



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

CASE NO. 744/2020

In the matter between:

BONISANI NDZUNDZU

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH

Respondent

JUDGMENT

COLLETT AJ

Introduction

- [1] The applicant, an adult male, suffered a head injury after being assaulted with an axe and attended at Grey Hospital on 25 November 2013 for treatment. He issued summons against the respondent on 18 November 2020 alleging negligence.
- [2] The respondent raised a special plea contending that there had been non-compliance by the applicant with the requisite statutory notice in terms of *Section 3(2)(a)* of the

Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (hereinafter referred to as '*the Act*')

- [3] The applicant now seeks condonation in terms of *Section 3(4)* of *the Act*. The respondent opposes the application contending that the applicant has not demonstrated '*good cause*', failed to make averments regarding prescription or that the respondent would be unduly prejudiced.

Factual Matrix

- [4] On 25 November 2018, the applicant attended Grey Hospital after an assault to his head with an axe. He was allegedly treated and discharged. Thereafter, he noticed that he was blind, consulted Dr Limbada and was admitted to ICU at St Dominic's Hospital. Fragments of his skull were removed and blood clots drained. He was absent from work for three months. The ensuing medical complications are alleged to have arisen as a consequence of the respondent's negligence.
- [5] The applicant's erstwhile attorney, T. Faku Attorneys (hereinafter referred to as '*Faku*') issued summons against the respondent on 18 November 2020. The respondent entering an appearance to defend on 20 June 2021. On 2 August 2022, the respondent filed a special plea and plea over raising non-compliance with *the Act*.
- [6] The applicant, as a layman, had instructed *Faku* having no knowledge as to whether the statutory notice was ever sent to the respondent. He states that he was unable to contact *Faku* or receive progress reports and accordingly instructed his present attorneys who filed a notice of acting in May 2022. The applicant's current attorneys wrote to *Faku*, terminated his mandate and requested the applicant's file, but it was not forthcoming.
- [7] Despite the respondent's belated filing of a notice of opposition, the applicant's attorneys called on the state attorney to file a plea. On 3 August 2022 a special plea and plea over was filed, raising non-compliance with *section 3(2)(a)* of the *Act*. In the

absence of the file from *Faku*, the present attorneys suspected the statutory requirements might not have been met. On 2 September 2022 they addressed correspondence to the respondent seeking condonation and acceptance of their letter of demand. No agreement followed from the respondent.

- [8] The respondent opposes condonation, alleging the applicant has not shown ‘*good cause*’, and that the applicant has neither alleged that the claim has not prescribed nor that undue prejudice would not be suffered by the respondent.

Litigation context

- [9] Section 3(2)(a) of the Act requires service on an organ of state within six months of a debt becoming due. If an organ of state relies on non-compliance with section 3(2)(a), then section 3(4) is triggered, permitting an application for condonation.

- [10] The requirements for a condonation application are embodied in section 3(4)(b) and (c) which reads as follows:

- ‘(b) The court may grant an application referred to in paragraph (a) if it is satisfied that –
- (i) the debt had 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’

- [11] The Constitutional Court in *Minister of Police v Miya*,¹ adopted the approach in *City of Tshwane Metropolitan Municipality v AfriForum and Another*² more particularly:

¹ (1250/2022)[2024] ZASCA 71 (06 May 2024) para [1]

² [2016] ZACC 19 para [18]

‘Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustration of real justice and equity through technicalities. The kind of justice that our constitutional dispensation hold out to all our people is substantive justice.’

- [12] Although *Miya* concerned service upon the Minister and the interpretation of *section 2(2)* of the Act, its purposive approach is significant. *Section 39(2)* of the Constitution³ enjoins the court to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights.
- [13] Implicit in *section 3(4)* is the right of access to court as enshrined in *section 34* of the Constitution and requires a purposive interpretation. An unduly restrictive approach inconsistent with our constitutional imperatives.
- [14] While compliance with *section 3(2)* of the Act remains important, the merits are not assessed on a balance of probabilities. The court must be ‘*satisfied*’ that condonation is justified on the facts and all three requirements as contained in *section 3(4)* have been met. The court then exercises its discretion to condone following the usual principles.⁴
- [15] The first requirement of the three-pronged enquiry as contained in *section 3(4)*, is prescription which is essentially a question of fact relating to whether or not the debt has been extinguished consequent upon the lapse of the three-year period.
- [16] The second requirement is ‘*good cause*’ for the delay. A reasonable explanation must be given to allow the court to assess the delay holistically. Heher JA in *Madinda* stated that:⁵

³ Act 108 of 1996

⁴ *Madinda v Minister of Safety and Security* (153/2007)[2008] ZASCA 34 (28 March 2008)

⁵ *Madinda supra* para 12

‘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 attached to the delay in serving the notice timeously.’ (my emphasis)

[17] Considerations of ‘*good cause*’ include fairness, prospects of success, reasons for the delay, sufficiency of explanation, *bona fides* of the applicant and any contribution to the delay by the applicant or others.⁶ No fixed formula for ‘*good cause*’ applies and each case turns on its merits. Moreover, prospects of success remain essential and are balanced with the cause of delay.

[18] The purpose of the condonation envisaged in *section 3(4) of the Act* is to permit the litigation despite non-compliance with the peremptory provisions of *section 3(2)(a)*. This is consistent with a purposive approach which is constitutionally aligned with *section 34 of the Constitution*. Both defective and absent notices entitle a litigant to seek condonation.⁷

[19] The third prong of the enquiry is for the applicant to demonstrate that the respondent has not been unduly prejudiced by the delay. This calls for a factual, common-sense inquiry as realistically, the respondent is best placed to show prejudice. As postulated in *Madinda*⁸:

‘Although the onus is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.’

Analysis

[20] The respondent submitted that the applicant did not assert that the claim had not prescribed. This, however, is a non-issue. Even if the debt arose on 25 November 2018, it is common cause that summons was served on 20 January 2020, well within

⁶ *Madinda supra* para 10

⁷ *Minister of Safety and Security v De Witt* 2009(1) SA 457, para [18]

⁸ *Madinda* para 21

the three-year prescription period. Accordingly, the court has a discretion to condone the defective service of the statutory notice.

- [21] On the facts, there is a two-year gap between attendance at Grey Hospital and service of summons.⁹ At worst, the claim arose on 27 November 2018, with six months running thereafter. This leaves an 18-month period potentially unaccounted for.¹⁰ Whilst the applicant did not provide the exact date of consulting *Faku* or of becoming aware of a triable claim, this should not disqualify his bid for condonation. The facts reveal that he was hospitalized in the ICU at St Dominic's Hospital after his initial admission at the respondent's facility and was absent from work for three months.
- [22] It is clear that the applicant sought legal advice during the intervening period and relied upon *Faku* to pursue his matter in accordance with the law. The particulars of claim reference compliance with the provisions of *section 3 of the Act* and embody the words '*despite demand*'.¹¹ Significantly, the plea denies compliance but is silent on the specifics.
- [23] Despite service of the summons on 18 November 2020, the respondent only filed its notice of opposition on 21 June 2021, some seven months later. Its plea followed on 22 August 2022, being 22 months after receipt of the summons, and then only after being prompted by a notice of bar from the applicant's current attorney. This pattern reveals *Faku's* recalcitrance as he neither acted when the notice of opposition was delayed nor served a timely notice of bar regarding the plea. The applicant was therefore plainly a victim of the dilatory conduct of both *Faku* and the respondent. *Faku's* inaction further supports the applicant's version that he received no progress reports and was unable to reach *Faku* telephonically. As a layman, the applicant reasonably entrusted the conduct of his case to *Faku*.

⁹ 25 November 2018 being the date of admission to Grey Hospital and the issue of summons on 20 November 2020

¹⁰ Post the 6 months within which proceedings should be instituted

¹¹ Para 14 and 15 of particulars of claim

- [24] Upon receiving instructions from applicant in May 2022, the applicant's present attorneys acted without delay. They served a notice of bar and sought to address '*the unknown reason*' for non-compliance with *the Act* raised in the special plea. In the correspondence dated 2 September 2022, they explained the absence of the applicant's file and the inability to contact his previous attorney. They requested the respondent's agreement to condonation, but no reply was forthcoming, necessitating this application.
- [25] It cannot be said that the applicant, as a lay person, showed a disinterest in his matter. He consulted *Faku* leading to summons being served on the respondent. Thereafter, both *Faku* and the respondent were dilatory. The applicant then instructed new attorneys, who pursued the matter albeit without the benefit of a file.
- [26] As submitted by applicant's counsel, the respondent's plea is sufficiently detailed to indicate access to the hospital file of the applicant. In assessing the prospects of success, the respondent who, whilst denying negligence, admits the admission and treatment. It would be palpably unfair to deny the applicant a trial on the merits.
- [27] A court is to be satisfied that the requirements of *section 3(4)(b)* are met, applying an overall impression and fair assessment of the facts. Proof on a balance of probabilities is not required. The applicant has produced acceptable reasons, supported by the facts as aforementioned, to substantially negate culpability for the delay in serving the notice timeously or at all. This court is satisfied that fairness and the consideration of *section 34 of the Constitution* warrant the exercise of discretion in favour of the applicant.
- [28] The respondent raises no tangible prejudice. From the plea and answering affidavit, it appears that the respondent has information necessary to mount a defence to the applicant's claim. Any claim of prejudice, is general and unspecified. In the absence

of actual prejudice, the respondent cannot be said to be unreasonably prejudiced by the applicant's failure.

[29] In considering and assessing the requirements for condonation in accordance with established principles against the explained and unexplained facts, the delays cannot fairly be attributed to the applicant or equated with disinterest. The applicant has, at least substantially, demonstrated a lack of culpability on his part.

[30] Accordingly, the following order is issued:

1. Condonation is granted for the applicant's failure to serve the notice contemplated in *section 3(1)(a) of the Institution of Legal Proceeding against Certain Organs of State Act 40 of 2002 ('the Act')* within the period laid down in *section 3(2)(a) of the Act*;
2. The costs are in the cause.

SA COLLETT
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Mr C. Wood
Instructed by: Niehaus McMahon Inc

For the Respondent: Mr A. D. Maduma
Instructed by: State Attorney

Date of hearing: 11 September 2025

Date of judgment: 23 September 2025