



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

Reportable/Not reportable

Case Number: 3203/2023

In the matter between:

KEFILWE MIYA

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH: FREE STATE PROVINCE**

Respondent

Coram: Reinders, J

Heard: 14 November 2024

Delivered: This judgment was handed down in open court on 14 March 2024 and distributed to the parties via electronic mail communication

Summary: Section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002

ORDER

1. Condonation is granted for the applicant's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State, Act 40 of 2022 within the period laid down in section 3(2) of the Act.
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JUDGMENT

Reinders, J

[1] On 22 June 2023 the applicant (as plaintiff in the main action) caused summons to be issued against the respondent (as defendant in the main action) claiming delictual damages as a result of alleged medical negligence by the defendant's medical personnel at the Universitas Hospital (the hospital) in Bloemfontein.

[2] The applicant now seeks condonation for the late filing in terms of section 3 (4) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act¹ (the "Act") for her failure to comply with sections 3(1) and 3 (2) (a) of the Act.

[3] The respondent opposes the application on several grounds as will become evident herein later.

[4] There is not dispute between the parties regarding the statutory framework for adjudicating the relief claimed, but rather in respect of the application thereof to the facts of this matter.

Section 3 of the Act reads:

"Notice of intended legal proceedings to be given to organ of state:

- (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...
- (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

¹ Act 40 of 2002.

- (ii) such particulars of such debt as are within the knowledge of the creditor.

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (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."

[5] The applicant in her founding affidavit states that she gave birth to twins by way of a caesarean section at the hospital on 5 June 2020. She was discharged after three days, experiencing severe pain which despite medication, continued unabated. The medical doctor who performed the operation, informed her to take some stomach medication. Roundabout 23 June 2020 she returned to the latter, who informed her to go to the emergency ward for assistance.

(a) On 25 June 2020 she once again returned to the hospital, and during a consultation with a gynaecologist she was informed that there was a foreign object visible in her abdomen. This resulted in an operation on 26 June 2020 when she learnt that a surgical swab had been removed from her abdomen.

(b) Upon her discharge she was advised to lay a complaint with the hospital management and also send a complaint to the Office of the Health Standards Compliance (OHSC) which she duly did. She received acknowledgement of the complaint around 5 November 2020 with an indication of a referral of the complaint back to the hospital and that she would be contacted again. Correspondence in this regard is annexed to the founding affidavit.

(c) As she did not receive feedback from the OHSC after numerous e-mail communication, she decided to seek legal assistance from a legal representative on 10 November 2022. She was advised that a s3 notice would be send to the State, but did not get any feedback from her despite her enquiries.

(d) At the end of May 2023, she decided to seek help from her current legal representative who enquired about the s3 notice, who then sent the notice immediately as she was advised that the matter would be prescribing in a matter of days. The applicant states that she has good prospects of success in the main action in view of the background mentioned herein.

[6] The applicant explained the reasons for the lateness in line with what is stated in the afore going paragraphs and in addition states that she was under the impression that the complaint that she had lodged would cause the matter to be attended to and she would receive the necessary medical care. By her seeking legal advice she harboured the honest belief that her case would be taken care of. She concludes that the delay was not caused by her being negligent or reckless and that she had done what she could to hold the hospital and the doctor liable.

[7] The applicant submits that she has good prospects of success in the main action as the doctor and nurses who operated on her were negligent and consequently, she "...cannot walk for long distances and suffers chronic pain". She also states that she might require further operations to address the situation for which she does not have the financial means.

[8] In its answering affidavit the respondent states that it is "common cause that the applicant's cause of action arose on 5 June 2020 and that the notice was only served on 21 June 2023", whereas it "ought to have been served no later than 5 December 2020" which is "approximately thirty (30) months out of time." The respondent also states that in view thereof *"that the applicant's alleged debt became due on 05 (sic) June 2020, and they (sic) would have acquired the entire set of facts pertaining to their(sic) claim at least from 07 (sic) June 2020 when they(sic) first complained of the pain in their (sic) abdomen, alternatively on 09 (sic) June 2020 when they (sic) were admitted in the lodge area of the hospital. The respondent proceeds that "in the premises, the Applicant had knowledge of the identity of the debtor and all the facts giving rise to the claim prior to 26 June 2020 and at the latest on 09(sic) June 2020. The applicant issued their (sic) summons on 22 June 2023 – and by effluxion of time, their (sic) claim has thus prescribed."*

[9] The respondent complains that the applicant did not give a full exposition of the entire time of her lateness, for instance what transpired from the time that she was with her erstwhile attorney (at the beginning of 2023) until she decided to employ new legal representation six months later on 20 June 2023. No explanation is tendered why it then took her counsel a further 21 days to issue the notice. It is also stated that the respondent has been prejudiced by the late filing of the notice, as the doctor who had performed the operation on her, has left the department. The late service of the notice, so the argument goes, had denied the department adequate time to investigate the claim properly.

[10] In reply the applicant reiterated that the knowledge of the swab that was left behind in her abdomen, only came to her full attention when she was operated on.

[11] I am called upon to decide whether the applicant has met the three requirements as envisaged in s 3(4)(b) of the Act.

[12] The Prescription Act² 68 of 1969 in s 12(3) provides:

‘(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

(4) ...’

[13] In *Johannes G Coetzee & Seun and Another v Le Roux and Another*³Mocumie JA, in dealing with the issue of prescription, held as follows:

² Act 68 of 1969.

³ (969/2020) [2022] ZASCA 47 (8 April 2022)

[1] The words 'debt' and 'the debt is due' are not defined in the Prescription Act. Neither are the words 'knowledge of . . . the facts from which the debt arises'. All of these terms, however, have been given meaning and defined in context by this Court and the Constitutional Court, and are followed by courts in general. In *Mtokonya v Minister of Police*,⁴ Zondo J states the following at para 36:

'Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises". Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor.'⁵

[14] Although counsel appearing for the respondent in heads of argument responsibly submitted in her heads of argument that "...it is arguable whether or not the Applicant's claim has prescribed...", the answering affidavit remains adamant that it is "common cause that the applicant's cause of action arose on 5 June 2020". This statement is incorrect as such date is not common cause. The applicant in fact denies the said date. Moreover, the fact that the applicant acknowledges that the notice was late, cannot be regarded as an acknowledgement that her claim has prescribed as suggested. In my view, even though summons were issued in the nick of time, the applicant's claim has not prescribed. The applicant could not have known, and in fact, did not know of the swab that was left behind in her abdomen at the time when she revisited the hospital due to unbearable pain within days after the operation. In fact, she avers that the treating doctor twice failed to attend to her complaints. She most certainly did not have knowledge at the time when the caesarean section was performed on 5 June 2020, of the facts which gave rise to the debt. It was only on 25 June 2020 when she was informed by a gynaecologist of the left behind swab, which was then followed by an operation for the removal thereof on 26 June 2020, that she became aware of the facts from which the debt arises. Summons were issued on 22 June 2023.

⁴ *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC).

⁵ See also *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) paras 30-35; and *Truter v Deyssel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) paras 16-19.

[15] The respondent complained in its answering affidavit that the applicant did not deal with the aspect of prejudice in her founding affidavit. In averring that the respondent has been unreasonably prejudiced by the lateness of the notice. It is stated that the delay has denied the Department adequate time to investigate the veracity of the Applicant's claim properly as "the medical officer that had performed the Applicant's delivery has since left the employ of the Department" and "(it) has the severe potential of disabling the Department of conducting a sufficient defence." Although the respondent states that the doctor has left the department, it does not explain whether such person can still be contacted. The respondent duly filed its plea and on 29 April 2024 a reply to the applicant's notice in terms of Rule 35(14). It would seem that the hospital duly discovered the applicant's medical file, including information on the caesarean section and operation to remove the swab from the applicant's abdomen.

[16] Even if I accept that the applicant has succeeded in proving the requirements that the claim has not prescribed and the respondent has not been unreasonably prejudiced, the applicant must still convince me that she has shown good cause for the delay.

[17] In *Madinda v Minister of Safety and Security*⁶ it was confirmed by the Supreme Court of Appeal that the court may grant an application for condonation if satisfied that the three requirements have been met. The test in doing so is not proof on a balance of probabilities, but "the overall impression made on a court which brings a fair mind to the facts set up by the parties."

Heher JA remarked as follows:

"[10] The second requirement is a variant of one well known in cases of procedural non-compliance. ... 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona

⁶ 2008 (4) SA 312 (SCA).

fides of the applicant, and any contribution of other persons or parties to the delay and the applicant's responsibility therefore."

...

[12] ... 'Good cause for the delay' is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two main elements at play in ... s 3(4)(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice."

...

[14] One other factor in connection with 'good cause' in s 3(4)(b)(ii) is this: it is linked to the failure to act timeously. Therefore, subsequent delay by the applicant, for example in bringing his application for condonation, will ordinarily not fall within its terms. Whether a proper explanation is furnished for delays that did not contribute to the failure is part of the exercise of the discretion to condone in terms of s 3(4), but it is not, in this statutory context, an element of 'good cause'. ...

[18] As far back as 1962 in *Melane v Sanlam insurance Co Ltd* it was held that an application for condonation must set out justifiable reasons for non-compliance.⁷ Holmes JA stated the principle thus:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the fact usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion..."

⁷ *Melane v Sanlam insurance Co Ltd* 1962 (4) SA 531 (A) at C-F.

[19] In *Grootboom v National Prosecuting Authority and Another*⁸ the Constitutional Court confirmed the trite principles as follows:

*"...The court seized with the matter has a discretion whether to grant condonation." The court held "It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default"*⁹ and further reiterated that *"...In this court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:*

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice."¹⁰

[20] From the trite case law it can be distilled that while the factors for consideration in a condonation application are inter-related, a reasonable explanation for the delay coupled with a good prospect of success may enhance the chances of the success of the application for condonation; a weak explanation, but good prospect of success and the importance of the case will allow for the granting of an application for condonation. The court is clothed with wide discretionary powers which it exercises judicially in the valuation of the relevant factors in the particular matter. The interests of justice underpin the court's exercise of its discretionary powers. A good explanation without prospect of success on the merits warrants a refusal of condonation.

⁸ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC), at para [20].

⁹ At para [25].

¹⁰ At para [50].

[21] There can be no doubt that the delay in serving the notice is indeed lengthy. Although the respondent complains that the applicant did not follow the correct legal route in lodging a complaint with the state, but rather with other medical institutions, it is in my view at least indicative of the applicant's intention to have her case tried. The defendant denies that the applicant has prospects of success in the main action, stating that "the applicant received reasonable medical care, treatment and advice at all material times during their (*sic*) labour and birth of her twins". It would seem to me however that it is not denied that a swab was indeed found and removed as pleaded. Case law dealing with swabs or other objects having been left behind during surgical intervention and later had to be removed from the abdomen of plaintiffs abounds and prospects of success can indeed be inferred *in casu*, although the plaintiff would of course still need to prove negligence on trial.¹¹ That the matter is important to the applicant, cannot be gainsaid.

[22] The founding affidavit is indeed by no means perfect and leaves much to be desired, and there are indeed periods not thoroughly explained by the applicant. However, as was stated in *Madinda*, applicant'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 unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice, must be carefully considered and balanced. In weighing up all the considerations alluded to herein above, I am of the view that it would not be in the interest of justice that the doors of justice that be closed on the applicant at this stage and that she should be afforded her day in court. I intend granting condonation to the applicant as envisaged in S3(4) of the Act.

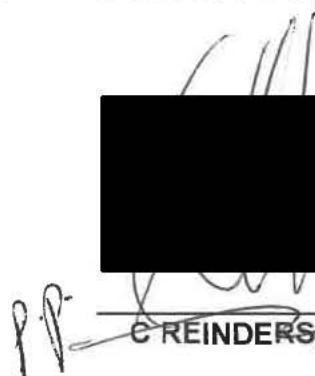
[23] The usual order is that costs should follow the successful party. The applicant however moves for an indulgence, and I did not form the impression that the respondent was unreasonable in opposing the application. In fact, it would have been reckless of the respondent not to oppose this application in circumstances where the notice had been given almost three years late and the state is confronted with a claim for medical negligence where such individual prays for an amount in excess of R

¹¹ *Goliath v Member of the Executive Council for Health: Eastern Cape* (085/2014) [2014] ZASCA 182 (25 November 2015).

6million in respect of general damages. Accordingly in my discretion I deem it just that each party should pay its own costs and I make no order in respect of costs.

[17] Accordingly I make the following order:

17.1 Condonation is granted for the applicant's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State, Act 40 of 2022 within the period laid down in section 3(2) of the Act.



C REINDERS, J

Appearances:

On behalf of the Applicant
Instructed by:

Adv NM Bahlekazi
Mlozana Attorneys
BLOEMFONTEIN

On behalf of the Respondent
Instructed by:

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