



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) **REPORTABLE: N**
- (2) **OF INTEREST TO OTHER JUDGES: N**
- (3) **REVISED: Y**
- (4) **Signature:** [Redacted] **Date:** 12/11/25

CASE NO.:033164/2022

In the matter between:

MAGRET SIBEKO

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH GAUTENG PROVINCIAL GOVERNMENT

Respondent

JUDGMENT

Kumalo J

INTRODUCTION

- [1]. The Applicant in this matter seeks condonation for the late filing of her notice in terms of section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act No. 40 of 2002 ('the Act'). The Respondent opposes the application.
- [2]. Section 3(1) of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of State unless
- 2.1 The creditor has given the organ of state notice in writing of their intention to institute the legal proceedings in question; or
- 2.2 The organ of state in question has consented in writing to the institution thereof without such notice upon receipt of such notice, which does not comply with all the requirements set out in subsection 2.
- [3]. Subsection (2) stipulates that the notice must be served on the organ of state within six months from the date on which the debt became due, and must briefly set out the facts giving rise to the debt, and the particulars of such debt that are within the knowledge of the creditor.
- [4]. It is to be noted that the provisions of subsection (2) are couched in peremptory terms, which suggest that they are to be complied with. However, subsection (4) makes provision that if an organ of state(as in this case) relies on the 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.

- [5]. The Applicant's application is brought before this court based on the above-stated provision of the Act.
- [6]. A court may grant the application if it is satisfied that the debt has not been extinguished by prescription, that good cause exists for the failure by the creditor, and the failure did not unreasonably prejudice the organ of state.
- [7]. The reason proffered by the Applicant in this matter for the late delivery of her notice is that he was not aware that she had a claim against the Respondent and only became aware thereof in or about June 2022 when she visited Chris Hani Baragwanath Hospital for her follow-up visits. She narrated her story to another patient, who then suggested that she seek legal assistance and recommended the Applicant's current attorneys of record.
- [8]. The Respondent opposes the application on the basis that the applicant failed to show that good cause exists for the Applicant's failure to serve the statutory notice in terms of the Act timeously, and further that the condonation application does not satisfy the requirement that the Respondent, as an organ of state, is not unreasonably prejudiced by the delay in serving the required notice.
- [9]. The Respondent argued that the Applicant failed to show good cause for the delay in serving the statutory notice and that the condonation application does not satisfy the requirement that the delay did not unreasonably prejudice the Respondent.
- [10]. It is trite that a party seeking the indulgence of the court to condone non-compliance bears the onus to satisfy the court that condonation should be

granted. Condonation is not a mere formality and is not to be had merely for the taking.¹ The Applicant must show that the failure was not wilful and must satisfy the court that there is sufficient or good cause for the failure to comply with the requirements.

[11]. In this matter, the Applicant appears to have confused good cause with referring only to the merits of her case. Whilst it is correct that the merits of a case do play a role in the determination of whether condonation ought to be granted or not, that is not the only issue to be considered by the court in such applications.

[12]. In *Madida v Minister of Safety and Security*², the Supreme Court of Appeals gave its interpretation of the phrase 'good cause'. It stated that this concept involves consideration of various factors relating to fairness, including the prospects of success, the reasons for the delay, the adequacy of the explanation provided, and the Applicant's bona fides.

[13]. The standard bearer in matters concerning condonation application is *Melane v Santam Insurance Co. Limited*³ where the Appellate Division stated the following –

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion to be exercised judicially upon consideration of all the facts, and in essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the

¹ See *Uitenhage Transitional Local Council v South African Revenue Services* 2004 (1) SA 292 (SCA) at para 6.

² *Madida v Minister of Safety & Security* [2008] ZASCA 34; [2008] 3 all SA 143 (SCA)

³ *Melane v Santam Insurance Co. Limited* 1962 (4) SA 531(A).

prospects 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, save, of course, that if there are no prospects of success, there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay, and the respondent's interest in finality is not overlooked."

- [14]. *In this case*, the Applicant alleges that on or about 10 September 2021, she attended at Leratong Hospital. She was pregnant and not feeling well. She was admitted and taken to the theatre for a caesarean section. The procedure was performed, and her baby did not survive.
- [15]. Applicant further alleges that the medical personnel cut off part of her bladder while conducting the caesarean procedure in trying to remove the baby. She was later referred to George Mukhari Hospital for treatment of urinary incontinence.
- [16]. She alleges that the hospital was negligent and had breached its legal duty of care towards her. These are some of the salient features of her case against the Respondent.

- [17]. The Applicant alleges that she became aware of the claim against the Respondent only in June 2022, when she visited Chris Hani Baragwanath Hospital for her follow-up appointment. She approached the offices of her attorneys of record on 5 July 2022, where she was taken through the legal process of suing an organ of state.
- [18]. The notice letter was only dispatched to the Respondent on 18 August 2022. There is no explanation in the founding affidavit why the said notice could not have been sent sooner, given that the Applicant consulted with the attorneys of record on 5 July 2022.
- [19]. The reason for the delay is provided in the replying affidavit. It is trite that one needs to make their case in the founding affidavit.
- [20]. The Applicant's attorneys of record ought to have been aware that the notice was out of time. The cause of action arose around September 2021, and by the time the Applicant approached her attorneys of record, the notice was almost four months past the time limit. Despite this knowledge, there is a further delay of nearly six weeks before the letter is dispatched.
- [21]. Of concern is the fact that nowhere in the founding affidavit is this period of delay addressed or explained. The founding affidavit focused on the issue of prescription, which was not in dispute. It is a common cause that there was no prescription, as alleged, at the time the claim was lodged against the Respondent.

- [22]. What this court is required to determine on the facts before it is whether good cause has been established and whether there is unreasonable prejudice to the Respondent.
- [23]. I have alluded to the fact that the Applicant's application is very scant on the good cause issue. Other than the allegation that she did not have the requisite knowledge that she had a claim against the Respondent, nothing further is preferred. Crucially, the period from 5 July to the date the notice is delivered is not explained in the founding affidavit.
- [24]. The Respondent has further criticized the applicant for the delay in bringing the condonation application. The Applicant's attorney approached the court only with an application for condonation after the Respondent raised a special plea for non-compliance with the Act. Nothing much turns on this fact. The Act stipulates that a party may approach the court for condonation in circumstances where the Respondent raises non-compliance with the relevant provisions of section 3.
- [25]. The criticism, though, directed at the Applicant's attorneys is valid. They know that there is a purpose for the provisions of section 3 of the Act. They are not a 'nice to have' in the statute. They ought to have considered applying for condonation as soon as they realised the notice was out of time.
- [26]. The assertion that they did not dispatch the notice because they had to seek a comprehensive legal opinion upon discovering that the statutory notice was out of time is, with respect, without merit. This is further compounded by the

assertion that the step was essential to ensure that the condonation application was grounded in a robust legal strategy.

[27]. The Applicant's attorneys ought to have realized, as they did, that the notice was out of time and that the issue needed to be addressed immediately.

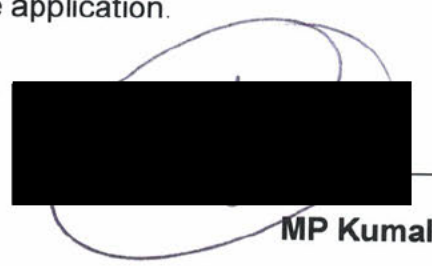
[28]. However, the most disturbing aspect of this matter is the Applicant's failure to address prejudice to the Respondent by her failure to file the statutory notice. I am swayed by the Respondent's argument that it is suffering unreasonable prejudice on the basis that it is difficult for it to secure witnesses in this matter.

[29]. The difficulties posed by litigation delays include the risk of losing witnesses. The Respondent states that it has problems securing the witnesses in this matter. The Respondent delivered the opposing papers out of time because the Respondent's counsel had difficulty securing witnesses for consultation. This is prejudicial to its case, and this could have been avoided had the Applicant delivered its notice timeously.

[30]. This court is alive to the fact that the Respondent has also failed to inform the court of the nature of the difficulty it has regarding the witnesses. Are they unavailable because they have since left the employ of the Respondent, or what is the real situation with them? That clarification is necessary for this court to make an informed decision. That information is lacking in the Respondent's papers.

[31]. The court has discretion to grant condonation, and that discretion must be exercised judiciously.

- [32]. Whilst the Applicant has failed to give a satisfactory explanation for the delay, I am of the view that there is a case for the Respondent to answer. It would not be fair to shut the court's doors to her being heard on the central issue due to the conduct, in part, of her attorneys.
- [33]. I have already stated my views on the alleged prejudice to the Respondent. The absence of witnesses has not been comprehensively explained to this Court. I believe that, in the circumstances, it would be fair to grant the condonation application.
- [34]. Further, I am of the view that there should be no costs order, and that each party should bear its own costs for this application.
- [35]. In the circumstances, the following order is made:
1. The application for condonation is granted; and
 2. Each party is to bear its own costs for the application.



MP Kumalo
Judge of the High Court, Pretoria

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: Adv KP Letswalo

Instructed by: MWIM & Associates Inc

For the respondent: Adv NM Seleso

Instructed by: Office of the State Attorney