



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) **REPORTABLE: NO**
- (2) **OF INTEREST TO OTHER JUDGES: [N]**

(3) **REVISED: [N]**

(4) **Signature**

Date:

28/08/24

CASE NO.: 14479/21

In the matter between:

SEFORA ELIZABETH MALESA

Applicant

and

MEC FOR THE DEPARTMENT OF HEALTH:GAUTENG

Respondent

JUDGMENT

Kumalo J

Introduction

- [1] The applicant seeks condonation for non-compliance with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 (the Act). The application is opposed by the respondent who raised a point *in limine*.

The parties' respective cases

The applicant's case

- [2] The applicant instituted a claim for damages against the respondent during March 2021. The claim is a claim for loss of support premised on the death of the applicant's son. The applicant avers that her son's demise was caused by the negligence of the doctors and/or medical staff at Mamelodi Hospital. He passed away on 12 April 2018.
- [3] The applicant explains that she first consulted with her lawyer in March 2021. She was then informed for the first time that she was required to deliver a letter of demand to the respondent within six months of her son's passing. She claims to have suffered from major depression since her son's death. Although she 'always' wanted to take legal action against the hospital since her son passed away, she lacked knowledge of the time timeframes and procedures of bringing a claim. In addition, she was consumed by grief and, therefore, did not consult with an attorney

immediately. Her attorney assured her that a letter of demand would be sent immediately. She was later informed that the letter was delivered in March 2021. The annexure to the founding affidavit reflects that the letter is dated 5 March 2021 and was received by the respondent's office on the same date.

- [4] The applicant opines that she does not think the respondent can suffer any prejudice if the application is granted. The respondent could still investigate the matter.

The respondent's answer

- [5] The respondent purported to raise two points *in limine*. The first is *ignorantia juris non exusat*. The respondent claims the applicant's ignorance of the law should not be considered an excuse.
- [6] The second point *in limine* is only raised in the heads of argument. The respondent submits that the Act requires the letter of demand to precede the institution of the action by 30 days.
- [7] The respondent opposed the condonation application essentially because the applicant did not provide the hospital admission number issued when the deceased was admitted and because locating the appropriate files might be tedious.

The applicant's reply

- [8] The applicant explained in reply that the hospital always used her son's identity number to track his file and since the system is computerized the failure to provide a hospital admission number is of no concern. She provided the deceased's full name and identity number, and it ought to have been sufficient for tracing the medical records.

Discussion

- [9] Section 3 of the Act provides 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.

[10] Section 3(4)(a) provides that where an organ of state relies on a creditor's failure to serve a notice in terms of section 3(2)(a), the creditor may apply to a court having jurisdiction to condone such failure. Section 3(4)(b) provides that a court may condone such failure 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 failure did not unreasonably prejudice the organ of the state.

[11] The factors that a court considering a condonation application in terms of section 3(4) of the Act must consider are clearly stated in the section. As for the first requirement, the respondents do not claim that the debt was extinguished by prescription, and as a result, the court is satisfied that the claim has not become prescribed despite no return of service from the sheriff having accompanied the application.

[12] The essential question is whether good cause exists for the failure by the creditor to send the letter within the prescribed period. It cannot be ignored that the plaintiff is an elderly woman from a previously disadvantaged background. She does not know the law, and although this is no excuse to raise against a claim becoming prescribed,

it is a factor that the court must consider when considering a condonation application in terms of the Act.

[13] The applicant's position was exacerbated by the fact that it was her son, the one who cared for and supported her, that passed away. I find it probable that she was overcome with grief. Her personal circumstances, as described in the founding affidavit, support a finding that good cause existed for the failure to send a letter of demand timeously. The fact that she utilised the services of the same attorney before her son passed away to complain about the circumstances in which he found himself in the hospital does not count against her. It supports the contention that she was overcome with grief after her son's demise and not thinking clearly.

[14] As far as the second point *in limine* is concerned, the legislature did not include the issue of whether process was served before the expiry of a period of thirty days after the notice has been served as one of the criteria to consider in a condonation application.

[15] The respondent failed to show how it will be prejudiced in any way if condonation is granted. The state attorney is the deponent to the answering affidavit. She does not explain how she can be regarded as having any personal knowledge of the administration of the Mamelodi Hospital. She raises the issue of the hospital admission number without explaining that it was indeed impossible to find the deceased's hospital and medical records as a result of this number not being provided. She objects on a purely theoretical basis and fails to deal with actual situation the hospital finds itself in. She could not even state as a fact that it was impossible to find the files but said it 'might be tedious to locate the files.'

[16] Having regard to the circumstances of this case, I am of the view that it is just to condone the applicant's failure to timely dispatch the section 3 notice.

[17] As for costs, the general principle that costs follow success applies.

ORDER

In the result, the following order is granted:

1. The points *in limine* are dismissed;
2. The application is granted with costs. Counsel's costs, if any, on scale B.



MP Kumalo
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:

FM Malesa

Instructed by:

Malesa F.M. Attorneys

For the respondent:

L Leballo

Instructed by:

State Attorney

Date of the hearing:

18 March 2024

Date of judgment:

27 August 2024