

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A241/2012

In the appeal between:-

MEC, DEPARTMENT OF HEALTH: FS

Appellant

and

KHOMOENG JANE MOTHUPI

Respondent

CORAM:

KRUGER, MOLOI *et* LEKALE, JJ

JUDGMENT BY:

KRUGER, J

HEARD ON:

19 MAY 2014

DELIVERED ON:

29 MAY 2014

[1] This is an appeal against a judgment granting condonation to the respondent for her failure to comply with section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. As far as relevant section 3 provides:

“(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;

.....

- (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.”

Section 3(4)(b) provides that condonation for non-compliance with the required notice may be granted by the court 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.”

[2] The chronology of events can be set out as follows:

28 February 2008: Incident upon which respondent bases her claim.

16 February 2009: Respondent consulted an attorney.

27 February 2009: Attorney sends notice to Minister of Health, the first defendant, which the court a *quo found* a misjoinder, which finding was not appealed by the respondent.

- 12 October 2009: Summons issued against first defendant.
- 22 October 2009: Respondent gives notice of intention to amend and join the appellant as second defendant.
- 8 December 2009: Letter: State Attorney to respondent's attorney advising him to withdraw against Minister and give notice to MEC.
- 22 February 2010: Letter: Notice to 2nd Defendant (MEC, appellant).
- 29 April 2010: Court order joining 2nd Defendant, plus order that Particulars of claim be served on 2nd Defendant.
- 11 August 2010: Plea of both defendants (Minister and MEC) filed.
- 16 February 2011: Application for condonation launched.
- 2 March 2012: Application for condonation argued.
- 26 April 2012: Judgment granting condonation delivered.
- 19 May 2014: Appeal argued before Full Court.

[3] A point arises relating to the history of this litigation and in particular the service of the summons on the appellant, the MEC. After the hearing of the appeal the legal representatives were requested to file submissions on this point, and we are grateful for their inputs. Section 3(1) provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless notice has been given within six months of the incident, or condonation has been granted. In their plea the defendants (the Minister and the MEC) raise the special plea that the plaintiff did not give proper notice before the particulars of claim were served. The steps pertinent to this point are the following:

12 October 2009: Summons issued against first defendant (Minister).

27 November 2009: Plaintiff gives notice of intention to amend particulars of claim by joining MEC as second defendant.

9 December 2009: Defendant objects, saying joinder should be by way of application.

22 February 2010: Plaintiff gives notice of intention to institute action against second defendant, MEC.

24 February 2010: Application to join second defendant launched: The prayers are:

- “1. That the applicant’s omission of citing and joining the second respondent [MEC] as the second defendant be and hereby condoned and effected.
2. That the service of the applicant’s particulars of claim be effected to the second respondent.
3. That the respondent’s objection of this amendment of joining the second respondent on this same cause of action be dismissed.”

[4] The state attorney sent a letter dated 11 March 2009 to the Registrar by hand under the heading of this case, stating:

“Please take note that the defendants do not wish to oppose this application and will abide by the court’s decision.”

[5] On 9 April 2010 the plaintiff filed an amended notice of motion, and on that same day a consent to draft order, signed by plaintiff’s attorney and the state attorney, was filed. On 29 April 2010 the court made an order as set out in the consent:

- “1. The Member of the Executive Council for the Department of Health, Free State Province is hereby joined as the 2nd Defendant on these proceedings under Case No 5059/09.
2. The Plaintiff is hereby directed to serve her particulars of claim to the second defendant within 10 days from date hereof.
3. The defendant hereby withdraws its notice of objection to the amendment sought by the plaintiff under Case No 5059/09.”

[6] On 27 May 2010 the sheriff served the amended particulars of claim on the state attorney on behalf of the second defendant.

- [7] Mr Ndaba says the conduct of the appellant indicates that the respondent wanted to move to the main issue as soon as possible. Both parties were aware that the section 3 requirements had not been met. He contends that by consenting to the draft order and joinder appellant decided not to raise the issue of condonation. Ms Wright points out that an objection to the failure to notify is usually made from the first time after proceedings have been instituted (usually in a special plea) **Minister of Safety and Security v De Witt** 2009 (1) SA 457 (SCA) at 462C. Ms Wright points out that at all times the appellant's attorney made it clear that the respondent would be expected to apply for condonation. The respondent did not file a replication to the Special plea, and the respondent never averred that the appellant consented to the institution of proceedings without proper notice. She says the appellant's consent only implied that an amendment to the pleadings could be effected. It does not mean that the appellant admitted the averments in the amended pleadings.
- [8] In the state attorney's letter of 8 December 2009 the respondent's attorney was told:
- “Even if your joining of the Second Defendant is successful, you will have the problem that you did not give proper notice to the Second Defendant in terms of Act 40 of 2002 and I will have no other option but to take the necessary special pleas in this regard and oppose any application for condonation that you may bring.”
- [9] The appellant's attorneys wanted to get to the main case. They used this phrase in opposition to the “joinder application”, not in

contradistinction with the condonation application. Condonation would be part of their plea in the main case.

- [10] The consent to the joinder of the appellant cannot be construed as consent in writing as contemplated in section 3 of Act 40 of 2002.

- [11] Condonation cannot be had for the mere asking. The explanation must be reasonable enough to excuse the default – **Grootboom v National Prosecuting Authority and Another** 2014 (2) SA 68 (CC) par [23]. The requirements for the granting of condonation listed in section 3(4)(b) quoted above must be established by the applicant for condonation and are conjunctive – **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd** 2010 (4) SA 109 (SCA) par [11]. The court has to be satisfied that the appellant was not unreasonably prejudiced by the failure of the respondent.

- [12] In **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) the appellant's intended cause of action arose from unlawful arrest, unlawful detention and assault perpetrated on her by unidentified members of the South African Police Service during the night of 11 September 2004. Her notice in terms of section 3(4)(b) of Act 40 of 2002 was about five and a half months out of time. The notice was rejected by the state attorney in October 2005, yet the appellant did not commence an application for condonation until July 2006. The appellant was unaware of the requirement of notice until she approached her attorney two months after the statutory period had expired.

[13] In **Madinda** the court held that in considering the requirements under section 3(4)(b) the court comes to an overall impression, bringing to bear a fair mind to the facts set up by the parties (par [8]). The explanation for the default must be sufficient to enable the court to understand how it really came about and to assess conduct and motives (par [11]). “Good cause for the delay” is not simply a mechanical matter of cause and effect. An applicant for condonation must produce acceptable reasons for substantially nullifying culpability on her part for the delay (par [12]). The two main elements at play in section 4(b) are the subject’s right to have the merits of her case tried by a court of law and the right of the organ of state not to be unreasonably prejudiced (par [12]). A court should be slow to assume prejudice for which the organ of state does not lay a basis (par [21]).

[14] Ms Wright, for the appellant, identified three periods of delay:

- (i) 28 February 2008: Incident; up to 16 February 2009 when she consulted her attorney.
- (ii) 16 February 2009 up to 22 February 2010 when notice was given to the appellant.
- (iii) 22 February 2010 up to 16 February 2011 when the condonation application was launched.

[15] In respect of the first period of delay, Ms Wright submits that the respondent only deals with this aspect in her founding affidavit, where she says that she was unaware of the notice period. She

does not say why she did not go to see her attorney sooner. She says she went to the physiotherapist, but gives no detail of the times and nature of the visits. Ms Wright says the court *a quo* misdirected itself by holding (in para [46] of the judgment) that the respondent “was primarily pre-occupied by one, and only one, extreme challenge to regain her natural mobility”. Ms Wright says a court must look at her explanation objectively, and the respondent must give reasons for the full period of delay, which she has not done.

- [16] In respect of the second period of delay, Ms Wright says that the respondent was told by her attorney that she was out of time. The appellant pointed out in the affidavits that the respondent did not explain the delay. In spite thereof she did not avail herself of the opportunity to explain her delay. In between notice was given to the Minister of Health. The respondent’s attorney took the wrong steps. The Minister is not the correct party to sue, the MEC is, as the appellant’s attorneys pointed out to the respondent’s attorney in correspondence in response to the proposed amendment to join the MEC, quoted in para [37] of the judgment of the court *a quo*. Further Ms Wright points out that the respondent does not say her attorney was responsible for the delay, as was the situation in the decision of **MEC for Education KwaZulu-Natal v Shange** 2012 (5) SA 313 (SCA) where the court was dealing with a minor. There the attorney accepted blame, which is not the case here. No affidavit has been filed by the respondent’s attorney explaining his delay.

- [17] As to the third period of delay, the delay in bringing the condonation application, that delay is due to the fault of the respondent's attorney. Ms Wright says with reference to **Saloojee and Another NN.O. v Minister of Community Development** 1965 (2) SA 135 (AD) at 141C-D that considerations *ad misericordiam* should not be allowed to become an invitation to laxity. There is a limit beyond which a litigant cannot escape the results of the attorney's lack of diligence; **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) at 9 H. Ms Wright says although the respondent does not blame her attorney for the delay, the court *a quo* did so. Mr Ndaba for the respondent says that attorneys are human, they make mistakes.
- [18] Court cases are conducted by attorneys and counsel on behalf of litigants. Litigants must accept responsibility for what their agents, the legal representatives do. In most cases litigants will not be aware of procedural requirements. But litigation cannot be conducted on the basis of the client pleading ignorance and thereby seeking to avoid or excuse compliance by the legal representative of procedural rules. That would lead to chaos. As the Appellate Division said in 1965 in **Saloojee and Another NN.O. v Minister of Community Development** (*supra*), confirmed in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** (*supra*), there comes a point beyond which the litigant cannot avoid liability for the legal representative's default.
- [19] Looking holistically at the facts and in particular the conduct of the respondent and her attorney, the appellant's attorneys from the

outset informed the respondent's attorney that the Minister of Health, the first defendant, was not the correct party to cite, but that the MEC, the appellant, should be cited. In spite of repeated advices in correspondence and the affidavits, the respondent's attorney, until the hearing in the court *a quo*, insisted that the Minister of Health was the correct party. Especially the delay during the period 16 February 2009 up to 22 February 2010 at which time the respondent knew that the appellant needed to be cited, counts heavily against the respondent.

[20] The delays of the respondent are substantially unexplained. The respondent did not make out a case for condonation.

ORDER

1. The appeal is upheld with costs.
2. The order of the court *a quo* is amended by the deletion of paragraphs 60.4 and 60.5 of the judgment and the substitution therefor of the following:
 - “60.4 The plaintiff's condonation application fails as regards the second defendant.
 - 60.5 The plaintiff is directed to pay the costs of the condonation application.”

A. KRUGER, J

I agree.

K.J. MOLOI, J

I agree.

L.J. LEKALE, J

On behalf of appellant:

Adv G.J.M. Wright

Instructed by:

State Attorney

BLOEMFONTEIN

On behalf of the respondent:

Adv V.D Ndaba

Instructed by:

Ponoane Attorneys

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