



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

CASE NO. 529/2022

NOT REPORTABLE

In the matter between:

E[...] S[...]

Applicant (Plaintiff)

and

**MEC FOR DEPARTMENT OF HEALTH,
EASTERN CAPE PROVINCE**

Respondent (Defendant)

**JUDGMENT IN RESPECT OF
INTERLOCUTORY APPLICATION (ILPACOSA)**

HARTLE J

[1] The applicant seeks an order declaring that she has complied with the provisions of section 3 (2) of the Institution of Legal Proceedings against Certain Organs of State Act, No. 40 of 2022 ("*IPLACOSA*") and/or alternatively an order condoning the late delivery of the notice.

[2] It is common cause that the impugned notice was in fact served on the respondent on 17 November 2021.

[3] The event giving rise to her claim for damages in the main action occurred on 12 September 2019. She alleges in her particulars of claim that due to the mismanagement of her labour at a public hospital on this date she gave birth to a stillborn baby.

[4] In the present application she explains however that she was unaware until she obtained legal advice that the nursing staff and medical personnel at the hospital had been negligent in relation to the management of her labour and that her child's death had been occasioned as a result thereof. This was on 15 August 2021 when she was advised by her attorneys that she may possibly have a claim against the respondent.

[5] In the lead up to this moment, she had also been cautioned by an unidentified woman to seek legal advice as to whether she might have a claim or not, a possibility she had never reckoned with before.

[6] Her attorneys more or less at the same time of apprising her that she had an actionable claim served the relevant notice, this within six months of the applicant having received such advice that brought her in the know that she could bring a claim.

[7] The notice dispatched speaks to the experience of her labour and the birth on 12 September 2019 at the Dora Nginza Hospital. It alleges that her child's fatality occurred as a result of the negligence of the respondent's nursing staff and doctors in that they failed to monitor the labour period appropriately and "*to use the appropriate measure*" to deliver her baby. It is further stated that as a result of the breach of a legal duty that rested on the hospital staff, she experienced pain and suffering and has since been in a state of depression. In consequence, she has suffered damages.

[8] The summons was issued on 31 August 2022. On 21 December 2022 the respondent raised special pleas of non-compliance with the provisions of section 3 of the ILPACOSA and that the applicant's claim has prescribed.

[9] The applicant asserts in her founding affidavit regarding this technical aspect that she only acquired knowledge on 15 August 2021 as to the identity of the organ of state and of the facts giving rise to the debt underpinning her claim. She avers that she would not of her own agency have been able to glean knowledge of either the identity of the debtor or of the facts giving rise to the debt, but for the legal advice obtained on this date.

[10] For the rest she sets out in her founding affidavit the basis upon which she asks the court to condone any delay in the service of her notice, if she is expected to explain her culpability, most notably contending that her claim has not prescribed; that good cause exists for her failure - explained by her having had no way of knowing that she could claim or that the hospital staff were responsible for the unfortunate outcome; and that there is an absence of any prejudice to the respondent if the relief sought is granted.

[11] Prior to the service by the respondent of her answering affidavit, the applicant supplemented her papers to deal with the fact that she had omitted in her founding affidavit to give a full explanation for the delay in seeking condonation once it became apparent that the respondent was objecting to the notice, in other words from the moment that the respondent's special pleas were delivered.

[12] The respondent took issue with the filing of her supplementary affidavit as a result of which it also became necessary for the applicant to file a further application for leave to permit its filing and to seek condonation for her failure to have buttressed her application for condonation in the first place with such additional detail in the primary interlocutory application.

[13] The respondent has set herself firmly against the applicant being granted the declarator sought by her, alternatively condonation, whether in respect of the main or supplementary applications.

[14] The main action has been enrolled for hearing on 23 May 2025 and it is imperative for the applicant to obtain redress from this court to enable her to successfully prosecute her claim upon trial.

[15] Section 3 of the ILPACOSA provides as follows:

“3. Notice of intended legal proceedings to be given to organ of state.

—

- (a) 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.
- (3) For purposes of subsection (2) (a)—
 - (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless

the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(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.

(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.”

[16] The relevant provisions of section 12 (3) of the Prescription Act¹ are for convenience also set out below as these provisions have an obvious bearing on the question whether the applicant's claim has been extinguished by prescription² and also speaks to the basis for her submission that she had neither actual or constructive knowledge of the identity of the debtor or the facts giving rise to the debt until she sought and obtained legal advice:

“12. When prescription begins to run. —

(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

¹ No. 68 of 1959

² Prescription has in fact been raised in the second special plea, but its issue as a separate plea was not before this court.

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.”

[17] The onus is on a defendant who raises a plea of prescription to prove such defence, and to prove the date when the plaintiff purportedly acquired actual or deemed knowledge of the identity of the debtor and of the facts from which the debt arises.³

[18] In her answering affidavit the respondent answered only to the applicant’s alternate prayer for condonation lamenting the fact that she was tardy in bringing the present application and expecting to be condoned as of right, but the spectre of prescription features in the midst of it all notably because the applicant asserts that prescription would not have commenced to run until 15 September 2021. This is the very basis upon she prays for the declarator as her primary relief.

[19] The respondent resolutely objects to this court granting any order in favour of the applicant contending that she has not met the requirements for condonation and complaining that the applicant delayed in seeking such a prayer once it was made known that she, the respondent, was going to rely on her failure to serve statutory notice in compliance with the provisions of section 3 (2) (a) of the ILPACOSA.

[20] In response to the applicant’s careful averments concerning the basis upon which she became wise to the fact, on 15 August 2021 more exactly, that she had a claim with regards to the events surrounding her baby’s stillbirth after seeking legal advice from her attorney (that is the moment from which she possessed sufficient facts to cause her on reasonable grounds to think that her baby’s death was due to the fault of the medical staff), the respondent pleads a lack of knowledge but has

³ *Gericke v Sacks* 1978 (1) SA 821 (A) at 827 – 828; *Drennan Maud & Partners v Pennington Town Board* 1983 (3) SA 200 (SCA); *Sibiya v The Premier of the Province of Kwazulu-Natal* [2008] (1) All SA 295 N at para [26]. See also *Links v MEC, Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC) at para [24].

readily conceded that she can neither admit nor deny such allegations. The non-sensical qualification added by her “*that to the extent that such is relevant in this application I deny them*”, to my mind raises no dispute on the papers and certainly does not speak to a proper defence in respect of which she bears the onus. Also vaguely denied is the conclusion pleaded by the applicant that her claim has not been extinguished by prescription and that her debt only became due on 15 August 2021.

[21] The respondent in her answering affidavit appears also to have missed the point entirely that the applicant emphasizes that she was not informed by the nursing and medical personnel at the hospital that her baby’s death was caused because of their mismanagement (possibly constituting negligence as per her attorney’s advice) and that such culpable conduct legally and factually conduced to the unfortunate outcome. It was not until she received legal advice that she had any reason to believe that this fateful outcome was due to their fault.

[22] The respondent has not suggested any other basis to point to the fact that the applicant could or should have acquired knowledge of the facts giving rise to the debt, or the identity of the debtor, in the legal technical sense, before she consulted with her attorney.

[23] In *Maleshiyo v MEC for Health, Eastern Cape*⁴ and in *Diko v MEC for Health, Eastern Cape*⁵ I dealt in detail with the kind of facts that a plaintiff such as the applicant who has instituted a claim for damages premised on professional negligence is supposed to know in order to trigger the running of prescription, and in what circumstances such knowledge ought to be imputed to a plaintiff. The correct approach is also helpfully set out in the full bench appeal in *MEC for Health v Diko*.⁶

[24] Given that I am under some pressure to deliver the present judgment before trial roll call this week, I do not intend to repeat the approach outlined in the judgments, which applies with equal reasoning to the situation at hand.

⁴ (451/2018) [2020] ZAECHC 28 (23 October 2020).

⁵ (583/2018) [2022] ZAECHC 11 (22 March 2022).

⁶ (*Member of the Executive Council for Health, Eastern Cape v Diko* - Appeal (CA1/2023) [2023] ZAECHC 28 (15 September 2023)).

[25] In the absence of any defence articulated by the respondent in her affidavit in this regard, the applicant is in my view entitled to the declarator she seeks, which renders it unnecessary for her to have explained her supposed culpability in not taking any steps between the date of the birth and the service of the statutory notice intended to advise the respondent of her intention to institute legal proceedings.

[26] In the light of the approach I adopt, the notice is thus taken to have been delivered timeously, within six months of 15 August 2021, before which date the applicant in my view was not in possession of sufficient facts such as she learned on the said date to think that the still birth of her child was due to the fault of the medical staff. Indeed she could not have known except for the insight of her attorneys, that the care administered to her at the hospital was substandard, or the legal import thereof.

[27] Inasmuch as the applicant thought it necessary to seek condonation in the alternative I see no reason not to permit the filing of her supplementary affidavit. I take the applicant's point that she felt obliged to file this application out of caution. The respondent could have excused the applicant's oversight but instead also vociferously opposed that application.

[28] Even though this court is not required in the peculiar circumstances of the matter to deal with the alternative prayer in the main interlocutory application, I am satisfied that the requirements stipulated in section 3 (4)(b) of the ILPACOSA have been established on an overall impression made and that it is necessary and in the interests of justice to have permitted the applicant to amplify her papers and to be afforded the opportunity to get on with the prosecution of her claim in the anticipated trial. The respondent's attempt to suggest that that claim is doomed to failure is further rather unfortunate and in my view entirely without merit. Whilst the respondent has recently delivered an amended and amplified plea (which contradicts the assertion that she was prejudiced at all by the service of the impugned notice only in November 2021) that calls attention to the fact that the alleged delay in her baby's delivery did not happen under the watch of the staff at the Dora Nginza

hospital but rather the admitting clinic, it still remains open to the applicant to plead consequentially thereto.

[29] I have referred above and in *Maleshiyo*⁷ and *Diko*⁸ to the principled approach adopted by our courts on the question of determining prescription in professional medical suits and the manner in which they consider when a debt is due within the meaning of section 12 (6) of the Prescription Act, and when the deeming provision in section 12 (7) can be invoked. Applied to the facts of the present matter, the applicant had the minimum facts necessary to institute her claim only once she consulted with her attorney. Without such advice she would not of her own agency have had grounds to think that the death of her baby was due to the fault of the medical personnel. While she knew that her baby was born dead and reconciled herself to the fact that she felt depressed because of this, there is nothing to gainsay her evidence that she had no inkling that the staff were negligent in respect of that outcome or that she possibly had a damages claim arising therefrom until her attorney informed her.

[30] On the issue of costs, I consider the defendant's opposition to the application to have been unnecessary and somewhat obstructive. This is an unfortunate approach to be adopted by an organ of state. The respondent has an obligation to litigate responsibly and not take technical and obstructive points where this is not in the interests of justice.⁹

[28] In the result, I issue the following order:

1. The applicant's request to permit the filing of her supplementary affidavit is granted.

⁷ *Supra*.

⁸ *Supra*

⁹ See *Minister of Safety and Security v Additional Mag, N Molo N.O and Keith Chipps* [2013] ZAE (GHC 89) (unreported judgment of Roberson J, concurred in by Plasket J dated 23 August 2017 at para[8]; *Mhlatshehi v RAF* 2009 (2) SA 401 (ECD) at paras [16] and [17] and especially the statement by the Constitutional Court in *Njengi v MEC, Department of Welfare, Eastern Cape* 2008 (4)_SA 237 (CC) at par [79] that "(a) decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution."

2. It is declared that the applicant has complied with the provisions of section 3 (2) of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 in respect of her statutory notice dated 17 November 2021.
3. The respondent is directed to pay the costs of both the main and interlocutory application to supplement her papers, such costs to include the costs of second counsel, to be reckoned on Scale A.

B HARTLE
JUDGE OF THE HIGH COURT

DATE HEARD : 8 May 2025
DATE OF JUDGMENT : 15 May 2025

Appearances:

For the applicant : Mr. N Zilwa & Ms. Livi instructed by ABN Attorneys, East ondon, (ref. Mr. Nyenyiso).

For the respondent : Mr. S P Ntsaluba instructed by The State Attorney, East London (ref. Mr. Mosia).