the notice within the six month period. The constructive knowledge argument did also not appear from the plea.

[42] Affidavits perform a dual function in motion proceedings, namely that of the pleading and the evidence to prove the allegations.<sup>8</sup> The applicant cannot be criticised for not addressing this issue with more particularity in the circumstances. I am in any event not persuaded on the facts of the matter that it can be found that the applicant should have been aware of the facts constituting the debt sooner had she taken reasonable care. The issue was not properly raised in the answering affidavit. In light of my ultimate conclusion the matter can be determined by taking into consideration that the

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<sup>8</sup> Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) para 28; Kham and Others v Electoral Commission and Another 2016 (2) SA 338 (CC).

delay to give the required notice consisted of several months as opposed to a few days. I will also accept that the explanation for the delay may then be described as being weak. That being said, the facts do not show wilful default as will appear from the discussion below. Notwithstanding the paucity of information regarding certain periods, the delay is not so unreasonable as to warrant the dismissal of the application and I am able to understand how the greater part of the delay was occasioned as will appear below.

- [43] It will be recalled that the second leg of the argument involves the contention that the applicant had knowledge of the facts constituting the debt before the email of 8 July 2016. In light of the fact that I accept that the delay must be several months, it is not necessary to discuss this leg of the argument in detail as the outcome will amount to what I am willing to accept in favour of the respondent, namely a delay of several months.
- [44] As the respondent's argument in this respect also underlies the submission that the applicant has not shown that she has prospects of success with the intended claim, it is convenient to evaluate the contentions at this juncture.
- [45] The respondent contends that the affidavit did not reveal anything new in as much as Dr Lethole's affidavit simply records that the printer did not work and that a copy of the image which was displayed could not be generated. The respondent contends that the grounds of negligence on which the applicant relies would have been in her knowledge before this affidavit was supplied. In conjunction with this the respondent argues that the applicant should have disclosed the expert report or advice on which she

relies as this would show what facts she relied on to constitute the debt. The respondent also contends that the fact that no image could be printed does not mean that the operator could not see what was displayed.

- [46] Suffice it to say that the parties have very different positions regarding the significance of Dr Lethole's affidavit. The applicant contends that the affidavit confirms that the machine was malfunctioning in one or the other respect.
- [47] I need not determine the dispute regarding the purport of Dr Lethole's affidavit. After this information was received the applicant was advised that the debt was claimable and this prompted the instructions to proceed with the drafting of the summons and the notice. Even if the respondent's contentions to the effect that the affidavit did not disclose new or further facts are accepted *in arguendo*, the applicant would not have known the import of the images until the images were either delivered or the applicant was advised that no images were available and the reasons why no images were available.
- [48] On the facts of the matter the applicant clearly attaches a different conclusion to the information pertaining to the fact that no sonar images could be or was generated.
- [49] The reason for the delay until 8 July 2018 is known, namely the applicant requested information (sonar images) which were pertinent and which is clear would in the normal course have formed part of her hospital records. The applicant only received the reply that no images were available as well as the reasons therefore on 8 July 2016. I have indicated that I am accept that

there is a paucity of information pertaining to this time period, namely from receipt of the hospital records until the request of the sonar images. The delay from March 2016 until 8 July 2016 is however known, namely the explanation for the absence of the sonar images were only supplied on 8 July 2016.

- [50] The respondent's criticism in respect of the explanation for the delay as far as lack of details are concerned of when exactly the instructions to counsel were given to draft the notice; why the consultation could only be held when it was and what the reason for the delay between the consultation and the eventual delivery of the notice was, has more force. There is clearly a paucity of information in this regard.
- [51] There is of course a distinction between the need to show good cause for the delay to deliver the notice and the period after the notice was supposed to be delivered until the application for condonation has been made. The first period forms part of the good cause requirement required by section 3(4) whilst the latter period does not form part of the good cause requirement but may play a role in the overall exercise of the court's discretion.
- [52] The erroneous belief, of whomever drafted the applicant's founding affidavit, that the notice had in fact been delivered timeously clearly informed the manner in how the applicant's case was ultimately presented. The applicant is however bound to the manner in which her case has been presented.
- [53] In light of the established principle that some issues, such as prospects of success may mitigate a weak explanation for delay, it

serves to evaluate the applicant's prospects of success and other facts specific to this matter.

- [54] As far as the applicant's motives and conduct must be evaluated it is clear that the applicant was desirous to institute an action and to take steps as result of the healthcare services which she perceived to have been rendered in negligent manner. I have no doubt that her motives are honourable. She simply wants to pursue her claim against the respondent. I also have no doubt that the applicant's delay was not the result of any intentional disregard for the respondent's rights.
- [55] On the facts in this case I do not agree with the respondent's submission that the expert advice had to be produced in the form of the report or discussed in more particularity in this matter. The applicant appended the particulars of claim and dealt with the grounds on which she claims that the healthcare professionals were negligent in their diagnosis and treatment.
- [56] I am satisfied that the grounds of negligence on which the applicant relies are quite apparent from the allegations in both her founding affidavit as well as her particulars of claim. I am satisfied that the applicant has shown strong prospects of success based on the allegations in the papers and particulars of claim. Whether the applicant will ultimately be successful is not the test at this stage.
- [57] The respondent was also partially culpable in the delay by not reacting to the numerous requests for information when the same was made. The first request, although not by means of PAIA, was made on 8 December 2014. The hospital records were only made

available during September 2015, after a formal request was made in terms of PAIA, whilst it appears that the records were promised much earlier. I find so because the Superintendent apparently advised the applicant's attorneys what the reasonable costs of making copies of the records would be. This was already during January 2015.

- [58] When considering good cause I am satisfied that the applicant has satisfied this requirement if all the facts specific to this matter are considered cumulatively. The strong prospects of success do mitigate the weak explanation for the delay. The facts of the matter do not justify a finding that the applicant made herself guilty of wilful default. I have no doubt that the applicant was and is desirous to pursue her claim.
- [59] It needs to be determined whether the organ of state was not unreasonably prejudiced by the failure. The respondent claims that the delay was unreasonable and that she was prejudiced. In amplification of the prejudice, which it only pleaded in general terms in the special plea, the respondent contends in these proceedings that "one of the doctors" who attended to the applicant, namely Dr Motsie, is out of the country and was out of the country when these proceedings were instituted on 5 May 2017.
- [60] The respondent complains that she was not given an opportunity to consult with Dr Motsie in order to determine what had happened and to consider whether the matter should be settled or not.
- [61] The aforementioned prejudice is the totality of prejudice relied upon by the respondent.

- [62] It was held in **Rance** *supra*, that whereas good cause primarily concerns the applicant's conduct and its motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the protection of its interests by receiving timeous notice. In **Madinda** *supra* it was held that a common sense analysis of facts are required and that prejudice should not be assumed in absence of evidentiary basis.
- [63] To my mind the respondent has not shown any unreasonable prejudice which would justify the dismissal of the application on that ground alone or conjunctively with other grounds. Firstly, on the respondent's own version Dr Motsie is one of the doctors who treated the applicant, not the only doctor. Secondly, Dr Lethole was able to depose to an affidavit regarding the functioning of the sonar machine. Thirdly, the respondent merely states that she was not able to consult Dr Motsie when the matter was instituted, after the notice was received, for purposes of deciding whether the matter should be settled or not. The respondent does not state that Dr Motsie's evidence would not be available at all. The respondent also did not state what steps, if any, the relevant department took to make contact with Dr Motsie or for that matter what evidence Dr Motsie would be able to give or not. Clearly there are other doctors with personal knowledge of the matter like Dr Lethole.
- [64] I am not persuaded that any unreasonable prejudice would be suffered by the respondent if condonation is granted. There are several options available to procure Dr Motsie's instructions and testimony in the event that he may still be out of the country when his attendance is required. I would also have expected the respondent to say that Dr Motsie would not be available in future if

that was the case. The applicant also correctly points out that there are numerous means to take instructions from Dr Motsie in future even if he is out of the country. The same applies if Dr Motsie's evidence is required by the respondent.

- [65] The following issues remain for determination, (i) the respondent's contention that the notice in any event did not satisfy the requirements of section 3(2)(b); (ii) the failure of the applicant to apply for condonation the moment she realised that condonation was necessary; and (iii) the costs.
- [66] The respondent's reliance on the fact that the notice did not satisfy the criteria of section 3(2)(b) is without merit. The notice clearly complied with the requirements of section 3(2)(b). The respondent did not rely on this issue in the first response after it had received the notice nor in its special plea. Had this truly been an alive issue, the respondent would have raised this issue. It clearly did not raise the issue because the notice satisfies the statutory requirements regarding the contents thereof.
- [67] The second issue pertains to the obligation of an applicant to seek condonation immediately when she realised that it was necessary. This issue plays a role in the exercise of my overall residual discretion. It is clear that the applicant's legal representatives laboured under the impression that the notice was due in January 2017. Somehow the applicant's legal representatives came to be under the erroneous impression that the 6 month period would only expire on 18 January 2017. This explains why the applicant did not deal with the instructions and lapse of time since receipt of the email of 8 July 2016 in more detail. I am however mindful of the circumstances of the matter and conclude that the failure to

make the application sooner should not deprive the applicant, on the facts of this matter, from the right to pursue her claim against the respondent. The prospects of success does mitigate the weak explanation in this regard.

[68] When considering the facts of the matter, even when accepting a longer delay as the respondent contends for, I am satisfied that the debt has not prescribed, the applicant has satisfied the good cause requirement and the respondent is not unreasonably prejudiced by the failure to deliver the notice timeously.

[69] The applicant, during reply, indicated that she no longer persisted with the prayer for attorney and client costs and would only seek costs on the scale as between party and party. The respondent likewise argued that there were no grounds for an order on the scale as between attorney and client if the relief was granted.

[70] The respondent's opposition, although ultimately not successful was not unreasonable. It would not have warranted a cost order on attorney and client scale. The applicant has ultimately achieved substantial success.

[71] In the premises the applicant's failure to comply with the requirement of section 3(2)(a) of the Act should be condoned.

[72] **IT IS ORDERED:**

1. Prayer 2 of the notice of motion is granted;
2. The respondent is ordered to pay the costs occasioned by the opposition of the application.

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**N. SNELLENBURG, AJ**

On behalf of the applicant: Adv R van der Merwe  
Honey Attorneys,  
Bloemfontein

On behalf of the Respondent: Adv ND Khokho  
State Attorney,  
Bloemfontein