

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – BHISHO)**

Reportable/Not Reportable

Case no.:170/2021

Matters heard on: 29 August 2024

Judgment delivered on: 03 September 2024

In the matter between:

S[...] N[...] obo I[...] N[...]

Plaintiff/Respondent

and

THE MEC FOR THE DEPARTMENT OF HEALTH

Defendant/Excipient

JUDGMENT

BRODY AJ

1. The applicant, Ms S[...] N[...] (“Ms N[...]”) is an unemployed mother of I[...] N[...] (“the minor child”) who resides in Nxanxase Administrative Area, Willowvale, Province of the Eastern Cape.
2. Ms N[...] stated the following in her founding affidavit, which is relevant to her sophistication:

“57. *As previously stated I am a lay person. I was not aware of the niceties of civil litigation and of the technical notice requirements stipulated in the Act and when it is intended to institute legal proceedings against Organs of State such as the respondent.*

58. *I did not have any knowledge in respect of the potential claim which I[...] and I had against the respondent, nor did I have the necessary information and facts to establish whether we did in fact have such a claim, or the knowledge of the specific Organ of State against which a potential claim might lie.”*

3. It is also clear from the various affidavits filed that the plaintiff had a nomadic life and moved from one area to the other in circumstances where her attorneys found it difficult to contact her from time to time.
4. Ms N[...] had a difficult pregnancy and was initially admitted to a clinic, and thereafter, the Butterworth Hospital on the 17th of March 2007. On or about the 20th of March 2007, the minor child was born and it was only much later that Ms N[...] observed that the minor child’s development was not normal in that she was “*unable to sit*”, “*had ongoing lower respiratory track infection*”, but “*did not speak at all*” and she was required to take the minor child to clinics as the years passed.
5. At the age of 13, the minor child still could not sit and was constantly on nappies 24 hours a day.
6. During 2020, the applicant met a young lady from her neighbourhood who advised her that there was the potential of a claim by her, on behalf of the minor child, against the State. She was provided with the landline number of an attorney in East London by the neighbour.

7. On or about 15 July 2020 Ms N[...] called the offices of the attorneys to arrange a consultation and this was done for the 20th of July 2020.

8. Ms N[...] admitted the following in regard to the initial contact with an attorney:

“31. On or about 15 July 2020, I called the offices of my attorneys of record herein to arrange a consultation. However, due to my attorney’s busy schedule, I was advised that the earliest date upon which a consultation could be scheduled was the 20th of July 2020.”

9. This attorney arranged for Ms N[...] and the minor child to see a Gynaecologist and Obstetrician in Pretoria (“the expert”) and this was arranged for the 27th of October 2020.

10. On the 9th of November 2020 Ms N[...]’s attorney received the report from the expert and the finding was as follows:

“Conclusion

- *the insult to the brain was preventable at the time of labour;*
- *emergency caesarean section should have been done;*
- *the final assessment on the child and the difficulties of raising such a child should be done by a paediatrician;*
- *the amount of emotional and psychological burden suffered by the mother should be assessed by a clinical psychologist.”*

11. On the 14th of December 2020 Ms N[...]’s attorney delivered a section 3(2) notice in terms of Act 40 of 2002 and a summons was issued on the 4th of March 2021.

12. The matter was defended by the Member of the Executive Council for the Department of Health of the Eastern Cape Province (“the defendant”) and on the 22nd of October 2022 a plea was served and filed. In the plea, the

defendant raised a special plea of non-compliance with section 3(2) of the Act.

13. Section 3(4) of the Act reads as follows:

“3(4)(a) If an Organ of State relies on a creditor’s failure to serve a notice in terms of sub-section (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) 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;

(c) If an application is granted in terms of paragraph (b) the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the Organ of State as the court may deem appropriate.”

14. It was common cause in the matter that the claim by the plaintiff in her personal capacity, and on behalf of the minor child, had not prescribed, no such claim of prescription was contained in the plea.

15. A fact which complicates this application for condonation is that Ms N[...] failed to mention in her founding affidavit that she had in fact instructed

another firm of attorneys, namely TA Nkele and Sons as far back as 2018. A copy of a letter addressed by that firm to the defendant was attached to the answering affidavit and which requested information in terms of the Promotion of Access to Information Act No 2 of 2000. No mention was made of the approach to this firm of attorneys and no mention was made of the fact by Ms N[...] that she had signed a special power of attorney when she initially consulted these attorneys.

16. The special power of attorney, which was signed by Ms N[...] in November 2018, was attached to the answering affidavit of the defendant. This special power of attorney indicates that Ms N[...] had instructed her attorneys to obtain all the required information from the Department of Health in the Eastern Cape *“for the medical negligence by the Butterworth Hospital and institute legal proceedings to obtain same... and on the basis thereof institute an action for medical negligence against the Eastern Cape Department of Health.”*
17. It went further to authorise the attorneys to pay all fees to counsel and witnesses and to do everything necessary to pursue such a claim.
18. In Ms N[...]’s replying affidavit she sought to explain away the visit to TA Nkele and Sons on the basis that contact between her and her attorneys was very difficult and that, in any event, the prescriptive period of the claim only began to run on the 9th of November 2020, when her subsequent attorneys obtained the expert report.
19. In the matter of Mulaudzi vs Old Mutual Life Insurance Company (South Africa) Limited and Others 2017(6) SA 90 (SCA) Ponnann JA, in a majority judgment, dealt with the issue of delays when condonation is sought. The following was stated at paragraph 26:

“What calls for an explanation is not only the delay in a timeously prosecution of the appeal, but also a delay in seeking condonation. An appellant should, however he realises that he has not complied

with the rules of this court, apply for condonation without delay. A full detailed and accurate account of the cause of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering the application for condonation include the degree of non-compliance, the explanation therefore, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and an avoidance of unnecessary delay in the administration of justice."

20. He went further and stated the following:

"[33] Mr Mulaudzi's application demonstrates an obvious lack of attention to matters that plainly called for an explanation and evidences a failure to fully and candidly enlighten the court, as an applicant in the matter such as this was obliged to do. I thus find it impossible to hold that the delay in bringing this application has been explained in a manner that is remotely satisfactory.

[34] In applications of this sort, the prospects of success are in general and important, although not decisive considerations. As was stated in Rennie vs Camy Farms (Pty) Ltd, it is advisable, where an application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success. This was not done in the present case: Indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success. It has been pointed out that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of his discretion, unless the cumulative effect of the other relevant

factors in the case is such as to render the application for condonation obviously unworthy of consideration.

[35] *In my view, the circumstances of the present case is such that we may well have been entitled to refuse the application for condonation irrespective of the prospects of success. This court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal. Here, the delay is so unreasonable and their explanation offered so unacceptable and wanting that we may well have been justified in adopting that cause.. ...”*

21. In Uitenhage Local Council vs South African Revenue Service 2004(1) SA 292 (SCA) Heher JA held that condonation was not to be had merely for the asking. A full, detailed and accurate account of the causes of the delay and their effects had to be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It had to be obvious that if the non-compliance was time-related then the date, duration and extent of any obstacle on which reliance was placed had to be spelt out.

22. Heher JA also stated the following:

[9] *It is apparent that not only was the affidavit in support of the application seriously inadequate but it was also misleading in relation to the date on which the appeal had lapsed and the awareness of the importance of 14 November on the part of the appellant’s attorneys both before and after that date...”*

23. In Darries vs Sheriff: Magistrate’s Court, Wynberg and Another 1998(3) SA 34 (SCA) the court held that even if an attorney was the reason for any delay, the litigant could not shield behind the attorney’s actions.

24. There are two principles that are relevant to applications for condonation. The first is a full explanation for the delay in acting in terms of a statute and, secondly, to bring the application for condonation as soon as the party becomes aware of the fact that non-compliance is being relied upon by the defendant, (and condonation is necessary).
25. In this matter, the special plea relating to the section 3 notice was served and filed on the 20th of October 2022 and no explanation is given by Ms N[...], or her legal representatives, why it took almost one and a half years to bring the application for condonation, only on the 14th of February 2024.
26. It is also trite that a court must have regard to the prospects of success in the action proceedings in deciding on condonation.
27. Mr Ndamase, on behalf of Ms N[...], argued that there was no prejudice to the defendant in that the defendant was able to comprehensively file a plea and was in possession of medical records. In his view, the plaintiff had strong prospects of success for her personal claim and that for the minor child. He further argued that because prescription was not an issue, there could be “*no prejudice*” to the defendant.
28. He did, however, argue that if the application was dismissed, the Biowatch principle was applicable and that a costs order should not follow the result.
29. Mr Pitt argued that the period of thirteen years was not a reasonable period, however, conceded that prescription was not raised in the plea on behalf of the defendant.
30. He further argued that the medical records have been compromised as certain of them had been “cut off” as evidenced in the limited discovery that has taken place, to date.

31. He properly conceded that, on any version, the minor child's claim has not prescribed. He further argued that the Ms N[...]’s personal claim could be dealt with separately from the minor child's claim, as they were two distinct claims.

32. Ms N[...]’s personal claim is pleaded as follows:

“13. As a result of the aforesaid wrongful and negligent conduct, of the injury, and the sequelae thereto, suffered by her child I[...], the plaintiff:

13.1 experienced severe psychological shock and trauma and will continue to experience such shock and trauma in future on a permanent basis as a result of the mental anguish, distress and difficulties of giving birth to a severely impaired child and of being required to care for such a child with global development epilepsy, and gross motor, fine motor, social/personal and communication delays;

13.2 will require and will undergo psychiatric treatment and psychological counselling in future, the details such are known appear in addendum “B” hereto;

13.3 has suffered and will suffer in future a loss of amenities of life in consequence of the need for the plaintiff to care for a child with global developmental delay with epilepsy, and gross motor, fine motor, social/personal and communication delays for the remainder of the child's life.”

33. The plaintiff's personal claim is one for R900 000.00 which is pleaded as follows:

“17. In the premises, the plaintiff in her personal capacity has suffered damages in the total sum of R900 000.00, which sum is calculated as follows:

17.1	General damages -	R800 000.00
17.2	Pre-estimated cost for psychological counselling and psychiatric treatment -	<u>R100 000.00</u>
	Total	R900 000.00”

34. As set out in the abovementioned authorities, Ms N[...] has not been frank and candid with this court in that she failed to mention the earlier visit that she had with TA Nkele Attorneys and failed to deal with the advices given by those attorneys to her, which resulted in the special power of attorney, and the letter addressed by the attorneys to the defendant. There can be no doubt, arising out of the special power of attorney, that Ms N[...] must have been advised of a claim that she had against the Butterworth Hospital, as the special power of attorney talks about medical negligence by the Butterworth Hospital, in terms. It also talks about the institution of legal proceedings for negligence against the Department of Health.
35. I am disinclined to grant condonation for the section 3 notice in respect of Ms N[...]’s personal claim.
36. The claim for the minor child is, however, entirely different. The minor child is an innocent party who is unable to deal with her claim and relies heavily on her mother, Ms N[...], and the legal practitioners.
37. I take into account that the minor child’s claim has good prospects of success, based on the expert’s report, and that there can be no prejudice to the defendant.
38. In addition to the difficulties that Ms N[...] faces with her failure to mention the attorneys she saw two years before the present attorneys, there is also

the clear delay of only proceeding with the application for condonation almost one and a half years after the special plea was served and filed, after the issue of condonation was raised.

39. The authorities referred to above make it clear that condonation should be sought as soon as possible and any delays in bringing an application for condonation should set out fully the reasons for the delay.
40. Finally, I am persuaded that this court, as upper guardian of the minor child should, where possible, act in the best interests of that minor child.
41. I am accordingly not persuaded to grant condonation for the delays in the section 3 notice for the plaintiff's personal claim, however, am persuaded to grant condonation for the minor child's claims and principally for the following reasons:
 - 41.1 This court is the upper guardian of the minor child;
 - 41.2 The minor child's claim has good prospects of success based on the expert report;
 - 41.3 The minor child cannot be faulted at all for the various delays;
 - 41.4 There is no prejudice to the defendant in regard to preparation for trial and no such prejudice was raised in the opposing affidavit;
 - 41.5 Prescription is not relevant; and
 - 41.6 The personal circumstances of the minor child's mother, who is uneducated, from a previously disadvantaged background, and unsophisticated.
42. Although serious consideration was given to ordering that the costs of the application be costs in the main action proceedings, I am persuaded that,

in the interests of the minor child, and her prospects of completing the litigation expeditiously, and to finality, that a costs order should follow the result in respect of the notice relating to the minor child's claim.

43. In the result, the following order is granted:

43.1 The applicant's non-compliance with the provisions of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 ("the Act"), is not condoned in respect of the applicant's personal claim.

43.2 The applicant's non-compliance with the provisions of section 3(2) of the Act in respect of the minor child, I[...] N[...], is hereby condoned in terms of section 3(4) of the Act.

43.3 That it is declared that the applicant has complied with section 3(2)(a) of the Act in respect of the minor child only.

43.4 That the costs of this application be paid by the respondent on a party and party basis, on scale B, as set out in rule 69(7).

B.B. BRODY

ACTING JUDGE OF THE HIGH COURT

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