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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: **2621/16**

In the matter between:

R. M Plaintiff

and

MEC FOR HEALTH, F.S Defendant

CORAM: CHESIWE, J

JUDGMENT BY: CHESIWE, J

HEARD ON: 11 JULY 2018

DELIVERED ON:

11 OCTOBER 2018

JUDGEMENT

- [1] The plaintiff instituted an action for medical negligence damages against the Member of the Executive Council of the Department of Health, Free State (the MEC) as envisaged in terms Section 1 of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 (the Act).
- [2] The plaintiff was admitted on the 8th November 2014 at the Mofumahadi Manapo Mopeli Regional Hospital. The plaintiff sustained a gunshot injury to the left arm posteriorly and superiorly; injury to the left side of the chest and lodgement of bullet in right lumbar region. The plaintiff was treated as follows: a laparotomy¹ was performed for the suspected injuries and an intercostal drainage² was inserted for the haemothorax; removal of the bullet was done under anaesthetic. As a consequence of these procedures the plaintiff alleged that he suffered unnecessary pain; a laparotomy scar; lower pain and discomfort around the area of the laparotomy; pain in the area around where the intercostal drain was inserted and the plaintiff experiences

¹ A laparotomy is a procedure involving a large incision into the abdominal cavity to examine the abdominal organs and aid to diagnose and management of pathology involving the abdominal organs.

² An intercostal drainage is an underwater drain system that allows drainage of air or blood surrounding the lungs to allow the lungs to take in air to maximum capacity.

more pain when he moves his body or when the weather changes.

- [3] The plaintiff claims medical negligence from the defendant in the amount of R4 Million for damages he suffered due to treatment that was done without prior chest and abdomen x-ray being conducted. The plaintiff in his particulars of claim against the defendant claims that his claim was founded in contract, in that the defendant was under a legal duty of care to ensure that the plaintiff whilst hospitalised received proper medical treatment. The defendant opposed the action.
- [4] The legal representative of the plaintiff send a letter dated 25 June 2015 via registered post to the legal representative of the defendant, which letter was received on 28 July 2015 and acknowledged on the 31 July 2015.³
- [5] The defendant raised a special plea to the plaintiff's particulars of claim that the plaintiff has failed to comply with the provision of section 3 of the Act and the plaintiff has failed to give the defendant proper notice as envisaged in terms the Act that notice is to be given within the mentioned six month period as calculated from the date the plaintiff relied upon, which is 8 November 2014 and that the plaintiff failed to give brief facts giving rise to the debt as envisaged in the Act. The defendant in the special plea denied that the doctors were negligent.

³ See Bundle of documents for defendant's special plea, page 1.

- [6] The issue that the court has to determine is whether the plaintiff has complied with section 3 of the Act.
- [7] The defendant called only one witness to the stand Mr Mojalefa Monyane who is employed as a Legal Administrative Officer for the litigation department of the defendant.
- [8] Mr Monyane testified that the plaintiff send a letter to the defendant dated 25 June 2015, which showed that the cause of action giving rise to the debt started on 8 November 2014. He stated that the letter from Booie & Sons Attorneys was received by his office on 28 July 2015 and further indicated that the track and trace numbers do not specify which track number must go to which department. Mr Monyane responded with a letter on behalf of the defendant dated 31 July 2015 advising the plaintiff that he failed to comply with relevant provisions of Act 40 of 2002 and that the claim of the plaintiff was rejected. He explained that the letter of instruction from the plaintiff's attorney showed that the cause of action arose on 8 November 2014 and that was the date that he used to calculate whether the claim falls within the six month period. He said according to the calculation the claim would expired on 1 May 2015. Mr Monyane mentioned that the plaintiff did not respond to the letter, nor did the plaintiff make an application to amend its papers. He brought it further to the court's attention that paragraph 21 of the particulars of claim worsened the plaintiff situation as it stated that during February 2016 a letter of demand was send and this made the calculation to be way out of the required six month. Mr Monyane indicated that the plaintiff therefore failed to give notice within six months as

required by the Act. Mr Monyane further testified that the defendant will be prejudiced as the doctors and nurses who used to be employed by the defendant has left the employment and that it was difficult to trace them.

[9] Under cross-examination, Mr Monyane testified that the letter itself was written six months after the cause of action, and therefore did not comply with the Act. It was then put to Mr Monyane that it is not expected of the plaintiff to have known when the cause of action arose, that the plaintiff only knew about the negligence when he consulted with his legal representative, Mr Boo. That was the defendant's case.

[10] The plaintiff did not call any witnesses.

[11] The Counsel on behalf of the defendant, Mr Masihleho in closing argument submitted that the plaintiff failed to comply with Section 3(2)(a) of the Act and that based on the information provided by the plaintiff, the six months expired on 7 May 2015. Counsel submitted that it was necessary for the plaintiff to make an application for condonation as the plaintiff had not complied with the required six months set out in the Act. Counsel submitted that since the plaintiff did not respond to the letter dated 28 July 2015, the facts of the defendant are thus unchallenged and that court can only make a determination based on the evidence before it. Counsel submitted that even before the plaintiff withdrew his replication, the replication did not deal with non-compliance, but rather dealt with a different issue of prescription. He concluded

that the special plea of the defendant before court is therefore unopposed in the absence of replication.

[12] Counsel for the plaintiff, Mr Kugu in his closing arguments submitted that the notice was given within the required six months. The question is when and how the six months was computed. Counsel submitted that the defendant should give the date when was the cause of action arose as the probable case is that the date given was the date that the plaintiff was sedated. Counsel further submitted that the defendant's case is not dependent on the plaintiff's version and that the defendant failed to proof when the plaintiff became aware that he was wronged by the defendant. Counsel for the plaintiff submitted that in this instance prescription does not apply and it was not an issue between the parties as the notice was served within the appropriate time and that condonation is not of relevance.

[13] The onus rest on the defendant to prove the plaintiff's failure of non-compliance with the provisions of section 3 of Act which reads as follows:

- (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)-

1. 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

2. 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.

3. 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.

[14] In **Madinda v Minister of Safety and Security**⁴ the court held that:

“The phrase 'if [the court] is satisfied' in s 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See eg *Die Afrikaanse Pers Beperk v Neser* 1948 (2) SA 295 (C) at 297...”⁵

The court held further that:

“The first requirement speaks for itself. The court must be satisfied that the plaintiff relies on an extant course of action. The second requirement is procedural and will look 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.”⁶

[15] With regards to the second and third requirements, the court in **Madinda** further stated that:

“Good cause' usually comprehends the prospects of success on the merits of a case, for obvious reasons... 'Good cause for the delay' is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced acceptable reasons... 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

⁴ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA)

⁵ *Ibid* para [8]

⁶ *Ibid* para [9]

prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone...”⁷

- [16] The structure of s 3(4) of the Act is such that the court must be satisfied that all three requirements have been met and once it is satisfied, the discretion to condone operates according to the established principles⁸. As stated by Holmes JA in **United Plant Hire (Pty) Ltd v Hills and Others**⁹

“It is well settled that, in considering applications for condonation, the Court has discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive”¹⁰

- [17] In the matter of **Minister of Safety and Security v De Witt**¹¹ it was held that condonation in terms of section 3(4)(b) of the Act could appropriately be granted even if no notice was given, or notice was given after the service of summons provided that the

⁷ Ibid para [12]

⁸ *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E-G)

⁹ Ibid

¹⁰ Ibid

¹¹ *Minister of Safety and Security v De Witt* 2009 (1) SA 459 (SCA) para [5], [11] and [13]

debt had not prescribed. As in this instance the plaintiff claim has not prescribed. The plaintiff's debt has not prescribed but according to the calculations by the defendant the plaintiff has not complied with the required six month. Counsel for the plaintiff correctly so, submitted that the plaintiff was not aware that he has a negligence claim against the defendant, until he consulted with his legal representative and became aware of the claim. The plaintiff approached the attorney not having any knowledge as to when a claim arises and how the cause of action arose.

[18] The plaintiff acquired information that he was mismanaged negligently by the medical staff when he first consulted with his attorney. Counsel for plaintiff submitted that it's the plaintiff's case that he has complied with the requirements of Section 3 of the Act and the onus rests on the defendant to prove otherwise. Furthermore, there is no evidence in all the facts submitted by the defendant to substantiate that the failure to give notice timeously would be unreasonable prejudiced them except than saying that they are unaware of the whereabouts of the doctors or the nurse. The defendant has at its disposal the different Regulatory bodies of these professions to trace the medical staffs, which are the South African Nursing Council and the Health Professional Council of South Africa.

[19] The plaintiff in this instance may have been unaware of the requirements for notice until he approached an attorney, or having knowledge as to when and how the cause of action arose. It therefore seems the explanation given by the plaintiff tends to favour the plaintiff. It is indeed true that the plaintiff did not seek

application proceedings for condonation as he thought and on legal advice received his notice was still within the required time.

[20] The primary purpose of the Act is to require that notice of intention to institute legal proceedings be given at an early stage, obviously to enable it to investigate the basis of the proposed claim. The legislature by requiring that a notice be given within six months of the date on which the debt became due is to safeguard on any claims that may be filed way out of the required six months without a proper explanation by the creditor. There will always be some cases where the delivery of the notice is or was late and section 3 (4) condones the late delivery. The fact of the matter is the plaintiff send a notice to the defendant that notifies of his intention to proceed with legal action. A court may grant condonation for such failure if it is satisfied that the debt has not been extinguished by prescription, that good cause exists for the failure by the creditor and that the Organ of State was not unreasonably prejudiced by that failure.

[21] Section 3(4)(b) circumscribes a court's powers to grant condonation by requiring that it be satisfied that:

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for the failure by the creditor to serve the statutory notice according to section 3(2)(a) or to serve notice that complies with the prescription of section 3(2)(b); and
- (iii) The organ of state was not unreasonably prejudiced by the failure.

- [22] The plaintiff is entitled to condonation for the late service on the defendant of the notice as required by the Act. Without getting into the merits of the case it seems to me that the plaintiff's prospects of success cannot be ruled out. Thus I am persuaded that in the interest of justice, the plaintiff's circumstances favours him and he can therefore not be denied an opportunity to a trial on the merits of this case. In my view the purpose of condonation is to forgive non-compliance or faulty compliance and the court has the discretion to condone the late filling of the notice on the defendant.
- [23] Condonation under the Act has nothing to do with non-observance of court procedure, but is for permission to enforce a right, which permission may be granted within the prescribed statutory parameters, and such an application is only necessary if the Organ of State relies on the creditor's failure to serve notice.¹²
- [24] Therefore, I come to the conclusion that the plaintiff has satisfied the elements of Section 3, whether it was timeous or not depend upon when the plaintiff acquired knowledge of the debt or the facts giving rise to the debt. The defendant was unable to prove as to when the plaintiff acquired the knowledge of the facts that gave rise to the debt. The plaintiff had to consult with an attorney and only then discovered that he was managed negligently by the medical staff, as a result thereof the plaintiff would not be aware as to when did the cause of action arise.

¹² Lakay v Premier of the Western Cape Provincial Government NO (1269/2006) [2009] ZAWCHC 185 (27 November 2009)

[25] I am satisfied for purposes of section 3(4)(b)(ii) of the Act that good cause exists for the plaintiff.

[26] In the circumstances, though the notice was not given within six months; the court has the discretion to condone the late service on the defendant.

[27] **ORDER**

1. Condonation is granted to the plaintiff's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against Certain organs of State Act 40 of 2002 within the period laid down in section 3(2) of the Act.
2. Costs to be in the cause.

S. CHESIWE, J

APPERANCES:

Obo Plaintiff: Adv. Kugu

Instructed by: Honey Attorneys
(Booi and Sons Attorneys)
Queenstown

Obo Defendant: Adv. MA Mohobo

Instructed by: State Attorney
Bloemfontein