



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: 1803/2014

In the matter between:

MATTHEUS GERHARDUS KRUGER

Applicant

and

THE MINISTER OF HEALTH

First Respondent

**THE MEMBER OF THE EXECUTIVE COMMITTEE
FOR HEALTH, FREE STATE**

Second Respondent

DR J WESSELS

Third Respondent

DR A BOTHA

Fourth Respondent

HEARD ON: 04 AUGUST 2016

JUDGMENT BY: MBHELE, J

DELIVERED ON: 03 NOVEMBER 2016

BACKGROUND AND INTRODUCTION

- [1] The applicant, an elderly male person, received medical treatment at state owned hospitals in Bloemfontein between February and June 2008. He suffered paralysis after undergoing laparoscopic cholecystectomy at Pelonomi hospital on 22 February 2008 and post operation medical treatment both at Pelonomi and Universitas hospitals.
- [2] On 17 June 2011 and some 3 years after the unfortunate incident in question the applicant, through his Attorneys, issued summons against the respondents in the North Gauteng High Court for recovery of damages on the grounds of alleged professional medical negligence at the hands of the respondents.
- [3] The respondents resist the action and, on 28 October 2011, filed special plea to, *inter alia*, the effect that the court lacks jurisdiction to hear the matter because the applicant failed to comply with the prescripts of sections 3(2) and 4 of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act).
- [4] On 17 September 2013 the matter was transferred from North Gauteng High Court to this court.
- [5] On 8 May 2014 the applicant, through his attorneys, notified the respondents in terms of the Act of his intention to institute action against the respondents for recovery of damages on the basis of alleged professional medical negligence.

- [6] The notice was followed by a letter on 9 May 2014 requesting the respondents to condone non-compliance with the provisions of section 3 of the Act.
- [7] The respondents, through state attorney, responded to the applicant's request for condonation and pointed out that same could not be agreed to.
- [8] On 13 November 2014 the applicant filed the instant application moving for condonation of the late filing of the aforementioned notice together with costs in the event of opposition by the respondents.
- [9] The respondents are opposing the motion on the ground that there exists no good cause to justify condonation.

ISSUES IN DISPUTE

- [10] The parties are divergent on whether or not good cause exists for condonation with reference to the following:
 - (a) Whether or not the delay involved has been adequately explained with the respondents contending that there is no explanation of the time lapse between the issue of summons on 17 June 2011 and the notice in terms of the Act, on 8 May 2014. Further, that there is no explanation for the lapse of time between June 2011 and November 2014 when the applicant filed his application for condonation.

- (b) Whether or not the claim has been extinguished by prescription with Mr Roux, for the applicant, maintaining that the issuing of summons interrupted prescription.
- (c) Whether or not the reasons advanced by the applicant for pre-summons delay is acceptable with the respondents contending that the reasons are not sound and render the delay inexcusable.
- (d) Whether or not the applicant's claim has prospects of success with Mr Claasen, for the respondents, maintaining that the only expert evidence on record is of Doctor JJ Wessels and Professor SJA Smit who unanimously refuted any medical negligence or malpractice.
- (e) Whether or not the respondents were unreasonably prejudiced by the failure to file notice timeously with the respondents submitting that due to lapse of time there are no records available at Pelonomi hospital with regard to the instruments used when performing the medical procedure in question on the applicant, their service record and usage. Mr Roux contends that the second respondent did not show actual prejudice in that it alleges unavailability of service records for the instrument used without proving that such records are in fact not available.

CONTENTIONS BY THE APPLICANT

- [11] The applicant attributes delay to the fact that he did not deem it necessary to institute a claim earlier owing to the advice he

received from medical practitioners he consulted, who gave him assurance that he would recover from paralysis.

[12] He only consulted his attorneys in March 2011 and prior to consulting them he was not aware of the provisions of the Act. It was submitted on behalf of the applicant that the summons was issued in haste in the North Gauteng High Court to obviate prescription. Mr Roux, further, submits that the applicant furnished sufficient reasons amounting to good cause for the granting of condonation. He further contends that the respondent has not been unreasonably prejudiced as Dr Wessels and Professor Smit were able to peruse the hospital records and provide clarity on what transpired. He contends, further, that the submission by the second respondent that the doctors who treated the applicant have left the hospital, is without basis as the doctors keep records of what they do on the files.

[13] He contends, further, that the issuing of summons in a wrong court did interrupt prescription and the applicant does have a valid claim against the respondents.

CONTENTIONS FOR THE RESPONDENTS

[14] The second respondent's legal administration officer deposed at length to, *inter alia*, the effect that the respondents have been severely prejudiced in their investigation of the alleged claim because the doctors who treated the applicant have since left the employ of the second respondent and are outside the Free State Province. He is of the view that since the plaintiff's claim

emanates from the alleged use of defective instrument when the operation was conducted, it is impossible to obtain service records for such instrument, after the inordinate delay involved in bringing the claim.

[15] Mr Claasen contends that the period of 3 years that lapsed between the issue of summons and the application for condonation is not sufficiently explained and it is an indication of the applicant's attitude and uncaring manner in which he approached this matter.

[16] He further contends that the premature summons issued by the applicant in a wrong court failed to interrupt prescription as, in his view, the summons was invalid and it would not have enabled the applicant to prosecute his claim to finality.

APPLICABLE LEGAL PRINCIPLES

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

"3. - 1. No legal proceedings 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 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.**

This section further gives the court a discretion to condone non compliance where:

- i) The debt has not been extinguished by prescription.
- ii) Good cause exists for the failure by the creditor to give notice timeously.
- iii) The organ of state was not unreasonably prejudiced by the failure.”

[18] The issue in question is whether the applicant has satisfied all the requirements set out above.

[19] The need to comply with the requirements governing litigation against state organs was emphasised in **Mohlomi v Minister of Defence** CCT41/95, where it was pointed out that:

“Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of

justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and these harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.”

[20] Condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. The explanation must be reasonable enough to excuse the default. **Grootboom v National Prosecuting Authority and Another** 2014 (2) SA 68 (CC).

[21] In **Madinda v Minister of Safety and Security** 2008 (4) SA 312 SCA it was held:

“The phrase ‘if the court is satisfied’ in section 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.”

[23] Section 27(1)(a) of the Superior Court Act 10 of 2013 provides as follows:

“If any proceeding have been instituted in a division or at a seat of a division, and it appears to the court that such

proceedings should have been instituted in another division or another seat of that division;
 that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other division or seat, as the case may be.”

[24] Prescription Act provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

[25] In Nqula v South African Airways (Pty) Ltd 2013 (1) SA 155 (SCA):

“As such a removal is now permitted by Act 41 of 2001, it may follow that a party that is deprived of its right to object to the court's jurisdiction in consequence of the case being transferred to a court having jurisdiction, cannot complain of either the loss of its plea to the jurisdiction or the loss of any advantage that would otherwise flow from that plea being upheld, such as the acquisition of a defence of prescription if the plaintiff instituted action afresh. So viewed, the legislation provides a means for overcoming challenges to the jurisdiction of the different high courts by treating such challenges as procedural in character. However, I do not rule out the possibility that, for the purposes of prescription, the institution of proceedings in a court not possessing jurisdiction may be regarded as ineffective to interrupt prescription.”

APPLICATION OF LEGAL PRINCIPLES

- [26] The applicant was in terms of the law obliged to file the relevant notice within 6 months from the date on which the cause of action arose but same was only served about 71 months later on 8 May 2014. The explanation given for this inordinate delay is that it only dawned on the applicant around March 2011 that his paralysis was permanent. There is a need to explain the delay after March 2011.
- [27] The applicant had to apply for condonation as soon as it became necessary to do so. The respondents raised a special plea of lack of jurisdiction and failure to comply with section 3 of the Act in November 2011. The matter was only enrolled in this court during May 2014 and about 8 months after the transfer was granted by the North Gauteng High Court.
- [28] Application for condonation was only filed in November 2014, 3 years and 5 months from the date of institution of action and 3 years from the date the applicant became aware of the need to apply for condonation. The applicant has, at all material times, since March 2011 been legally represented by an attorney who was in a better position to understand what was required of the applicant to prosecute his claim successfully. The delay involved in all significant stages of this matter is unreasonable. It has not been fully explained by the applicant.
- [29] Applicant's claim hinges around a laparoscopic cholecystectomy allegedly performed on him with a defective cautery machine.

The applicant failed to sufficiently deal with prospects of success in this case. The only version I have is that of the respondents as far as the extent of culpability on the part of the respondents is concerned.

[30] With the evidence before me, I am persuaded that applicant's prospects of success are sequestered.

[31] The Superior Court Act 10 of 2013 permits transfer of matters from a court that does not have jurisdiction to a court that has jurisdiction to hear the matter. This process is procedural in nature.

[32] The respondents were served with the summons before the applicant's claim could be extinguished by prescription

[33] Service of summons in the North Gauteng High Court would not have enabled the applicant to prosecute his claim to finality due to lack of jurisdiction.

[34] For prescription to be interrupted the following must be met:

- (i) There must be a process;
- (ii) The process must be served on the debtor;
- (iii) By that process, the creditor must claim payment of debt.

[35] The applicant's action was duly transferred to this court. The action proceeded in this court on the same cause of action as the original process instituted in the North Gauteng High Court.

- [36] The continuation of applicant's action is governed by the rules which provide for transfer of a matter from one court to the other. It is my view that the institution of proceedings in a court with or without jurisdiction does interrupt prescription.
- [37] Mr Roux in his argument reiterates that the respondents have not succeeded in proving that they were detrimentally prejudiced in their ability to investigate the matter. The respondents have, in my view, shown sufficient evidence for the court to infer presence of unreasonable prejudice.
- [38] The respondents demonstrated how it would be difficult to locate service records for the cautery machine alleged to have been used during the operation, and how that would deprive them of the opportunity to investigate the matter properly.
- [39] I am not persuaded that the applicant has shown good cause for condonation.
- [40] There is no reason why costs must not follow the event.

ORDER

Consequently, the application is dismissed with costs.

NM MBHELE, J

On behalf of applicant: A. ROUX
Instructed by: c/o Spangenberg Zietsman & Bloem
Bloemfontein

On behalf of respondents: JY Claasen SC
Instructed by: State Attorney
Bloemfontein