IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Not Reportable
Case No: 2917/2019

In the matter between:

WESSEL JOHANNES BADENHORST	**First Applicant**
SUSANNA ALLETTA LIEBENBERG	**Second Applicant**
BEATRIX PETRONELLA VAN KRADENBURG	**Third Applicant**
ANNETTE DU PREEZ	**Fourth Applicant**

and

THE MEC FOR HEALTH, NORTH WEST PROVINCE	**Respondent**

Coram: Petersen ADJP
Date heard: 14 May 2026
Judgment reserved: 14 May 2026

Delivered: This judgment was handed down electronically, circulated to the parties' legal representatives by email, uploaded to CaseLines, and released to SAFLII. The date and time for handing down the judgment are deemed to be 10h00 on 03 July 2026.

Summary: Condonation in terms of s 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – Applicants failed to serve a timeous notice of intended legal proceedings against the MEC arising from the death of the Applicants' wife and mother following alleged negligent medical treatment – Applicants demonstrated good cause for the delay – Debt not extinguished by prescription – MEC failed to establish unreasonable prejudice – Condonation granted.

JUDGMENT

PETERSEN ADJP

Introduction

[1] This is an application in terms of s 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act"). The applicants seek condonation for their failure to serve, within the period prescribed by s 3(2)(a), a notice of their intention to institute legal proceedings against the respondent ("the MEC").

[2] The contemplated action arises from the death of the applicants' wife and mother, Mrs Anna Johanna Badenhorst ("the deceased"), on 17 February 2015, following medical treatment rendered at Joe Morolong Memorial Hospital and her subsequent transfer to Kimberley Hospital.

[3] The applicants contend that the deceased's death resulted from negligent medical treatment administered by employees of the MEC. The MEC opposes the application on the basis that the applicants acquired knowledge of the material facts giving rise to the alleged debt during February 2015, failed to serve the statutory notice within six months thereafter, and that the debt became prescribed before summons was issued. It follows, so the MEC contends, that this Court lacks jurisdiction to grant condonation.

[4] The application requires consideration of the interplay between the notice provisions in s 3 of the Act and the prescription provisions in s 12(3) of the Prescription Act 68 of 1969. It also requires consideration of the particular difficulties that frequently arise in medical negligence litigation, where laypersons, despite appreciating that a tragic medical outcome has occurred, are unable, without further investigation, to determine whether that outcome may reasonably be attributable to negligent medical treatment.

Background

[5] The material facts are substantially common cause. During February 2015, the deceased presented at Joe Morolong Memorial Hospital complaining of abdominal pain and associated symptoms. She was examined, treated, and discharged. Her condition thereafter deteriorated significantly. She was subsequently transferred to Kimberley Hospital, where emergency surgery was performed. Despite those interventions, she died on 17 February 2015.

[6] The applicants did not remain passive following the deceased's death. Approximately one month later, on 18 March 2015, they lodged a formal complaint with the Health Professions Council of South Africa ("the HPCSA") concerning the treatment rendered to the deceased by Dr Dube. The complaint initiated a statutory disciplinary process that continued over an extended period. On 7 May 2018, the HPCSA informed the applicants that disciplinary proceedings had culminated in findings adverse to Dr Dube and the imposition of a sanction. Thereafter, the applicants consulted attorneys, caused a notice contemplated by section 3 of the Act to be served during October 2018, and instituted action during 2019.

The MEC's point *in limine*

[7] The MEC raised a point *in limine* arising from an earlier interlocutory application which had subsequently been withdrawn, contending that the

applicants sought inconsistent relief. The applicants explain that the earlier application was withdrawn following reconsideration of the most appropriate procedural route to obtain the relief sought.

[8] The withdrawal of an interlocutory application neither deprives this Court of jurisdiction nor precludes the applicants from seeking competent relief in subsequent proceedings. It does not affect the Court's competence to determine the present application. The point *in limine* must therefore fail.

The legal framework

[9] Section 3 of the Act serves an important public purpose. It enables organs of state to investigate claims promptly while relevant evidence remains available. It facilitates the preservation of records, promotes efficient public administration, and encourages the early resolution of disputes. At the same time, s 3(4) recognises that rigid adherence to procedural requirements may unjustly impede access to courts. The discretion conferred upon a court by s 3(4) reflects the Legislature's intention that procedural discipline should not defeat substantive justice where the statutory requirements for condonation have been established.

[10] Section 3(4)(b) provides that a court may grant condonation only if it is satisfied that:

(a) the debt has not been extinguished by prescription;

(b) good cause exists for the creditor's failure to serve the statutory notice timeously; and

(c) the organ of state was not unreasonably prejudiced by the delay.

Each of these jurisdictional requirements must be satisfied before the discretion to grant condonation may properly be exercised.

[11] The principles governing applications under s 3(4) have been authoritatively stated by the Supreme Court of Appeal in *Madinda v Minister of*

Safety and Security[1]. Equally relevant are the Constitutional Court's decisions in *Links v MEC for Health, Northern Cape Province,* and *Loni v MEC for Health, Eastern Cape*[2], together with the Supreme Court of Appeal's decision in *Truter and Another v Deysel*[3], each of which considers the operation of s 12(3) of the Prescription Act within the context of medical negligence litigation.

Prescription

[12] The principal dispute concerns the date on which the applicants acquired knowledge of the facts underlying the alleged debt. The MEC submits that prescription commenced during February 2015 because the applicants already knew that the deceased had attended Joe Morolong Memorial Hospital, had been discharged, had deteriorated thereafter, had been transferred to Kimberley Hospital, and had subsequently died. Those facts, the MEC contends, constituted all the material facts necessary to institute proceedings.

[13] The applicants accept that they were aware of those events. They contend, however, that they were lay persons with no medical expertise. Although they suspected that something may have gone wrong, they lacked sufficient factual knowledge to appreciate whether the deceased's deterioration and eventual death were attributable to negligent medical treatment or to the progression of an underlying disease. They submit that they acted with reasonable diligence by immediately invoking the statutory disciplinary mechanisms of the HPCSA to establish the factual basis upon which such a conclusion might responsibly be reached.

[14] Section 12(3) of the Prescription Act provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor

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[1] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA).

[2] *Links v MEC for Health, Northern Cape Province* 2016 (4) SA 414 (CC) para 49; *Loni v MEC for Health, Eastern Cape* [2018] ZACC 2; 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC).

[3] *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) para 20.

and of the facts from which the debt arises. A creditor is deemed to possess such knowledge where the exercise of reasonable care could have acquired it. The enquiry therefore contains both subjective and objective elements. It is directed not merely at what the creditor actually knew, but also at what a reasonably diligent creditor in the same position could, by exercising reasonable care, have discovered.

[15] It is well established that s 12(3) requires knowledge of material facts and not legal conclusions. A creditor need not appreciate that known facts establish negligence, wrongfulness, or legal liability before prescription begins to run. Equally, however, mere suspicion that something may have gone wrong does not constitute knowledge of the material facts contemplated by the section. The enquiry remains whether the creditor possessed, or could through the exercise of reasonable care have acquired, sufficient factual knowledge to identify the material facts giving rise to the claim.

[16] In *Truter,* the Supreme Court of Appeal held that prescription is not postponed merely because an expert opinion subsequently enables a plaintiff to appreciate that known facts may support a legal conclusion of negligence. By contrast, in *Links* the Constitutional Court recognised that, particularly in medical negligence litigation, a patient or family member may know that an adverse medical outcome has occurred while nevertheless lacking sufficient factual information reasonably to appreciate that negligent treatment may have caused that outcome. These authorities are not inconsistent. *Truter* rejects the proposition that prescription awaits expert confirmation of negligence. *Links* recognises that prescription cannot commence before the creditor possesses, or reasonably could have acquired, the material facts from which the claim arises.

[17] The distinction is of particular importance in the present matter. The applicants do not contend that prescription was suspended until the HPCSA expressed a disciplinary opinion. Such a contention would indeed be inconsistent

with *Truter*. Their case is rather that, despite acting diligently, they lacked sufficient factual knowledge to appreciate whether negligent medical treatment had caused the deceased's death. The significance of the HPCSA proceedings, therefore, lies not in the disciplinary findings ultimately reached, but in demonstrating both the applicants' diligence and the objective difficulty laypersons face in obtaining the material facts necessary to evaluate a complex medical negligence claim.

[18] The chronology is instructive. Within approximately one month of the deceased's death, the applicants invoked the HPCSA's statutory investigative processes. They thereafter pursued that process to completion. Their conduct is inconsistent with indifference. On the contrary, it demonstrates that they took the very steps which reasonably diligent lay persons, confronted with complex medical issues beyond their expertise, would ordinarily take in attempting to determine whether negligent treatment had occurred.

[19] The MEC nevertheless places considerable reliance upon the fact that the applicants suspected negligence sufficiently strongly to lodge the HPCSA complaint during March 2015. That submission merits closer scrutiny. The complaint undoubtedly demonstrates that the applicants entertained serious concerns regarding the treatment administered to the deceased. However, suspicion, even a reasonable suspicion, is not synonymous with possession of the material facts contemplated by s 12(3). The very purpose of lodging the complaint was to obtain clarification concerning matters lying beyond the applicants' knowledge and expertise.

[20] The prompt lodging of the HPCSA complaint is, in my view, more consistent with an absence of sufficient knowledge than with its existence. Had the applicants already possessed the material facts necessary to found a medical negligence claim, there would have been little purpose in lodging a complaint with the HPCSA to confirm that their concerns were justified on the facts. Their

conduct demonstrates that they sought to obtain information which they did not yet possess, rather than confirmation of conclusions already reached.

[21] The significance of the HPCSA proceedings should also not be overstated, so as to obfuscate the real issues in this application. The disciplinary findings ultimately made against Dr. Dube neither determine nor pre-empt the issues that will arise in the contemplated civil proceedings. Different legal standards apply, different issues may arise, and the HPCSA's findings are not binding on a civil court. Their relevance in the present application provides objective support for the applicants' explanation that the circumstances surrounding the deceased's treatment were sufficiently complex to require investigation before reasonably diligent lay persons could properly appreciate whether negligent treatment may have caused the harm suffered.

[22] Section 12(3) also requires consideration of what knowledge the applicants could reasonably have acquired through the exercise of reasonable care. The MEC has not demonstrated what additional steps reasonably diligent lay persons ought to have taken beyond those which the applicants in fact took. No evidence has been presented suggesting that the relevant medical records were readily available to them, that expert medical advice could reasonably have been obtained at an earlier stage, or that the material facts underpinning the alleged negligence were otherwise accessible without specialised investigation. In these circumstances, the applicants cannot be criticised for pursuing the statutory disciplinary process as the primary means of obtaining the information necessary to evaluate a potential claim.

[23] It follows that this is not a case in which the applicants delayed unreasonably before embarking upon enquiries concerning the circumstances of the deceased's treatment. They acted promptly, consistently, and diligently. The delay that thereafter occurred arose substantially from the duration of the disciplinary process itself rather than from any inaction on their part.

[24] The MEC correctly submits that the present proceedings do not constitute the trial of a special plea of prescription. Nevertheless, s 3(4)(b)(i) requires this Court to be satisfied that the debt has not been extinguished by prescription before condonation may competently be granted. This Court cannot avoid determining that jurisdictional question merely because the ultimate merits of the contemplated action remain to be adjudicated.

[25] Having regard to the evidence before this Court, the applicants' prompt and diligent conduct, the factual complexity inherent in the medical issues involved, the objective difficulties confronting lay persons in acquiring the material facts necessary to evaluate a medical negligence claim, and the principles articulated in *Links*, I am satisfied that the applicants did not possess, nor could reasonably have acquired through the exercise of reasonable care, the material facts contemplated by s 12(3) of the Prescription Act until the HPCSA investigation had materially clarified the factual basis upon which negligence could reasonably be inferred.

[26] It follows that the debt had not become due during February 2015 in the manner contended for by the MEC. Consequently, prescription had not extinguished the applicants' claim before service of the statutory notice or before summons was issued. The jurisdictional requirement contained in s 3(4)(b)(i) has therefore been established.

[27] This conclusion must not be misconstrued. This judgment does not establish or propose a general rule that prescription in medical negligence matters commences only once disciplinary proceedings, or expert investigations have been completed. Each case must be determined upon its own peculiar facts. The conclusion reached in the present matter rests upon the particular chronology of events specific to this matter. The applicants' demonstrated diligence, the complexity of the underlying medical issues, and the absence of evidence that the

material facts giving rise to the claim could reasonably have been acquired at an earlier stage.

Good cause

[28] The second jurisdictional requirement is whether the applicants have shown good cause for their failure to comply with s 3(2)(a) of the Act. The concept of "good cause" is not susceptible to precise definition. It requires a broad, flexible, and equitable assessment of all relevant circumstances, including the explanation for the delay, the applicants' conduct throughout the period of non-compliance, the bona fides of the application, the prospects of success in the contemplated action, and the interests of justice.

[29] The chronology has already been described. Shortly after the deceased's death, the applicants lodged a complaint with the HPCSA. That complaint remained under investigation for more than three years. Once informed of the disciplinary outcome on 7 May 2018, the applicants consulted attorneys and caused the statutory notice contemplated by s 3 of the Act to be served during October 2018. Summons followed in 2019.

[30] The explanation advanced for the delay is coherent, candid, and supported by the objective chronology. The applicants did not ignore their rights, abandon their claim, or display indifference to the statutory requirements. Their conduct throughout demonstrates an ongoing attempt to establish whether they possessed a sustainable claim arising from the medical treatment administered to the deceased. They pursued the investigative process available to them with reasonable diligence before embarking upon expensive civil litigation.

[31] The MEC criticised the applicants for awaiting the outcome of the HPCSA proceedings before serving the statutory notice. While it may, with the benefit of hindsight, have been possible to adopt a different procedural course, the enquiry is not whether the applicants acted perfectly. The question is rather whether they

acted reasonably in the circumstances confronting them. In my view, the applicants indeed acted reasonably in the circumstances. Their conduct reflects a *bona fide* attempt to obtain the factual information necessary to assess the viability of a medical negligence claim rather than a deliberate disregard of the statutory notice provisions.

[32] Prospects of success remain a relevant consideration in assessing good cause, although they are not decisive. I am not called upon to determine the merits of the contemplated action. It is sufficient that the proposed claim is neither frivolous nor vexatious and discloses a *prima facie* basis upon which relief may ultimately be obtained.

[33] In this regard, the applicants rely on allegations that the deceased was examined and discharged despite symptoms that, if properly managed, ought to have prompted further investigation or admission. That her condition deteriorated shortly thereafter; that emergency surgery subsequently became necessary; and that she died despite those interventions. The prompt complaint to the HPCSA, the ensuing statutory investigation, and the disciplinary findings ultimately made against Dr Dube do not establish civil negligence. They do, however, demonstrate that the contemplated action cannot properly be characterised as speculative or manifestly without merit.

[34] The aforesaid factors cumulatively considered, I am satisfied that the applicants have established good cause within the meaning of s 3(4)(b)(ii) of the Act.

Prejudice

[35] The remaining jurisdictional requirement is whether the MEC has demonstrated that it has suffered unreasonable prejudice as a consequence of the applicants' failure to serve the statutory notice within the period prescribed by s 3(2)(a). Unlike the requirement of good cause, which focuses primarily upon the

conduct of the creditor, this enquiry is directed at the practical effect of the delay upon the organ of state's ability fairly to investigate and defend the contemplated proceedings.

[36] It is well established that prejudice cannot simply be presumed from the passage of time. While delay is undoubtedly relevant, s 3(4)(b)(iii) requires proof of unreasonable prejudice. The statutory requirement contemplates actual disadvantage rather than speculative or theoretical inconvenience. The MEC bears the evidentiary burden of placing before this Court sufficient facts demonstrating that the delay has materially impaired its ability properly to investigate the claim or present its defence.

[37] The MEC's opposition is directed primarily at the issues of prescription and the applicants' alleged failure to comply with the statutory notice provisions. Relatively little or no evidence has been presented concerning actual prejudice arising from the delay itself. The MEC has not identified any witness who has become unavailable, whose recollection has materially deteriorated, or whose evidence can no longer reasonably be obtained. The MEC has also not alleged that any relevant medical records have been lost, destroyed, or rendered unavailable through the passage of time.

[38] Equally absent is any evidence that contemporaneous investigations could not be undertaken, that relevant hospital documentation was no longer accessible, or that the MEC's ability to obtain expert opinion has been compromised. The allegations of prejudice remain generalised and largely inferential.

[39] The chronology of events also bears upon this enquiry. The applicants initiated the HPCSA complaint within approximately one month of the deceased's death. The events giving rise to the contemplated litigation, therefore, became the subject of a formal investigation at a relatively early stage. Medical records, professional explanations, and other relevant documentation would

ordinarily have been assembled or considered during that process. While the HPCSA investigation cannot substitute for the MEC's own preparation of its defence, it significantly diminishes the suggestion that the underlying events remained dormant or incapable of investigation for an extended period. Further, the MEC has not suggested that the disciplinary proceedings impaired the ability to defend the contemplated civil action.

[40] The mere effluxion of time, without more, cannot establish unreasonable prejudice. If it were otherwise, s 3(4) would seldom serve any practical purpose, since every application for condonation necessarily involves some degree of delay. The Legislature plainly contemplated that condonation may be granted notwithstanding delay, provided the statutory requirements have been satisfied, and no material prejudice has been demonstrated.

[41] Having considered the evidence placed before this Court, I am not persuaded that the MEC has established unreasonable prejudice within the meaning of s 3(4)(b)(iii). This jurisdictional requirement has accordingly also been satisfied.

Interests of justice

[42] Although s 3(4)(b) prescribes the jurisdictional requirements for condonation, the discretion to grant or refuse condonation must ultimately be exercised judicially. This Court must have regard to the interests of justice and the constitutional imperative that disputes should, where reasonably possible, be determined on their merits (substance) rather than defeated by procedural default.

[43] This does not imply that procedural requirements are not important. The notice contemplated by s 3 serves an important legislative purpose, and litigants are expected to comply with it. Condonation is not granted merely because non-compliance has occurred or because an HPCSA investigation has taken place.

Each application must be assessed on its own facts and against the statutory requirements prescribed by the Legislature.

[44] In the present matter, the applicants did not ignore their obligations. They acted promptly following the deceased's death. They invoked the statutory disciplinary processes available to them. They pursued those proceedings diligently over several years. They consulted legal representatives immediately after receiving the disciplinary outcome, and served the statutory notice within a relatively short period thereafter, and subsequently instituted action. Their conduct throughout demonstrates diligence rather than indifference.

[45] The MEC's opposition to the application must be considered against these considerations. The MEC has been unable to establish that the debt became prescribed or that it has suffered unreasonable prejudice as a consequence of the delay. The explanation advanced by the Applicants is reasonable, *bona fide,* and objectively supported by the chronology. Their contemplated action cannot properly be characterised as speculative or devoid of merit.

[46] To refuse condonation in these circumstances would elevate procedural form above substantive justice. The purpose of s 3(4) is not to provide an arbitrary procedural barrier to litigation, but to ensure that non-compliance is excused only where the statutory safeguards enacted by the Legislature have been satisfied. Those safeguards have, in my view, been met in the present matter.

Conclusion

[47] Having considered each of the jurisdictional requirements prescribed by s 3(4)(b) of the Act, I am satisfied that the applicants' claim had not been extinguished by prescription; the applicants have established good cause for their failure to serve the statutory notice within the prescribed period; and the MEC has failed to demonstrate that it suffered unreasonable prejudice arising from the delay.

[48] The discretion conferred by s 3(4) is accordingly exercised in favour of the applicants.

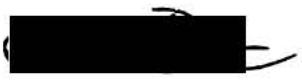
Costs

[49] There is no reason why costs should not follow the result. The applicants have been put to costs by the opposition from the MEC, to the relief sought. They are accordingly entitled to costs. The application raised issues that required careful preparation and consequent scrutiny, relevant to the specific facts of this matter, and an order as to costs is warranted on Scale C.

Order

[50] I accordingly make the following order:

1. The Applicants' failure to comply with section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is condoned.
2. The Applicants are authorised to proceed with the action instituted under case number 2917/2019.
3. The Respondent shall pay the costs of this application on the party-and-party scale, Scale C, which costs shall include the costs of counsel, as taxed or agreed.



AH PETERSEN
ACTING DEPUTY JUDGE PRESIDENT
NORTH WEST DIVISION, MAHIKENG

Appearances:

For the Applicants:	Adv T W Snyders
Instructed by:	Gildenhuys Malatji Attorneys c/o Labuschagne Attorneys Mahikeng

For the Respondent:	Mr N E Nene
Instructed by:	State Attorney, Mahikeng