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

Case no: A39/2023
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:
DATE: 14 SEPTEMBER 2023
SIGNATURE

In the appeal between

JANSEN VAN VUUREN DILLON Appellant

And

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH OF THE GAUTENG PROVINCE Respondent

AMENDEMENT OF JUDGMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE __14___ SEPTEMBER 2023

PRETORIUS J:

After being alerted to a patent error in the judgement regarding the order handed down on 14 September 2023, the order has been amended as follows in terms Of Rule 42(1) (b) of the Uniform Rules of Court.

The order reads:

1. The appeal is upheld, but should be:

1. The appeal is dismissed.

Signed at Pretoria on this the 15th day of September 2023.

C Pretorius
Judge of the High Court

THE APPEAL:

1. The appellant launched an application for condonation in respect of the filing of a notice in terms of section 3 of the Act for non-compliance with the provisions of the Act.

2. The Notice of Motion accompanied by a founding affidavit was signed on 4 August 2020. It was served on 6 August 2020. The purpose of the application was to seek condonation from the Court *a quo* for condonation for the late service of the required notice in terms of section 3 of the Act.

3. The appellant stated in the founding affidavit that the purpose of the application is" *f*or *the failure of the Appellant to present a complaint statutory notice to the respondent of his intention to institute legal proceedings within the time frames prescribed by the Act".* This application was opposed by the respondent.

4. The statutory notice dated 30 March 2017 was deemed to have been served *via* registered mail on the respondent/defendant on 31 March 2017. This notice, by the appellant's attorney, indicated*: "We are aware that our client's aforesaid notice is not within the 6(six) month period from date of the incident….We shall be grateful if you would indicate whether or not you are prepared to condone the late furnishing of the notice to you…."*

5. Special pleas of prescription, as well as non-compliance by the appellant of the Act, were filed by the respondent on 14 June 2018. The appellant subsequently filed a replication, acknowledging that the statutory notice did not comply with the provisions of the Act and was not delivered timeously. On 10 July 2018 the appellant indicated that the appellant would apply for condonation for failure to adhere to the time limits as provided for in the Act.

THE APPELLANT'S CLAIM:

6. The appellant's claims are, as set out in the particulars of claim, for previous and future loss of support**,** as well as emotional shock resulting from the death of his mother.

7. His mother had been treated at the Charlotte Maxeke Hospital, which hospital falls under the auspices of the Department of Health, Gauteng.

8. The appellant's mother was admitted to this hospital on 12 September 2011.She was 45 years old at the time of her admission to hospital. On 13 September 2011 a femoral popliteal vein graft was done to her right leg under spinal anaesthesia. She immediately, after surgery, complained of loss of sensation in her lower limbs. She was thereafter scheduled for spinal surgery which never took place. She developed pressure sores on her lower back area and on her hip. These sores became septic, which according to the respondent, caused her death. She had suffered of co-morbidities including hypertension and diabetes.

9. On 29 October 2011 the deceased was admitted once more to hospital for a surgical debridement of the sacral bedsore. On 9 November 2011 she was referred to hospice. On 22 November 2011 she and her husband refused further hospital treatment at the hospital, despite advice to the contrary from the doctor and nursing staff.

10. Her husband was the appellant's biological father. The appellant's mother was subsequently taken home where she was treated at home by the appellant

and his father. Thereafter she was taken to the East Rand Hospice on 12 December 2011 where she passed away on 22 December 2011. She was treated at home for approximately 20 days before she was admitted to the East Rand Hospice.

11. The appellant was 14 years and 9 months old when his mother passed away. He turned 15 years of age on 9 March 2012.

12. No post-mortem was done. The documents discovered by the appellant were in the possession of the appellant's family since December 2011 or shortly thereafter. The Medical Certificate issued noted as" immediate cause of death" of the appellant's mother as "**UNCONTROLLED DIABETES-YEARS".**

13. since the appellant's mother's death. The family consisting of the appellant's father, his uncle, Professor van den Berg and the appellant had been in possession of all the hospital records pertaining to the appellant's deceased mother. Apart from the hospital records they were in possession of the records of the East Rand Hospice, as well as a recording of the program Medical Errors wherein the story of the deceased had been related on TV. The appellant was present when this program was recorded. These records also consisted of the views of medical experts obtained in 2012. The fact that all this material was available since 2012 was never in dispute.

14. It is thus clear that from, at least since 2012, the appellant had known what the allegations of negligence were as set out in the particulars of claim. This was also available in 2012 and was set out in the statutory notice as well.

15. The respondent alleged that the appellant had known the identity of the debtor and the facts, since 2012.

16. The facts setting out the appellant's knowledge, as set out in the opposing affidavit, have not been denied nor dealt with by the appellant in his replying or confirmatory affidavit.

17. The founding affidavit was deposed to by the appellant's attorney and was not confirmed in a confirmatory affidavit by the appellant regarding his personal knowledge of the facts.

18. According to the appellant he only became aware of the debt on 28 November 2016 when he consulted his present attorneys. His submission is that he was not aware of the identity of the debtor or the facts from which the debt arose.

19. At the hearing of the appeal counsel for the appellant submitted that it is not necessary for an application for condonation as the notice was served within the six-month period. There is no such relief requested in the notice of motion, nor was any amendment to the notice of motion requested at any time to indicate that it was not necessary for an application for condonation. This Court will not entertain such a submission made by counsel during argument as it is not on the papers before Court.

THE LEGAL POSITION:

20. Section 3 of the Act provides as follows:

(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) ……..

(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….

(3)(3)(a) 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 reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge……"

21. Compliance with the provisions of section 3 as stated above is to avoid loss of evidence, information, and documents, such as hospital records. This is to avoid unreasonable prejudice to an organ of state if claims are instituted years after the incident had occurred.

22. Sections 3(4) (a) and (b) of the Act stipulates that a creditor may apply to court for condonation for failure to serve a notice timeously. The court will grant such an application 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.

23. Section 12(1) (3) provides: *"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.* According to section 13(1)(a) (i) of the Act, where the cause of action occurred at the time that the appellant was a minor, being 22 December 2011, prescription is deferred by one year after the age of majority of such a claimant is reached.

24. The applicable date in this instance, where the appellant reached the age of majority was 9 March 2015. In normal circumstances this claim would have prescribed on 8 March 2016, a year after he had reached the age majority.

25. There was no attempt by the appellant, his father or his uncle, Professor van den Berg, to claim from the respondent before the appellant reached the age of majority. There is mention made of advice received from attorneys during 2012, but no attempt is made in the founding affidavit to explain any of these actions and there are no particulars advanced as to who these attorneys were and why these attorneys did not want to assist the appellant, his father, and uncle. This despite knowing the facts of the claim and who the debtor was since 2011.

26. The appellant consulted attorneys for the first time on 28 November 2016. There is no explanation as to why it took him 20 months, after becoming a major, to consult with attorneys.

27. He had known, on his own version, the facts of the matter and he had known that the hospital was allegedly to blame. He was present during the recording of the program dealing with medical errors and had known since, at least from 2012, who the debtor was and the facts that he relied on for his claim. The facts from which the debt arose, and the identity of the debtor had been known to him even as a minor. Yet he took 20 months after reaching the age of majority to consult an attorney.

28. The founding and replying affidavits lack the averments that can be expected as to what steps the appellant had taken to establish the facts of his claim and the identity of the respondent/defendant from the time he had attained the age of majority.

29. The test has been set out in **Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bisho [2018] ZACC 2.** The Constitutional Court found that when dealing with section 12 (3) of the Prescription Act in a medical negligence claim the knowledge of the facts on

which the claim is based is an objective one and therefore the reasonable person test is applicable.

30. It is common cause that the deceased had refused further hospital treatment against the advice of the doctors and nursing staff. On 22 November 2011. She discharged herself from hospital and went home where her husband and the appellant, aged 14 years at the time, nursed her.

30. The appellant, during argument and in the heads of argument attempts to refer to expert evidence which is not relied upon in the founding papers. This is wholly inappropriate and cannot be considered.

32. To exacerbate his tardiness in requesting condonation timeously the appellant does not explain the delay from 31 March 2017, the date that he knew that a condonation application is necessary, until the application for condonation was launched in August 2018.

33. In **Mohlomi v Minister of Defence 1997(1) SA 124 (CC)** Didcott J held at paragraph 11: *"…… Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to been forced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken".*

34. The appellant waited 3 years and 5 months after his statutory notice to bring an application for condonation for the late filing, and 2 years and 2 months after the special plea of non-compliance.

35. The unreasonable prejudice the respondent will suffer is important in this matter. The complete hospital records are unavailable and cannot be found.

Personnel had resigned, cannot be identified, passed away or retired. Although the incident took place in November and December 2011, the respondent was only given notice in 2017 – 6 years later. The personnel, who was according to the appellant negligent are not identified. Even if they can be located, it is quite unlikely that they will have an independent recollection of the events to testify and will have to rely on the contents of documents.

The original hospital file cannot be found, and this constitutes more prejudice to the respondent as all the records are not available. The result is that the respondent will suffer great prejudice. The staff of the hospital have either retired, passed away or relocated, which fact leads to further prejudice to the respondent. These consequences of waiting so long to apply for condonation could have been prevented if the appellant had not waited a further 20 months after becoming a major to start instituting legal proceedings.

36. The appellant approached the present attorney of record on 28 November 2016, almost 20 months after attaining the age of majority. There are no dates or names given of any advisors before the present attorney was approached. Although the respondent denied the allegations that the appellant only became aware of the identity of the debtor and the merits of his claim on 28 November 2016, there was no response to this denial by the appellant.

37. The appellant has throughout failed to explain the reasons for the delay as from the time he had to bring the application for condonation until it was ultimately done.

38. Counsel for the appellant argued that it was due to the legal representative's tardiness that the application for condonation was brought at such a late stage. Furthermore, suggestions are made in the heads of argument of the appellant for reasons why previous attorneys did not proceed with the case, but no facts are provided. The Court cannot accept evidence from the Bar, nor from the contents of the heads of argument if it had not been set out in the affidavits and there is no such evidence before Court in this regard.

39. The appellant relies on the dictum of **The MEC for Education, KZN v Shange 95299/11) [2012] ZASCA 98 (1 June 2012)** where Snyders JA confirmed the dictum in **Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA)** in para 8 where it was held that "*The phrase "if the court is satisfied" in s3 (4) (b)has long been recognized as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties*".

The present application is distinguishable as, in this instance the appellant was a university student and his circumstances can clearly not be compared to that of the appellant in the **Shange case (supra),** who was a learner in a rural area. There is no affidavit by the attorney or counsel to set out the circumstances as to the reason for them to be blamed for the failure to apply timeously for condonation.

40. The appellant failed to mention in the founding affidavit in the Court *a quo* and in this Court that the deceased had declined further hospital treatment against the advice of the nursing staff and doctors treating her in hospital. As a result, she was discharged on 22 or 23 November 2011 and was not treated by any employee of the respondent thereafter until her death on 22 December 2011.

41. The deceased had voluntarily left the hospital and was cared for at home by her husband and her 14-year-old son. She received no medical intervention or professional care whilst at home. The hospice records show that the appellant's father was requested to provide the prescribed medicine for the deceased's various illnesses when she was admitted to the hospice, but he refrained from supplying it to the hospice.

42. The family of the deceased had, since 2012, on numerous occasions, proclaimed publicly and in the Press that they were intending to institute action against the hospital and the Department of Health, Gauteng. The newspaper clippings were discovered by the appellant and were thus in his possession and within his knowledge since 2012. He waited for 20 months after becoming a major to consult an attorney as previously mentioned with no explanation for the time lapse.

43. In addition, he claim for previous maintenance is weak. According to the appellant his Uncle, Professor van den Berg, supported him and his father until 6 August 2020. There is no documentation to support this allegation. Discovery by the appellant shows that the deceased had not been employed since January 2011. The claim for maintenance is thus not very strong on merits.

44. In a Rule 35(3) request the particulars of the appellant's father's contribution to the appellant's maintenance was requested. Both the appellant and Professor van den Berg confirmed that the appellant resides with his father. The appellant, in another affidavit, alleges that his father had died in November 2019 and had not maintained the appellant since 2008. Both versions cannot be true and leaves a question as to who maintained the appellant. The addresses provided in the two affidavits by the appellant are different from one another as well.

45. Nowhere does the appellant personally deal with these discrepancies or explain the discrepancies**.**

46. If this Court applies the test of the reasonable person, in the circumstances of the appellant, then the conduct of the appellant in applying for condonation cannot be regarded as a serious attempt to apply for condonation. He had known since 2012 the facts of the case, although he was still a minor. Furthermore, he waited a further 20 months after he had attained the age of majority, before launching the application, without taking the court in his confidence as what he had done in this period or submitting any information for this period of the delay.

47. This Court finds that the appellant had the required knowledge from at least the date of becoming a major to institute a claim and that he failed to apply for condonation for his failure, where a reasonable person in similar circumstances would have done so.

46. The appellant did not request condonation for the late notice of intention to institute a claim against a state organ within the prescribed period. He had not shown good cause for his failure to do so. The respondent will suffer unreasonable prejudice should condonation be granted in this instance. This Court must agree with the Court *a quo* that the appellant had failed to discharge the onus of proof in this application for condonation.

47. In the result the following order is made:

1. The appeal is dismissed.

2. The appellant is ordered to pay the costs of the appeal.

C PRETORIUS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

C COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

P PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

CASE NUMBER: A39/2022
HEARD ON: 23 AUGUST 2023
FOR THE APPELLANT: ADV W L MUNRO
FOR THE RESPONDENT: ADV M BARNARD
DATE OF JUDGEMENT: ___14___ SEPTEMBER 2023