

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **2015-72110**
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: **YES**/NO
DATE 14 April 2026
SIGNATURE

In the matter between:

T[...]: M[...] I[...]

APPLICANT

obo B[...] K[...] T[...]
and

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH OF THE LIMPOPO PROVINCIAL GOVERNMENT**

RESPONDENT

JUDGMENT

Raubenheimer AJ:

Introduction

[1] This matter concerns an interlocutory application for condonation brought by the Applicant, acting in her representative capacity as the natural guardian and mother of her minor child, the minor. The Respondent is the Member of the Executive

Council for Health, Limpopo Province (the "Respondent" or "MEC") cited in his official capacity as the authority responsible for the public health facilities where the minor received medical treatment.

[2] The current proceedings arise from a medical negligence claim by the Applicant against the Respondent as a result of birth-related injuries sustained by the minor at the Dilokong Hospital in August 2012. The Applicant alleges that the medical staff acted negligently during the labour and delivery process, resulting in permanent neurological impairment to the minor.

[3] In the application brought in terms of Section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act¹ ("the Act") the Applicant seeks the following primary relief:

1. A declaratory order that the notice served on the Respondent amounts to substantial compliance with the requirements of Section 3(2) of the Act;
2. In the alternative, should the Court find that the notice was non-compliant or out of time, an order condoning the failure to serve a timeous and technically correct notice upon the Head of the Department, as required by Section 4(1) of the Act;
3. An order directing that the main action for damages may proceed to trial.

[4] The Respondent opposes the application on the basis that there was non-compliance with the statutory notice period prescribed by the Act. The Respondent further argues that this non-compliance has caused prejudice to the Department's ability to mount a substantive defence. The Respondent challenges the Applicant's reliance on the date of "discovery" of the injury's cause, contending that the debt became due upon the birth of the child in 2012.

Factual Background

[6] The origin of the litigation is located in the medical care provided to the Applicant and her minor child at Dilokong Hospital in Limpopo Province to which the Applicant was admitted to the hospital in labour on 6 August 2012. The Applicant contends that the medical staff failed to monitor the fetal heart rate appropriately, leading to a state of prolonged fetal distress.

¹ Act 40 of 2002

[7] After prolonged labour the baby was delivered by means of an emergency Caesarean section and on delivery exhibited signs of severe birth asphyxia and respiratory depression, necessitating immediate resuscitation and subsequent transfer to the neonatal intensive care unit. For several years thereafter, the minor suffered from developmental delays and neurological deficits. The root cause of these delays and deficits remained unknown to the Applicant as she was never advised of any potential medical error by the attending hospital staff.

[8] The Applicant became aware of the potential negligence in early 2015 after a consultation with medical professionals due to the minor's deteriorating health. On 16 April 2015, the Applicant obtained an MRI report which provided a clinical explanation for the minor's condition, specifically identifying injuries consistent with hypoxic-ischemic encephalopathy due to possible substandard obstetric management.

[9] This discovery led the Applicant to seek legal assistance culminating in the issuing of a summons on 15 October 2015 in which damages arising from the alleged medical negligence was claimed. At the time of issuing the summons the Applicant believed that the necessary notice to the organ of state had been satisfied through the correspondence exchanged between her legal representatives and the office of the MEC.

[10] The Respondent entered an appearance to defend the action on 10 November 2015 and on 14 February 2017 served a Special Plea challenging the court's jurisdiction on the basis that the Applicant had failed to comply with the notice provisions stipulated in Section 3(2) of the Act

[12] The protracted delay between the filing of the Special Plea and the current application for condonation is a point of significant contention. The Applicant maintains that her financial circumstances and the complexity of accessing expert medical-legal reports contributed to the delay in launching this formal application, while the Respondent maintains that this delay is inexcusable and has compromised its position in the litigation.

The Legal Framework

[13] The resolution of this application for condonation is governed by the provisions of the Act of which the legislative purpose is to provide a uniform legal framework for the institution of legal proceedings against organs of state, while balancing the state's interest in receiving notice with the constitutional right of access to courts.

Statutory Notice Requirements

[14] Section 3(2)(a) of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has notified the organ of state in writing of their intention to institute such proceedings within six months from the date on which the debt became due.

Condonation under Section 3(4)

[15] Where a creditor fails to comply with the notice period, Section 3(4)(b) empowers this Court to grant condonation if satisfied that the debt has not been extinguished by prescription, good cause has been shown for the failure to serve the notice and that the organ of state was not unreasonably prejudiced by the failure.

The Discovery Doctrine (*Links v MEC for Health*)

[16] In *Links v MEC for Health, Northern Cape Province*², the Constitutional Court held that in medical negligence matters a debt does not necessarily become due when the injury occurs, but rather when the creditor has knowledge of the facts from which the debt arises. Such knowledge include that the harm sustained was the result of wrongful conduct by the medical staff. The effect is that the six-month notice period only commences once a plaintiff, acting with reasonable diligence, acquires the requisite knowledge to institute action.

Determining 'Good Cause'

[17] The concept of "good cause" was elaborated upon in *Madinda v Minister of Safety and Security*³ where the court held that this requirement constitutes a flexible standard entailing a consideration of all relevant factors, including the explanation for the delay, the prospect of success in the main action, and the balance of prejudice.

² 2016 (3) BCLR 338 (CC)

³ 2008 (4) SA 312 (SCA)

These factors must be assessed holistically in determining whether the interests of justice favours the continuation of the litigation despite the procedural lapse.

[18] In matters involving minors the court should be cognizant of Section 28 of the Constitution which prioritises the best interests of the child in its assessment of the good cause requirement. This approach leans toward a more lenient approach where procedural lapses are involved.

Submissions on Behalf of the Applicant

[19] The Applicant submits that the condonation application is not a mere procedural formality. It is a necessary step to vindicate the constitutional rights of the minor child. The application is based on three primary pillars namely when the debt became due, the existence of good cause, and the absence of unreasonable prejudice to the Respondent.

The Application of the 'Discovery' Doctrine

[20] Based on the *Links v MEC for Health* decision the applicant contends that the debt did not become "due" on the date of the child's birth in 2012. As a lay person the Applicant had no way of knowing that the minor's neurological impairments were caused by the possible negligent conduct of the hospital staff at the time. Only on 16 April 2015 when she received the specialist MRI report did she acquire the requisite knowledge of the causal link between the medical treatment and the resultant harm. She consequently contends that the notice period only commenced on 16 April 2015, and that the ensuing litigation was substantially compliant with the legislative intent of the Act.

'Good Cause and Prospects of Success

[21] According to the applicant the good cause requirement is located in the strength of the main action. She obtained expert medical-legal reports from independent specialists indicating a clear deviation from the standard of care expected of a public health facility. She argues that a denial of condonation would effectively extinguish a meritorious claim for damages the purpose of which is to secure the long-term care and development of a minor child. This would be contrary to the interests of justice and the protections afforded to children under Section 28 of the Constitution.

Absence of Unreasonable Prejudice

[22] In respect of prejudice the Applicant asserts that the Respondent's claims are unsubstantiated. The Respondent has been in possession of 97 pages of relevant medical records since 2020, affording the Respondent ample time to investigate the claim. The Respondent actively participated in the litigation process since the institution of the claim, filing pleadings and engaging in correspondence contradicting the claim that they were unaware of or unable to respond to the allegations. The Respondent has not provided any evidence of specific prejudice, such as the loss of critical evidence or the unavailability of key witnesses that could be attributed specifically to the delay in notice.

Submissions on Behalf of the Respondent

[23] In its opposition of the condonation application the Respondent contends that the application is not only procedurally irregular but that the Applicant has not met the threshold for the exercise of this Court's discretion to grant the requested relief. The basis for this proposition is the lack of a sufficient explanation for the delay, the failure to comply with mandatory statutory service requirements, and the profound prejudice suffered by the Department.

Inadequacy of the Explanation for the Delay

[24] The Respondent argues that the Applicant has failed to provide a reasonable explanation for the inordinate delay in bringing this application after being alerted thereto in the Special Plea of 14 February 2017. The Applicant eventually brought the condonation application after seven years which period of inactivity is entirely unexplained and demonstrates a lack of diligence disqualifies the Applicant from the relief of condonation.

Fatal Defect in Statutory Service

[25] The requirement for the serving of the notice in terms of Section 4(1) of the Act is mandatory. According to the Respondent the requirement was not complied with as the notice was served on the MEC and not on the Head of the Department as the designated statutory official for such service. This non-compliance constitutes a fundamental failure rendering the notice "fatally defective" rather than merely technically irregular.

Unreasonable Prejudice to the Respondent

[26] The delay has caused irreparable prejudice to the Department's ability to defend the action. As the events occurred in 2012 the passage of over a decade, key clinical notes and auxiliary documentation have been misplaced or destroyed in accordance with standard record-keeping retention policies. The medical personnel who attended to the Applicant and the minor child at Dilokong Hospital in 2012 are no longer in the employ of the Department. Their current whereabouts are unknown, and the Respondent maintains that it is impossible to secure their version of the events or their testimony for trial. The Respondent argues that even if witnesses could be located, the significant lapse in time makes the prospect of obtaining reliable, accurate testimony regarding a routine delivery from 2012 highly improbable.

Analysis of the Condonation Requirements

[27] The criteria for assessing the condonation application as contained in Section 3(4)(b) of the Act are the absence of prescription, the demonstration of "good cause," and the absence of unreasonable prejudice to the Respondent.

Assessment of 'Good Cause'

[28] Good cause should not be understood in isolation. It is a cumulative assessment requiring a sufficient explanation for the delay together with a demonstration that the Applicant has a viable case. In respect of the delay the Applicant has provided a reasonable explanation based on the time taken to obtain expert confirmation of the causal link between the hospital's conduct and the minor's injury.

[29] The prospects of success are not merely speculative and is based on clear deviations from the standard of care during the birth process. Where a plaintiff demonstrates a high probability of success in establishing medical negligence, the Court should be less inclined to penalize procedural lapses not born of malice or deliberate neglect. The Applicant's failure to act between 2017 and the present is eclipsed by the manifest merit of the underlying claim and the constitutional necessity to ensure that the minor child is not deprived of potential relief due to legal technicalities.

Evaluation of 'Unreasonable Prejudice'

[30] The Respondent contends that it has suffered prejudice due to the passage of time. In assessing this element it is apposite to distinguish between the general difficulties inherent in defending older claims and "unreasonable prejudice" as contemplated by the Act.

[31] The assertion of prejudice is undermined by the fact that the Respondent has been in possession of the relevant medical records for years and has actively participated in the litigation, including discovery and pre-trial engagement. The Respondent furthermore failed to identify a single specific document or witness, beyond general claims, that is now unavailable due to the delay. A defendant cannot claim prejudice while simultaneously participating in the litigation process for several years without raising the issue of the missing notice as a primary obstacle to its defence. Consequently, the Court finds the Respondent's claims of prejudice to be vague, unsubstantiated, and insufficient to outweigh the Applicant's claim.

Interests of Justice and the Minor's Rights

[32] In the final analysis the court is required to balance the statutory obligations in terms of the Act with the constitutional imperative enshrined in Section 28 of the Constitution, which demands that the best interests of the child be of paramount importance in every matter concerning the child.

Conclusion

[33] Having carefully considered the submissions of both parties and evaluated the evidence in light of the applicable legal principles, this Court concludes that the Applicant has discharged the onus of proving that condonation is warranted under Section 3(4) of the Act.

[34] The Court finds that the Applicant's delay, while extensive, is mitigated by the circumstances of the case, most notably the time required to ascertain the causal link between the medical treatment provided and the minor child's developmental injuries. The "discovery" of the facts necessary to sustain the claim provided a reasonable basis for the subsequent commencement of legal proceedings. Furthermore, the Court is satisfied that the Applicant has established strong

prospects of success in the main action, a finding supported by the expert clinical opinions presented before this Court, including those acknowledged by the Respondent.

[35] Regarding the requirement of prejudice, the Court concludes that the Respondent's claims of hardship are largely theoretical. The Respondent has failed to demonstrate that its ability to mount a substantive defence has been meaningfully hampered by the late service of notice. The Respondent has been in possession of the primary medical evidence for years and has actively participated in the litigation, thereby demonstrating that it possessed sufficient information to engage with the merits of the dispute. The procedural flaw regarding the specific addressee of the notice is thus outweighed by the manifest absence of actual, identifiable prejudice.

[36] In the final analysis, the interests of justice demand that the minor child be granted access to this Court to have his claim for damages heard. To dismiss the action on the basis of the procedural deficiencies identified would be to elevate form over substance and would unjustifiably undermine the constitutional protections afforded to children. Consequently, the balance of factors weighs decisively in favour of granting the relief sought by the Applicant.

Order

In the result, the following order is made:

1. Condonation is hereby granted to the Applicant for her failure to comply with the notice requirements set out in Section 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.
2. The notice served by the Applicant on 20 May 2015 is declared to be proper and valid notice for the purposes of the institution of these legal proceedings, and the Applicant is permitted to proceed with her action against the Respondent.
3. The Respondent's special plea, predicated on the Applicant's alleged failure to comply with the statutory notice provisions of Act 40 of 2002, is hereby dismissed.

4. The Respondent is ordered to pay the costs of this application, including the costs of counsel, on Scale B.

RAUBENHEIMER AJ
ACTING JUDGE OF THE HIGH
COURT
GAUTENG DIVISION
PRETORIA

COUNSEL FOR THE PLAINTIFF: Adv Coetzer

INSTRUCTED BY: Wim Krynauw Inc

COUNSEL FOR THE 1st RESPONDENT: Adv MTHOMBENI

INSTRUCTED BY: STATE ATTORNEY

DATE OF ARGUMENT: 13 August 2026

DATE OF JUDGMENT: 21 August 2026

