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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable / Not
reportable**

Case no: **4469/2023**

In the matter between

V[...] L[...] J[...]

obo A[...] O[...] J[...]

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH - FREE STATE PROVINCIAL
GOVERNMENT**

Respondent

Neutral citation:

Coram: Cronje, AJ

Heard: 8 August 2024

Delivered: 23 August 2024

Summary: Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – condonation – section 3(4)(b) – unreasonable prejudice to Sate – requirement not alleged or met – signature of Applicant suspect – no medical opinion – prescription – knowledge of facts – minor’s claim not prescribed – application dismissed with costs

ORDER

1. The application is dismissed.

2. Each party pays its own costs, including the costs that stood over.

JUDGMENT

Cronje AJ

Introduction

[1] The Applicant, in her personal as well as her representative capacity as mother and legal guardian of A[...] O[...] J[...] ('the minor', born on 1[...] A[...] 2010), instituted action against the Respondent claiming in her representative capacity past and future medical expenses in the amount of R26 190 000.00 (twenty-six million one hundred and ninety thousand rand) and R3 000 000.00 (three million rand) for the minor's past and future loss of income. In her personal capacity, she claims R1 000 000.00 (one million rand) for '*pathological grief reaction with depressed moods*' and R2 000 000.00 (two million rand) for past and future loss of earnings. The total amount claimed is R32 190 000.00 (thirty-two million one hundred and ninety thousand rand).

[2] It is pleaded that costs will be incurred at an overall percentage of 10% of the capital award for the proper protection and management of the award either by means of the appointment of a Curator *Bonis* or Trustee, the cost of providing security, annual auditing and ancillary costs. The approach by the SCA in matters of this nature when it affects minors, is to be found in *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another*.¹

Non-compliance with the Institution of Legal Proceedings Against Certain Organs of State Act

[3] It is common cause that there was no compliance with the Institution of Legal Proceedings Against Certain Organs of State Act² (the Act). The purpose of the

¹ *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* [2023] ZASCA 50; [2023] 2 All SA 613 (SCA).

² Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

application is to secure condonation for late notice, as the Respondent filed a special plea to that effect. The notice of motion was filed in this Court on 25 January 2024 and served on the State Attorney on the same date. In the notice, dated 4 July 2023, it is *inter alia* stated that the Applicant and minor suffered damages and will continue to suffer damages in the amount of R38 000 000.00 (thirty-eight million rands), which is in contrast to the amount claimed in the summons. In para 7 of the notice, it is stated that should the Respondent fail to comply, they hold instructions to issue summons against the Member of the Executive Council in the North West (MEC).

[4] The second special plea states that the Applicant's claim in her personal capacity arose on 11 April 2010 and that it prescribed in terms of the Prescription Act.³ It is common cause that the summons was served on the Respondent on 14 September 2023, approximately thirteen (13) years after the alleged delict.

The special power of attorney

[5] A special power of attorney (SPOA), dated 29 May 2023, contains two (2) signatures of witnesses, the identities not stated, and a signature above the word 'Client'. It is stated that she is acting in her personal capacity and in representative capacity. She nominates the attorneys with power of attorney to be her lawful attorney and agent in name, place and stead and to *investigate* the circumstances relating to the incident, which occurred on 11 April 2010 (birth to the minor). She *empowers the firm to obtain information* from the relevant hospital(s) and doctor(s) concerning all facts, medical reports, accounts, and details of the injuries sustained. She further *authorises* them to ascertain the name of the hospital/clinic responsible, to *sign the necessary claim form* and to *fix the amount of compensation* claimable for damages in the attorney's discretion, to *negotiate settlement* with the Respondent, to *agree with them on figures* for settlement and to *advise* her if it.

[6] It also states that should she terminate the mandate of the attorneys, she undertakes to settle their costs of handling the matter on attorney and own client scale; to sign any release of discharge of the amount of the settlement in order to receive and recover the amount; and that they may charge her R2 500.00 (two thousand five hundred rand) per hour for all work to be done in connection with the action, including

³ Prescription Act 69 of 1969.

consultations, time spent in medical research, preparations, drafting, perusals and review of medical literature, books of account and other relevant documentation, and the time spent on telephone calls and travelling.

[7] Most importantly, the power states:

'I understand that my claim has been dealt with without me incurring or paying towards the Attorneys and such as my Attorneys will be entitled to deduct his/her fees from the capital amount and should thereafter any costs be awarded, such costs shall be paid over to the company Nozuko Nxusani Incorporated, as their own costs... Insofar as Nozuko Nxusani Incorporated will be incurring disbursements and rendering services without me [making] payment for same as the disbursements are incurred and the services are rendered, I irrevocably and unconditionally authorize Nozuko Nxusani Incorporated as security for fees and disbursements, to receive all funds in my name with respect of capital.'

I asked Mr Plaatjies, who appeared for the Applicant, whether this is a mandate or a contingency fee agreement. My view was, and his too, without binding him, that it is a contingency fee 'agreement'. It is clear that it does not meet the requirements prescribed by the Contingency Fees Act⁴.

The grounds for condonation

[8] The Applicant attended the MUCPP Health Centre on or about 11 April 2010 to give birth to the minor. It is alleged that the staff and medical personnel failed to assist her to give birth safely and timeously and that the minor was born with Apgar scores of 2/10 and 5/10. As a result of the prolonged labour process, the minor was in distress and suffered a hypoxic brain injury, manifesting in cerebral palsy.

[9] She alleges that she met a former schoolmate in May 2023, who informed her that she has a cousin who has a child with a similar condition. She learned that the mother is pursuing a claim against the Respondent. Initially, she did not want to pursue a claim but was convinced to contact one Mr Sifundo Simaya, a legal secretary at Nozuko Nxusani Attorneys in Johannesburg.

[10] Mr Simaya allegedly informed her on 29 May 2023 that it was his opinion that the

⁴ Contingency Fees Act 66 of 1997.

standard of medical management that she received at MUCPP and Pelonomi Hospital fell short of the accepted standard of reasonable care, skill and diligence. He would investigate the matter, whereupon she provided the firm with the SPOA. On 4 July 2023, Mr Simaya informed her that he served a notice in terms of the Act.

[11] The requirements for condonation are dealt with in paras 8 and 9 of the founding affidavit. Concerning the degree of lateness and explanation for it, she states that she is a layperson and has no knowledge of the law and the processes involving the institution of a claim. She would not have been able to know the cause of the minor's disability without a professional opinion. I pause to state that no affidavit or a report of a medical practitioner or specialist served as a confirmation of all the allegations about the standard required from the medical profession, such as the monitoring of maternal and foetal well-being, intrapartum management, maternity guidelines, poor intrapartum monitoring, or a failure to use a partogram.

[12] She alleges that Mr Simaya explained the elements of negligence which are attributed to the Respondent in relation to the lengthy hospitalisation of the minor and the diagnosis of cerebral palsy soon after birth. She further states that the maternity case record attached to the founding affidavit is a complete copy provided by the Respondent. Should the Court require all copies of the neonatal and paediatric clinical notes, they will be made available at the hearing of the application.⁵ She became aware of all the facts when she consulted with Mr Simaya during or about 29 May 2023 and 2 October 2023.

[13] In a document of Pelonomi Hospital, the names of the Applicant appear with the date of 16 February 2010. Under the heading 'Hospitalization', it states 'PHCRC P Obstetric High-Risk Clinic'. On 17 November 2016, the Department of Paediatrics at Pelonomi Hospital indicated that the minor suffers from cerebral palsy but that the aetiology was unknown. It is also reported that the minor was born at the MUCPP on 11 April 2010 and that the gestation period was 41 weeks.

[14] A maternity case record is appended to the founding affidavit. Clinical notes dated 10 February 2010 at 18h15 stated that the patient is 20 years old and has

⁵ Para 11.4.

primigravida at 38 weeks. The record does not show any particulars of the Applicant herself. Innumerable blank pages are appended. It cannot, in itself, be accepted that no duties were complied with.

[15] Attached to the founding affidavit is, *inter alia*, a confirmatory affidavit of Mr Simaya, who merely states that he is the legal secretary dealing with the matter. He confirms the contents of the founding affidavit in as far as it relates to him. He does not profess to have any medical training, experience or background.

[16] With respect to the importance of the matter, she states that she is unemployed and that the full-time care of the minor is a burden on her and the rest of her family. Unless she succeeds with the matter, she will have to continue caring for the child with significant *sequelae* at her own expense and limited resources to ensure that she develops to her full potential.⁶

[17] No allegations were made regarding the third critical requirement for condonation in the Act, to wit that the organ of state has not been unreasonably prejudiced by the failure to comply with the Act.

Prescription

[18] It is common cause that the minor's claim has not been prescribed.

The Respondent's opposition

[19] The Respondent states that the Applicant failed to show that the Respondent will not suffer unreasonable prejudice. The requirements of s 3(4) of the Act are peremptory, and all must be present before condonation may be granted. The Applicant's claims in her personal capacity have been extinguished by prescription. No records were provided to Mr Simaya on 4 July 2023, and there is no explanation of how he managed to furnish the statutory notice.

[20] The medical records attached by the Applicant do not correlate with those in possession of the Respondent and are incomplete. The record shows that on 9 May 2010, approximately a month after the birth, the minor was admitted with respiratory

⁶ Para 12.2.

distress and HIE grade 1-2. The records of 29 October 2015 indicate that the minor was a known cerebral palsy (CP) patient and that the Applicant was well informed. In notes of 9 November 2015, the Applicant provided a history. Physiotherapy and occupational therapy appear to have been provided to the minor as indicated in records of 18 January 2017. Notwithstanding being aware of the minor's challenges, the Applicant was remiss to take steps to institute action. Her own claims have prescribed.

[21] The Applicant's signature is challenged with reference to her identity card and the signature on the founding and replying affidavits. The Respondent takes issue with the signature on the SPOA. It states that there are similarities between the signatures of Mr Simaya in the power of attorney, purporting to be that of the client, and his confirmatory affidavit.⁷

[22] This challenge to the signatures was not met with a reply.⁸ The SPOA limits the attorney's ability to act on specific, identified activities and does not authorise the institution of the action or to bring the application. It attaches a report of an investigation that was done in the Northern Cape Province into the conduct of Mr Simaya, specifically. I pause to state that the report is concerning but is not determinative for this application. No medical opinion supported the claim. Mr Simaya is not medically qualified.

[23] I noted that the Applicant did not reply to paras 4 to 34 of the Respondent's answering affidavit.⁹ Those paragraphs in the answering affidavit deal *inter alia* with the lack of authority, the lack of evidence of prolonged labour, the knowledge of Mr Simaya, the signature of the Applicant, the records provided to Mr Simaya, the failure to comply with all the requirements for condonation, the alleged substandard management and monitoring of the Applicant in labour, that no professional opinion was provided, the difference in the records of the Department and those attached to the affidavit of the Applicant, the lack of prospects for success, and that no basis for condonation was laid.

Arguments

[24] Mr Plaatjies, who appeared for the Applicant, submits that the damages suffered

⁷ Pleadings at 21 and 55.

⁸ Record at 99, para 12.

⁹ Record, p. 67 – 76; p. 99 – 100.

by the Applicant in her capacity commenced when she became aware of the debtor's identity and possession of full knowledge of the facts from which the debt arose.¹⁰ She only learned of the facts on 29 May 2023. She is a layperson and obtained advice from her legal representatives.

[25] The Respondent bears the onus to show that her personal claims prescribed. He *inter alia* relies on *Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bhisho*,¹¹ where it was held:

'[34] When the principle in *Links* is applied to the present facts, the applicant should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he had been given his medical file, he could have sought advice at that stage. There was no basis for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued to experience pain in his leg, does not help him either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately seek further advice in 2011.

[35] It is clear, that long before the applicant's discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts upon which his claim was based. He had knowledge of his treatment and the quality (or lack thereof) from his first day in hospital and had suffered pain on a continuous basis subsequent thereto. The fact that he was not aware that he was disabled or had developed osteitis is not the relevant consideration.' (My emphasis.)

[26] As I stated above, Mr Simaya is not a medical specialist. The basis for the conclusions that the Respondent, through its employees/agents, was negligent is, as the papers stand, at best, speculation and not informed by objective facts or medical opinion. Considering her averments in the founding affidavit, she could have obtained medical advice earlier.¹²

¹⁰ Section 12(3) of the Prescription Act, 69 of 1969.

¹¹ *Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bhisho* [2018] ZACC 2; 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC).

¹² Pleadings, p. 7, par 7.6 and p. 10, par 11

[27] He also refers to *MEC for Health, Eastern Cape v N H obo A*.¹³ As I read the judgment, there is a major difference between the facts there and the matter before me. In that matter, there was a medical report by Dr Mugerwa-Sekawabe, a specialist obstetrician and gynaecologist who reviewed the Plaintiff's medical records from the hospital and consulted with her, which was not the case before me.

[28] Mrs Williams SC, who appeared for the Respondent, takes issue with various aspects contained in the founding affidavit, *among other things* the authority of the attorney, prescription of the Applicant's claim in her personal capacity, the delay being unreasonable, failure to explain the delay to bring the condonation timeously, lack of good cause and failure to demonstrate that the Respondent will not suffer unreasonable prejudice.

[29] She relies on *Ganes and Another v Telecom Namibia Ltd*.¹⁴ where the authority of the deponent and the attorney was challenged. The attorney's affidavit confirmed his authority. As stated above, the Applicant did not meet the challenge to her signature or the import of the SPOA. I attempted to read and interpret the SPOA as benevolently as possible but could not find that reliance can be placed on the signatures or that it covers the actions taken by the attorneys.

[30] She submits that although Section 3(4) of the Act provides the Court with the discretion to grant condonation, all three requirements must be met. They are conjunctive and must be established by the Applicant. In *Minister of Safety and Security v De Witt*¹⁵ it was held:

[13] The discretion may only be exercised, however, if the three criteria in s 3(4)(b) are met: that the debt has not been extinguished by prescription (at issue in this case); that good cause exists for the creditor's failure; and that the organ of state has not been unduly prejudiced, It is an overall impression which must bring a fair mind to bear on the facts alleged by the parties. Only once the Court is satisfied that all requirements have been met, condonation can be granted.' (My emphasis.)

[31] She refers to paragraph 7.8 of the founding affidavit where it is alleged that:

¹³ *MEC for Health, Eastern Cape v N H obo A* [2022] ZASCA 181.

¹⁴ *Ganes and Another v Telecom Namibia Ltd* [2003] ZASCA 123; [2004] 2 All SA 609 (SCA); 2004 (3) SA 615 (SCA); (2004) 25 ILJ 995 (SCA).

¹⁵ *Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA).

‘On or about 11th April 2010, the Applicant attended at MUCPP Health Centre in order to give birth to her minor child A[...] O[...] J[...]. The nursing staff and medical personnel failed to assist her to give both safe and timeously, the minor child was born with low Apgar score of 2/10 and 5/10 and was experiencing difficulty breathing.’

Mrs Williams argues that those facts were known in April 2010, and prescription started running against the Applicant in her personal capacity.

[32] Regarding good cause, she relies on *Madinda v Minister of Safety and Security, Republic of South Africa*.¹⁶ The Applicant was fully aware of the minor’s disability and underwent regular treatment shortly after birth. She knew who the debtor was. The medical records do not show any causal negligence. The Applicant has not shown that the Respondent will suffer unreasonable prejudice, which is a lower standard than mere prejudice. The Applicant has to satisfy the Court on this requirement. In this regard, reference is made to *Mohlomi v Minister of Defence*.¹⁷ She submits that the Respondent does not dispute the well-being of the minor but it should not, in the circumstances, outweigh the multiplicity of factors that the Respondent highlighted in opposition to her relief sought.

Discussion

[33] I am not satisfied that the Applicant signed the affidavits and SPOA. I do not have to be an expert to see the apparent difference. It was easy for the Applicant to assure the Court that she signed. She did not.

[34] Various material allegations were addressed in the answering affidavit to which the Applicant did not reply. Following *Plascon Evans v Van Riebeeck Paints*,¹⁸ I have to accept the Respondent’s version to the extent that the Applicant cannot deny it. The averments about, among other things, medical opinions or reports did not support medical negligence and failure to comply with proper care. I do not accept that the attorneys for the Applicant have the necessary qualifications, experience or skill. The averments in the founding affidavit do not even meet the bar of hearsay.

[35] The Applicant did not meet the third requirement for condonation. Bearing the

¹⁶ *Madinda v Minister of Safety and Security, Republic of South Africa* [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) paras 10 and 12.

¹⁷ *Mohlomi v Minister of Defence* [1996] ZACC 20; 1996 (12) BCLR 1559; 1997 (1) SA 124 para 11.

¹⁸ *Plascon Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A).

history of the matter in mind, the time that passed and serious allegations regarding the way the medical records may have been obtained, I am left with no alternative but to find that the requirements were not all met.

[36] Dismissal of the application does not infringe on the rights of the minor. At face value, the minor will never be able to litigate herself. On the other hand, I cannot find that the Applicant's claim did not prescribe. She must have been able to relay the occurrences during birth earlier.

[37] Accordingly, I find that the requirements for condonation have not been met.

Costs

[38] I believe that interrogating the conduct of the attorneys, more specifically that of Mr Simaya, if they were ever empowered to prosecute it, will not be helpful. The Applicant and the minor have remedies against the attorneys if the SPOA does not comply with the Contingency Fees Act, which at face value does not.

[39] Making an order of costs against the Applicant and, effectively, against the minor would, under these circumstances, be unfair. I am of the view that justice requires that each party pays its own costs.

ORDER:

[40] In the result, the following order is made:

1. The application is dismissed.
2. Each party pays its own costs, including costs that stood over.

CRONJÉ, AJ

Appearances

For the Applicant:

Adv. N Plaatjies

Instructed by:

Nozuko Nxusani Inc.
Eugene Attorneys
Bloemfontein

For the Respondent:

Adv. R.T. Williams SC
Adv L Tlelai

Instructed by:

State Attorney
Bloemfontein