

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Appeal No. : A189/11  
Case No. : 2292/2008

In the appeal of:-

**MOQHAKA MUNICIPALITY**

Appellant  
(Defendant in the Court *a quo*)

and

**MOTSOAKI CONSOLATION MABULA**

Respondent  
(Plaintiff in the Court *a quo*)

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**CORAM:**                      CLAASEN, AJ *et* CHESIWE, AJ

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**HEARD ON:**                5 MARCH 2012

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**JUDGMENT BY:**        CHESIWE, AJ

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**DELIVERED:**            15 MARCH 2012

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[1]    The appellant, Moqhaka Municipality, is the defendant in the Court *a quo*. The respondent, Motsoaki Consolation Mabula, is the plaintiff in the Court *a quo*.

The respondent issued summons in her capacity as mother and guardian of the minor child, Thabang Relebohile Mabula, currently 13 years old. At the time of the incident the child was

five years old.

[2] The appeal in this matter arises from an action instituted by the respondent during August 2008, in which she claimed damages of R100 000,00 from the appellant.

[3] The facts of this matter are summarised as follows:

- On 23 November 2003 the minor child of the respondent fell in an open sewerage drain that is under the control of the appellant.
- The minor child was admitted in hospital with vomiting, diarrhoea and a frequent coughing.

[4] The respondent wrote a letter of demand to the appellant on 8 November 2005. It is recorded that the letter was forwarded in terms of Act 40 of 2002. The appellant responded with a letter dated 17 November 2005, stating that the claim has been send to their insurer and the respondent must keep the matter in abeyance until the insurer has responded.

[5] The Court *a quo* had to determine whether the respondent

complied with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002 and whether the claim has not prescribed in terms of the Prescription Act, 1969.

[6] The Court *a quo* ruled that the appellant condoned the non-compliance of the provisions of the Act by not objecting to the late delivery of the letter of demand, but instead responded with a letter referring the matter to their insurer. The court *a quo* also ordered that the claim has not prescribed in terms of the Prescription Act.

[7] Appellant filed heads of argument. The respondent has not filed heads of argument. The respondent's attorney send a letter indicating that the respondent wish to oppose the appeal, but due to financial constraints she is unable to brief counsel regarding the appeal.

[8] Advocate Reinders, on behalf of the appellant, submitted that the respondent did not comply with section 3 of the Act. He

argued that the magistrate erred in making an order that the respondent had complied with the provisions of section 3(2)(a) of the Act. He submitted that the appeal must succeed with costs and that the matter be referred back to the magistrate's court for purposes of removing it from the roll and to allow the respondent an opportunity to file an application to condone the non-compliance of section 3 of the Act.

- [9] Section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State specifically provides that a notice must

“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) ...”

- [10] The respondent, though there was no appearance, nor any heads of argument filed, appears to have assumed that after issuing summons and receiving a letter from the appellant, the appellant condone the non-compliance in terms of section 3(2) (a) of the Act.

The section 3 clearly states that no legal proceeding for the recovery of a debt may be instituted against an organ of state

unless-

“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”.

[11] It is common cause that the said notice has not been served on the defendant within six months period as required. Respondent only issued summons two years later. Nor did the respondent make an application for condonation in terms of section 4(1) of the Act.

[12] To issue summons without first complying with the provisions of section 3(4) for condonation renders that the summons are premature.

[13] In **MINISTER OF SAFETY AND SECURITY v DE WITT** 2009 (1) SA 457 (SCA) the court held that an application for condonation for failure to comply with section 3(1) of the Act may be brought after the institution of proceedings.

[14] The respondent in this matter has already issued summons. The respondent thus has a remedy of applying for condonation. Condonation must be applied for as soon as the party

concerned realises that it is required or if the state organ makes an objection to the absence or late service of the notice.

[15] With regard to prescription, the Prescription Act 68 of 1969 (“the Act”) makes provision for a minor that prescription would not run against a minor. The section provides that:

“Completion of prescription is postponed in certain circumstances if the person against whom the prescription is running is a minor.”

The issue of prescription in this matter is therefore not relevant plea as the minor is currently 13 years.

[16] In the circumstances I am of the view that respondent should have proceeded with an application for condonation, in view of the fact that the court has a discretion to grant condonation in respect of the appellant’s failure to comply with the requirements of section 3(2) of the Act.

[17] Accordingly I make the following order:

1. **The appeal is upheld with costs.**
2. **The order of the Court *a quo* is set aside and**

**substituted with the following order:**

**“The summons are removed from the roll.”**

**S. CHESIWE, AJ**

I concur.

**J.Y. CLAASEN, AJ**

On behalf of appellant:

Adv. S.J. Reinders  
Instructed by:  
Rosendorff Reitz Barry  
BLOEMFONTEIN

On behalf of respondent:

In person