IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

Case Number: 47217/2015

In the matter between:

P[….] P[….] M[….] obo

O[….] T[….] M[….] Applicant/Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH OF THE MPUMALANGA

PROVINCIAL GOVERNMENT Respondent/Defendant

JUDGMENT

POTTERILL J

[1] The plaintiff, P[....] P[....] M[....], ["M[....]"] issued summons on behalf of her son, O[....] T[....] M[....] ["O[....]"] on 23 June 2015 for the defendant's breach of duty of care in negligently failing to perform timeously a Caesarean section to deliver O[....]. Due to this negligence O[....] suffered a hypoxic-ischaemic incident due to perinatal asphyxia causing O[....] to sustain severe brain damage as a result of which he is suffering from cerebral palsy, mental retardation and epilepsy.

The common cause facts as background

[2] A notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 ["the Act"] dated 9 April 2015 was served at the MEC Department of Health and Social Development MP Government at 7 Government Boulevard BLDG 3 Riverside Park Extension 2 Mbombela. The notice was not addressed to the Head of Department.

[3] The summons was served on 18 August 2015 at the office of the MEC for Health and Social Development of the Mpumalanga Provincial Government. The address served at was 7 Government Building BLDG 3, Riverside Park, Extension 2, Mbombela.

[4] On 15 January 2016 a special plea as well as a plea on the merits was filed and served.

[5] The content of the special plea was that the plaintiff did not comply with section 3(2)(a) of the Act. Paragraphs 1.2 and 1.3 of the special plea reads as follows:

> *"1.2 The plaintiff failed to serve a notice, alternatively served a notice outside the prescribed time period, alternatively served a notice which in form and substance did not comply with the requirements of the Act.*
>
> *1.3 In consideration of the aforesaid, the plaintiff has no cause of action, alternatively, the plaintiff's cause of action is incomplete."*

[6] On 31 July 2019 the plaintiff's medico-legal reports were filed.

[7] On the 8th of August 2019 both M[....] and the defendant had filed their unsigned discovery affidavits.

[8] In the minute of the pre-trial conference dated 23 March 2017 M[....] requested the defendant to indicate whether she will condone the *"late"* filing of the plaintiff's notice of intended legal proceedings and withdraw its special plea herein. The defendant's answer was that it had no record of any statutory notice and therefore did not intend to waive the special plea. However, upon being provided with copies of the documents the defendant will be able to reconsider.

[9] On 16 August 2019 the application for an order declaring that M[....] did comply with the provisions of s3(2) alternatively for condonation was issued.

[10] The defendant on 16 September 2019 filed a notice of counter-application seeking that the action between the parties be dismissed with costs of two counsel. Attached to this notice of counter-application is the defendant's answering affidavit to the application for condonation for failure to comply with the Act.

Section 3(2)(a) of the Act

[11] *"3 Notice of intended legal proceedings to be given to organ of state*

(1) 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 becoming 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 (1) 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."

The debt has not been extinguished by prescription

[12] It is common cause between the parties that the debt has not been extinguished by prescription. The reason is simply that O[....] is currently 9 years and 8 months old and due to his minority status the cause of action has not become prescribed under the relevant provisions of the Prescription Act. Even if this fact is a neutral fact, section 4(b)(i) is satisfied.

Did M[....] establish good cause for the failure to comply with section 3 of the Act?

Good cause

[13] Good cause includes all those factors which will ensure fairness in granting the relief and would be in the interests of justice on the facts of the matter at hand. The prospects of success of the intended claim play a significant role.[1] A court has to be furnished with sufficient facts of the default to enable a court to understand how a delay came about and to assess the defaulting party's conduct and motives.[2]

[1] *Minister of Agriculture and Land Affairs v CJ Rance* 2010 (4) SA 109 (SCA) para [37]
[2] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H-353A

[14] The court can also consider the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.[3]

[15] *"'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor."*[4]

The facts set up by M[....]

[16] In the founding affidavit M[....] sets out that on 30 December 2009 she experienced perceived labour pains at home and upon arrival at the Matebidi Hospital she was advised that she was still far from giving birth. She was monitored by staff and then on the 31st of December 2009 she was informed that she was to be transferred to the Mapulaneng Hospital as Matebidi Hospital did not have facilities to perform a Caesarean Section.

[17] Upon arrival at Mapulaneng Hospital she was examined but told to wait until further assistance for nurses to become available as there were too many patients needing

[3] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para [8]
[4] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para [10]

assistance at that time. She was later informed that a bed would become available in the labour ward in the evening.

[18] On a further examination it was found that she had not dilated any further and was given an injection. Later in the day she was again examined and she was informed that there was still no change in her dilation and was given a tablet to drink.

[19] She fell asleep and woke up in great pain.

> *"29. After the doctor's examination, I must have fallen asleep as I remember waking up in pain and calling for assistance. I did not get assistance from the nurses and decided to walk to the doctor's rooms which were not far from my bed. I informed the doctor that I could feel the baby's head and he urgently examined me. The doctor rushed out of the room and shouted at the nurses wanting to know why I was not examined regularly to monitor any progress in labour.*
>
> *30. The doctor requested that a theatre bed be brought to his rooms whilst he changed into his theatre clothes. I was rushed off to the theatre and the doctor advised that upon his examination he could not feel any movement from the baby and advised that a Caesarean section would be the safest way to deliver my baby."*[5]

[20] O[....] did not cry when he was born and the nurse rushed off with him. M[....] was informed that O[....] was very ill and that he would be admitted to the Intensive Care Unit [ICU].

[5] Paragraph 29 of the founding affidavit

[21] M[....] tried to breastfeed O[....], but he could not latch on. She saw that O[....] vomited up a brown substance and asked what that was and the nurse answered that because O[....] was in labour for a long period he started to swallow his own faeces and that is why his vomit is brown.

[22] O[....] was admitted to ICU for one month whereas she stayed in the general ward for one month.

[23] When O[....] was eight months old he had a fit whereupon she took him to the Mapulaneng Hospital for treatment where he was admitted.

> *"I was not advised by the doctor, nor did I consider the possibility that what occurred as a matter of fact could be as a result of the hospital staff's negligence during the birth during the birth process."*[6]

> *"As stated above, even though I was told what the cause of O[....]'s brain damage was, I did not have the medical or legal knowledge to realise that someone could be held liable for such consequences and because I am not so directly involved in caring for O[....] (due to the fact that I am obliged to work in order to care financially for my family), I accepted his condition as 'one of those things in life'."*[7]

[24] O[....]'s development continued to fall behind and it became increasingly difficult to take proper care of him. Her mother had some general discussions with people in the community about O[....] being disabled and how this seemingly was caused by

[6] Para 18 of the founding affidavit
[7] Para 40 of the founding affidavit

something that happened at the hospital during his delivery. M[....] then learned that her grandmother's neighbour also had a disabled child and she was apparently receiving legal assistance in investigating a possible claim against the hospital where her child was born. M[....] came to know of this fact sometime during 2014 when her mother phoned her and told her that she had learned about this from M[....]'s cousin and that M[....] should investigate this further. This resulted in her consulting with the attorneys on the 26th of January 2015. She does not have the financial means to pay for the services of an attorney, but was then advised that if the matter had merit it could be done on a no win-no fee basis. After the consultation the notice was then delivered on the 15th of April 2015.

[25] On behalf of the defendant it was argued that on the above facts M[....] had sufficient facts to cause a reasonable person to suspect that something had gone wrong and to seek advice. Reliance for this argument was placed on ***Links v The Department of Health*** **2016 (4) SA 414 (CC)** para [42] which reads as follows:

> *"[42] There is a further problem with the submission in that it presupposes that any explanation given to the applicant by the medical staff would have identified medical error as the actual or even a potential cause of his injuries. It is not necessary for a party relying on prescription to accept liability. To require knowledge of causative negligence for the test in s 12(3) to be satisfied would set the bar too high. However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to*

think that injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises."

[26] It is ironic that defendant relies on this matter as support for her argument, because it does not support her contentions in the circumstances. I need only to quote from the ***Links*** matter paragraphs [45] and [47] for an understanding of my finding:

"[45] In a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action. Negligence and as this court has held, causation have both factual and legal elements. Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in s 12(3)."

and

[47] ... Without advice at the time from a professional or expert in the medical profession, the applicant could not have known what had caused his condition. It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had

an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice."

[27] The doctor informed M[....] what caused the cerebral palsy, but I cannot fault her statement that she did not attribute negligence to the staff for the long labour and shortage of oxygen to O[....]'s brain. Only when her mother started asking around and heard that medical staff could be held accountable did the penny drop that perhaps it was not bad luck, but that there was negligence on the part of the medical staff. Then she had a reason to approach a specialist to find out whether in fact a debt had become due.

[28] It is true that M[....] knew that the nurses did not attend to her when she experienced pain and went in search of a doctor. It is also correct that M[....] knew that the nurses were shouted at for not monitoring her regularly. She knew she was in labour for a long time and that O[....] had swallowed his faeces. She knew that a lack of oxygen to his brain caused his damages and resulted in cerebral palsy. I can however not find that a reasonable person in the circumstances of M[....] would have realised that the substandard care of the nurses and medical staff caused O[....]'s cerebral palsy. M[....] lives in a rural area. She does not work in the medical field. Labour can be notoriously long. The doctors helped the labour along with an injection and a pill. The doctor assisted her when the nurses did not. The doctor explained why the child had cerebral palsy i.e. oxygen loss to the brain. The

applicant thus knew why her child had cerebral palsy, but did not know she could attribute blame. M[....] only had knowledge of the facts that would lead her to think that possibly there had been negligence when she heard that one could hold medical staff liable. She then went to an attorney who inspected and explained about negligence. A litigant who has no knowledge of medicine cannot be expected to know what caused the cerebral palsy without having first had an opportunity of consulting relevant medical practitioners or an attorney for advice. The contention that she just accepted it as *"one of those things that happened in life"* is accepted and does not constitute, as argued on behalf of the defendant, an acquiescence to the medical negligence and therefore she should be barred from proceeding with her claim.

[29] On behalf of the defendant reliance was placed on the matter of ***Mtokonya v Minister of Police*** **2018 (5) SA 22 (CC)** where the majority of the court found that the absence of appreciation of the fact that the conduct complained of was wrongful and actionable, is not a fact, but a conclusion of law and therefore falls beyond the ambit of section 12(3) of the Act, i.e. *"... of the facts from which the debt arises ...."*

[30] The Constitutional Court however distinguished the ***Mtokonya*** matter from the ***Links*** matter in that in the ***Links*** matter the decision related to the proviso of section 12(3). On the facts before me, the proviso of the Prescription Act is irrelevant.

[31] I am satisfied that only when M[....] went to consult with an attorney did she have knowledge of the facts from which the debt arises and the notice was thus given within six months on which the debt became due.

The prospects of success

[32] In support of M[....]'s prospects of success is attached to the founding affidavit an affidavit from Dr. L. Murray, an obstetrician and gynaecologist who practices as such at the Life Vincent Pallotti Hospital in Cape Town. In M[....]'s founding affidavit she sets out that she has been advised that it is Murray's expert opinion, that there is at the very least a reasonable prospect of success in pursuing the intended claim in that the drug given to M[....] to induce labour was at an inappropriate time as M[....] was already contracting with ruptured membranes and cervical change. This inappropriate administration of prostaglandin exposed the foetus to risk in that it can result in too many uterine contractions which in return can result in foetal distress. Electronic foetal monitoring by way of CTG should thus have been utilised, there is no evidence that in fact this was done and in fact there is evidence of a five hour period during which no monitoring of labour of the foetal condition occurred. A labour complication of cephalo-pelvic disproportion was diagnosed and accordingly the decision was made to deliver the baby by way of Caesarean section. However, this only occurred two hours after the decision was taken and this period is twice as long as the 60 minute limit documented in the National Guidelines as the time period in which an emergency Caesarean section should be performed.

[33] In answer to these paragraphs set out by M[....] and confirmed by Dr. Murray the defendant only submitted that Dr. Murray was seemingly not advised that the hospital staff were too busy to attend to the plaintiff since there were too many other patients that needed assistance at the time. Since the records upon which Dr.

Murray's opinion is based is not attached the veracity thereof cannot be determined and therefore it is submitted that M[....] has no prospects of success.

[34] It was further argued on behalf of the defendant that the opinion and medico-legal report is thus no more than a view that the treatment received by M[....] was negligent. The opinion of Dr. Murray is unsubstantiated and irrelevant to an assessment of the objective facts that the court is to consider to grant or dismiss the application for condonation.

[35] This argument is laboured and is dismissed. I am satisfied that I was placed in the position to make an assessment on the merits in order to balance that factor with the cause of the delay, if any, as explained by M[....]. This court is most certainly not left in the dark on the merits of the intended action. M[....] sets out as to what grounds of negligence are to be pleaded and what the reasons for that is. The expert confirms same in an affidavit. The mere fact that no report is attached does not leave this court in the dark in assessing the merits.[8] Simply no facts on the merits to the contrary is set up by the defendant. There is accordingly reasonable prospects of success on the merits of the matter.

Prejudice

[36] Argument raised on behalf of the defendant, it has to be said, is quite appalling. The argument was that O[....] has received treatment in the public sector for almost a decade, and even if the action is successful O[....] will still be entitled to treatment by the defendant. The defendant is providing treatment far cheaper than

[8] *Minister of Agriculture and Land Affairs v CJ Rance* 2010 (4) SA 109 (SCA) para [37]

the private healthcare system, and to disallow the claim premised on private care is thus not prejudicial to O[....]. Not only is this argument offensive, it is also irrelevant. As the prejudice suffered is that which the defendant will suffer and not what O[....] will suffer.

[37] On behalf of the defendant it was submitted that the defendant is in an impossible position to investigate the applicant's version 10 years after the fact. It was submitted that the defendant is hamstrung simply because plausible reasons for any delay in the hospital to attend to the plaintiff cannot be established. It is common cause that the records are available and that the respondents did in fact obtain medico-legal reports from at least two expert witnesses. Nowhere is it pleaded that these experts could not form a view of the merits. The plaintiff and defendant are in the same position pertaining to the time delay. The defendant was in a position to prepare for trial. There is no evidence from the defendant setting out the nature of the prejudice except that they don't know how many patients were admitted that day. I cannot find that the defendant will suffer unreasonable prejudice. From the time the defendant knew of the action a period of four years has lapsed.

[38] I am accordingly satisfied on the overall impression on the facts set up by the parties that the condonation should be granted, if necessary.

Explanation for the time period from when the notice was given on 15 April 2015 to August 2019 when this application was launched

[39] Much was made of the fact that M[....] only applied for condonation a year and a half after M[....] through her representatives had requested the defendant to indicate

whether it was now in a position to reconsider its position insofar as its special plea was concerned. M[....] failed to address follow-up correspondence to the defendant to clarify the position when M[....] did not receive any reply to her representatives' letter of 4 December 2017. In the ***Madinda*** matter ***supra*** in paragraph [20] the following is stated:

> *"... As I have earlier pointed out, unexplained delay which relates to the period after the notice was de facto given will ordinarily relate not to the establishment of good cause but to condonation."*

[40] This delay accordingly is a separate enquiry and does not relate to any good cause to be shown.

The notice contained factually incorrect information

[41] In the notice it is reflected that O[....] was born in the Matebidi Hospital and not in the Mapulaneng Hospital. Only in the summons was this reference to the incorrect hospital corrected. It was argued on behalf of the defendant that as a result this incorrect fact bars M[....] from holding the defendant liable for any potential debt which may have occurred at the Mapulaneng Hospital.

[42] In the answering affidavit M[....] submits that it was a *bona fide* error, but any investigation of the defendant would have revealed that M[....] was transported to the Mapulaneng hospital and the defendant would have accordingly suffered no prejudice.

[43] The argument raised by the defendant is formalistic and does not in any way set out how the defendant could not have identified the claim, therefore could not consider the claim responsibly and was prejudiced. The purpose of the Act is accordingly not defeated. The defendant could prepare for trial.

Non-service of the notice

[44] The defendant also submitted that condonation was not sought for the defect that the notice was not served on the Head of Department. It was argued that the action must accordingly be barred. On behalf of M[....] it was submitted that the *"non-service"* was not raised in the special plea and M[....] only became aware of this complaint in the answering affidavit of the defendant to M[....]'s condonation affidavit.

[45] A creditor is entitled to apply for condonation when there was *"a complete failure to send a notice, or the sending of a defective notice ... if the organ of state makes no objections to the absence of a notice, or a valid notice, then no condonation is required. In fact, therefore, the objection of the organ of State is a jurisdictional fact for an application for condonation, absent which the application would not be competent."*[9] The objection of the organ of state is thus a jurisdictional fact for an application for condonation. The defendant did not object to the *"non-service"* or incorrect service of the notice and no condonation needed to be sought for it.

[9] *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) 462 para [10]

[46] The *"non-service"* can thus not for the first time be raised in the answering affidavit. Because the defendant did not object to the *"non-service"* there is no jurisdictional basis therefor.

[47] It is thus strictly not necessary for this court to address the argument of the defendant based on the unreported matters of ***Mfundisi Gcam-Gcam v Minister of Safety and Security***, unreported case under case number 187/11 in the Eastern Cape Local Division delivered on 12 September 2017 and ***N[…] M[…] obo N[…] M[…] v MEC for Health, Eastern Cape***, unreported judgment in the Eastern Cape Local Division: Mthatha under case number 1748/2017 with judgment delivered on 27 August 2019. In the ***Gcam-Gcam*** matter, despite a Full Bench decision to the contrary, it was found that an application for condonation in terms of section 3(4) must be made. As there was no condonation application within that matter the plaintiff solely relying on the notion of substantial compliance the court rejected the argument on substantial compliance and held that a condonation application was necessary. However, in view of the ***De Witt*** matter ***supra*** if the *"non-service"* was not raised in the special plea then no condonation for non-service is required.

[48] In the ***N […]*** matter the court found the following in paragraph [21]:

> *"I do not see any reason why a stricter interpretation should be placed on section 3(4) by insisting that there must be a stand alone prayer for the condonation of the non-compliance with section 4(1). This in circumstances in which the facts relevant for section 4(1) non-compliance had been specifically pleaded and the defendant elected not to oppose the condonation*

application and raise the very issue that is now being made a big and fundamental issue."

And in paragraph [22]

"Therefore, the defendant's submission that the granting of the condonation for sections 3(1) and 3(4) excludes non-compliance section 4(1) is not only opportunistic but also a disguised attempt at not wanting the matter to see the light of day in court."

[49] In that matter accordingly the special plea was dismissed with costs.

[50] I am accordingly satisfied in terms of s3(4)(b) with bringing a fair mind to the facts set up by the parties that in the overall impression made on this court condonation for the wrong fact and *"non-service"* should be granted.[10]

Costs

[51] On the plaintiff's behalf it was argued that even though they were the ones forced to seek an indulgence, the notice was in fact sent in time and that the opposition was frivolous and vexatious. On behalf of the defendant it was argued that the plaintiff is the party seeking an indulgence and that the opposition was not unreasonable and that the plaintiff should be ordered to pay the costs.

[10] *Madinda* matter paragraph [8]

[52] In view of the fact that the notice was sent within the six months period, the non-service was not pertinently raised in the special plea, and the fact that the defendant could not put any facts before this court as to the prejudice that it suffered or that there would be no prospects of success I find the opposition hereto unreasonable and I make the following order:

52.1 The application for condonation, in as far as it need be necessary, is granted.

52.2 The plaintiff is to serve the notice on the Head of Department, and the date of the service will be seen as a date within the six months period.

52.3 The defendant is to carry the costs, costs to include the costs of two counsel.

_____

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 47217/2015

HEARD ON: 21 October 2019

FOR THE APPLICANT/PLAINTIFF: ADV. J.I. DU TOIT SC

ADV. M. COETZER

INSTRUCTED BY: Wim Krynauw Attorneys

FOR THE RESPONDENT/DEFENDANT: ADV. H. VAN EEDEN SC

ADV. D. WIJNBEEK

ADV. B.Z. BOBISON-OPOKU

INSTRUCTED BY: Adendorff Theron Inc

DATE OF JUDGMENT: 4 November 2019