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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

(1) REPORTABLE:NO	
(2) OF INTEREST TO OTHER JUDGES:NO	
(3) REVISED: YES	
	28/06/2021
…….	…….
SIGNATURE	DATE

CASE NO: 1674/2018

In the matter between:

T[….] L[….] M[….] Plaintiff

and

MEC FOR HEALTH: MPUMALANGA Defendant

J U D G M E N T

MASHILE J:

[1] This is an application for condonation as contemplated in Section 3(2)(a) of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002 (the Act"). The Section lays down that where a party wishes to sue an organ of State, the party concerned must, within a period of six months from the date on which the debt becomes due, notify the organ of state of its intention to do so.

[2] It is common cause that the Applicant has failed to comply with Section 3(2)(a) of the Act insofar as she did not alert the Respondent within the prescribed period of her intention. However, where an Applicant has not observed the provisions of Section 3(2)(a) of the Act, as is the case here, Section 3(4)(b) prescribes the requirements that must be met to enable a court seized with the matter to condone the omission. This application is, as such, about whether or not the Applicant has demonstrated that she has satisfied the condonation prerequisites prescribed in Section 3(4)(b) of the Act.

FACTUAL MATRIX

[3] Following confirmation that she was 'with child', the Applicant adhered to a rigorous pre-natal care and/or examinations programme at LIKAZI COMMUNITY CLINIC ('the Clinic"). The objective was to secure an incident free pregnancy that would in the end lead to the ultimate safe delivery of her child.

[4] The Applicant gave birth to a baby boy "(the minor child") on 12 May,2006 at ROB FERREIRA HOSPITAL ["the Hospital"]. The Applicant avers that the minor child was born with a brain damage that has rendered him severely and permanently disabled. The Applicant maintains that the condition in which the minor child finds himself is due to the wrongful and negligent conduct of the Clinic and/or the Hospital and/or or employees of the respective medical institutions

during her pregnancy. This, she argues, occurred immediately before birth and during the delivery process of the minor child.

[5] The Applicant further alleges that while she was an adult and a fully grown lady by the time she gave birth to the minor child, she was and remains a semi-illiterate lay person who know nothing about litigation and related matters. In short, the Applicant claims that she was oblivious of the steps on which to embark to sue the Respondent for the negligent act of the Clinic and/or the Hospital and / or the employees of the respective institutions.

[6] The Applicant says that it was only in early 2018 towards the end of February while talking to a friend and other unknown members of the public when her attention was drawn to the fact that she could hold the Respondent liable for the loss suffered by the minor child. She was further advised that in order to institute legal proceedings against the Respondent, she would require a thorough consultation with an attorney to take her through the process henceforth. Sometime lapsed before she could see an attorney and this was due to lack of money to pay for her transport to visit her attorneys.

[7] Subsequent to the advice and obtaining transport money, the Applicant arranged a consultation with Mr Charles Dennis Mthobisi Mkhize, an attorney practicing under the name and style of Charles Mkhize Attorneys. The earliest time on which she could consult with the attorneys was on 14 April 2018. Once she had understood how the litigation process would commence and culminate, she instructed her attorneys of record to assist her sue the Respondent both in her representative and personal capacities.

[8] On 16 April 2018, Charles Mkhize Attorneys, her attorneys of record**,** sent the Section 3(2)(a) notice to the Respondent in Mbombela by registered mail. It is not disputed that the notice does not comply with the provisions of Section 3(2)(a) of the Act insofar as it was served outside of the prescribed six-month period. That

said, the Applicant states that it nonetheless constitutes a lawful notification to the Respondent that she would be initiating legal proceedings.

[9] The Respondent neither acknowledged nor responded to the notice. In the absence of reply, the Applicant instituted an action ("the main case") for damages against the Respondent on 20 June 2018. The sheriff served the founding papers upon the Respondent on 27 June 2018 to which the Respondent answered by delivery of a plea comprising a special plea on 14 October 2018. The special plea pertains to the Applicant's lack of observance of the time bar prescribed in Section 3(2)(a) of the Act.

[10] The Applicant attributes her failure to institute the action to sue the Respondent on time to her ignorance of the law and to the fact that she is a semi-illiterate lay person. It was not motivated by intentional or reckless disregard of the legal consequences or a disdain of the prescribed legal processes, she concludes.

[11] The Respondent states that due to the inordinate lapse of time since the occurrence, it could be difficult to trace the medical records relating to the minor child. Its application in terms of Uniform Rule of Court 35(14) remains unanswered by the Applicant to date. As such, its endeavours to properly prepare to defend the main action continue to be hampered.

ISSUES

[12] The issues with which this Court ought to contend are mainly whether or not the Applicant has made a case for the Court to:

12.1 Condone her omission to serve the Notice upon the Respondent within 6 months of the date of incident 12 May 2006;

12.2 Direct that the notice of 16 April 2018 served by the Applicant upon the Respondent by registered mail on 19 April 2018 is proper and sufficient as a notification to the Respondent indicating her intention to institute legal proceedings;

12.3 Declare that the action instituted by the Applicant against the Respondent on 20 June 2018 was validly and properly instituted.

[13] These issues can only be sufficiently addressed by having due regard to the provisions of the three requirements prescribed in Section 3(4)(b) of the Act and case authority on the subject. Since the Applicant must comply with all three requirements conjunctively, failure to demonstrate that observance has been in respect of all three of them will necessarily result in a dismissal of the condonation application.

LEGAL FRAMEWORK

[14] The Applicant's application for condonation is premised on the provisions of the Act. To this extent, it will be useful to describe the various provisions in the Act. The starting point should be Section 3, which provides:

"(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).”

[15] Section 3(2) prescribes that 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 willfully 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 become due on the fixed date.”

[16] Where an applicant has failed to comply with the provisions of Section 3(2) of the Act and a respondent raises such failure as a special plea, as is the case here, an applicant may apply to court with the necessary jurisdiction for condonation. In this regard, Section 3(4) lays down that:

“(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 (a) 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."

[17] The introduction of the Act has seen a proliferation of litigation on the time bar contained in Section 3(2)(a), on Section 3(4)(b), which concerns condonation and Section 3(4() (b((i) to (iii) being the conditions that a court hearing the application must satisfy itself that they have been established prior to granting the condonation. In *Mohlomi v Minister of Defence* **1997 (1) SA 124 (CC)** at par 11, the Constitutional Court recognising the significance of the time bar in the Act stated:

"*[11] Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, 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."

[18] A litigant ought to persuade a court of the three requirements laid down in Section 3(4)(b) of the Act. A court will not grant condonation if it is not satisfied that all the three preconditions described in Section 3(4)(b) have been met. Thus, in *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* **2010 (4) SA 109 (SCA)** it was held that:

"[11] As can be seen, s 3(4)(b) circumscribes a court's power by requiring that it be satisfied that: (i) the debt has not been extinguished by prescription; (ii) good cause exists for the failure by the creditor, i.e. to serve the statutory notice according to s 3(2)(a) or to serve a notice that complies with the prescripts of s 3(2)(b); and (iii) the organ of State was not unreasonably prejudiced by the failure. These requirements are conjunctive and must be established by the applicant for condonation."

See also*, Madinda v Minister of Safety & Security* **2008 (4) SA 312 (SCA).**

[19] A court possesses an extensive discretion when deciding whether or not an applicant has shown good cause, which it must apply fully conscious of the merits of the matter seen in their entirety. See, *Gumede v Road Accident Fund* **2007 (6) SA 304 (C).** This approach was endorsed by the Constitutional Court in the matter of *Ferris v FirstRand Bank Ltd* **2014 (3) SA 39 (CC) at 43 G-44A** where it was stated that precision is not the only consideration in determining whether an application for condonation may be granted. The test for condonation, said the Court, is whether it is in the interest of justice to grant it. Pertinent factors to determine the interest of justice are the Applicant's prospects of success and Importance of the issue to be decided.

[20] The broad discretion enjoyed by a court when considering whether or not a litigant has shown good cause does not extend to incorporate ignorance of an Act of Parliament nor is it a free-floating power to condone non-compliance with

statutory time periods. The power ought to be exercise circumspectly and judiciously. See, *Vlok NO v Sun International South Africa Ltd* **2014 (1) SA 487 (GSJ)**

EVALUATION

HAS PRESCRIPTION EXTINGUISHED THE DEBTS

[21] The Applicant contends in this regard that prescription is not a factor with which the Court should concern itself. This, she argues, is for two reasons. Firstly, prescription does not run against a minor until 12 months following the year on which the minor will have attained majority age. Secondly, the minor child is brain damaged as such, prescription cannot run against him because of his mental status. Either the one or the other, if established, will be adequate to interrupt prescription.

[22] To amplify the issue pertaining to the minority status of the minor child. The minor child was only 13 at the time when the Applicant instituted his action in 2018. Accordingly, and quite evidently, his claim against the Respondent had not prescribed at the time when the action was instituted. For what it is worth, perhaps I should point out that since prescription for the claim of the minor is not an issue, this case differs from the Constitutional Court case of *Mtokonya v Minister of Police* **[2017] ZACC 33**. The court held that in terms of Section 12(3) of the Prescription Act, 68 of 1969 knowledge that an applicant has a legal remedy is not required but knowledge of the identity of a respondent and facts giving rise to a claim remain necessary to show.

[23] The Applicant asserts further that even if the minor child's claim had prescribed by the time of the institution of the claim because of attainment of majority status, the claim would still not have prescribed. This would have been so because in terms of the Prescription Act, 68 of 1969, prescription does not run against a

mentally incapacitated person. In consequence of the conclusion of this Court that the claim has not prescribed due to the minority status of the minor child, it will be gratuitous to traverse mental incapacitation of the minor child.

[24] Although the Respondent contests the argument that the debt has not prescribed, it seems nonetheless not keen to take the matter further in that he believed that it is not only prescription of the debt that presents a hurdle for the claim of the minor child. In this regard, it believes that the Applicant's explanation on good cause and the prejudice to be suffered by the Respondent is not satisfactory. As such, the court should dismiss the application on the basis of inadequacy of information on good cause and prejudice to be suffered by the Respondent.

[25] On the contrary, it is apparent from the evidence before court that there is no difference of opinion that the personal debt of the Applicant has prescribed. For that reason and save to mention that the personal debt of the Applicant prescribed three years following the incident on 12 May 2006, it is unnecessary to elaborate or to delve into the subject beyond what I have set out above.

GOOD CAUSE

[26] In the case of Gumede *supra* it was stated that in deciding good cause, a court has a wide discretion, which it must exercise judiciously with due regard to all the facts surrounding the case. the Court made reference to the case of Farris *supra* where it was held that ultimately the test for good cause is the interest of justice. Factors generally used to determine interest of justice are the existence of prospects of success and the importance of the case to be decided.

[27] With the above in mind, the starting point here should be Section 3(3)(a) of the Act and case authority. For that matter, it might be beneficial for referring back to the provisions of the Section once again:

"(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 willfully prevented him or her or it from acquiring such knowledge; and…."

[28] Against the background of the provisions of that Section, the natural questions to pose are:

28.1 When did the Applicant acquire knowledge of the identity of the Respondent and the facts that gave rise to the minor's claim?

2.8.2 Having regard to the facts of this matter, could the Applicant be regarded as having acquired knowledge of the identity of the Respondent and the facts that gave rise to the minor's claim as soon as she could have by exercising reasonable care?

28.3 Did the Respondent knowingly prevent her from acquiring such knowledge?

[29] To turn then to the first question. It is apparent that the Applicant acquired knowledge of the identity of the clinic as well as the Hospital as soon as she attended clinic before birth and upon admission respectively. She alleges that she was ignorant of the law, which means that even if she had knowledge of the Hospital, she would not have known firstly, the identity of the Respondent before court and secondly, that the Respondent would be vicariously liable for the actions of the Hospital until she obtained legal advice.

[30] That said, acquisition of the knowledge of identity of the Hospital in late February 2018 as the treating health institution that might have been responsible for the state of health of the minor child certainly set matters in motion. This is what took her to her current attorneys of record in 2018 and matters have been unfolding since then. Thus, her knowledge of the identity of the treating hospital cannot, without the advice of her attorneys of record, be stretched beyond to encompass the identity of the Respondent before court. Mere knowledge of the identity of the treating health institution without concomitant information of a party vicariously liable for the claim cannot assist a respondent to avoid a valid and genuine claim by an applicant.

[31] This Court readily acknowledges that the period that lapsed between the occurrence in 2006 and 2018 is exceedingly long. The issue, however, is whether or not it is reasonable having regard to the semi-illiteracy and social background allegations of the Applicant. There are no counter allegations of her social background that she grew up in a rural township nor is there one against her semi-illiteracy. Her allegations, outlandish as they sound, are common across townships and rural areas of South Africa.

[32] Accordingly, this Court must not be too quick to judge for doing so might be perceived as discrimination and deprivation of deserving claimants on the basis of their ignorance in favour of what might be exclusive to the urbanites and somewhat educated. Given her situation, I accept that she only acquired knowledge of the identity of the Respondent and the facts that gave rise to the claim following her consultation with her attorneys of record in 2018.

[33] I cannot demand of her to have known that the medical personnel at the hospital were responsible for the state of health of the minor child. Even assuming that she was aware of the facts, key is knowing that the Respondent would be liable for compensation. Again, the objective of the Act could not have been that mere knowledge of the facts without knowledge of utility of those facts at one's

disposal would tick the box. As will be seen below, other than the Respondent slating her for lack of supporting evidence for certain evidence, there is no evidence of the kind of reasonable care that she could have exercised to acquire knowledge of the identity of the Respondent and facts that gave rise to the claim

[34] I am mindful of the criticism of the Applicant by the Respondent that she has made unsupported allegations. For example, the Respondent points out that the Applicant's assertion that she was in the company of a friend when she was advised that the hospital could be liable to compensate the minor child for his state of health is not buttressed by any evidence. While I acknowledge this fact and that there is no proper explanation for the omission to include such evidence, I do not think that given the alleged state of health of the child, the Court should frustrate endeavours to have the matter proceed to a trial stage where most of the issues will be ventilated anyway.

[35] In any event, the Court exercises a wide discretion taking into consideration prospects of success and the importance of the case. I note the criticism of the Respondent that lack of medical records and/or expert reports necessarily diminishes the prospects of success of the minor child's claim. Here the question is, has the Applicant made a *prima facie* case for the claim of the minor child? The answer ought to be in the affirmative.

[36] The Applicant has made reference to certain technical medical terms suggesting that the minor child indeed suffered a massive brain injury. This is not denied. Instead, the Respondent has asked this Court to draw a negative inference from the Applicant's refusal to provide medical records and/or expert reports. It must be borne in mind that this is a condonation application where an allegation such as the brain damage of the minor child should suffice especially in the absence of direct denial of the allegation.

[37] Apart from the aforegoing, the Respondent must be reminded that it will still have opportunity to request the medical records from the Applicant prior to the commencement of the trial in the main case. Demanding production of medical records and/or experts medical reports at condonation stage blurs the line between condonation and trial. The two are discrete each with different hurdles to overcome prior to proceeding to the next stage. The point is simply this – if the Applicant, having been afforded a chance to proceed to trial, fails to demonstrate before the trial court that the minor child is entitled to compensation, the claim will be dismissed.

[38] This Court should not be misconstrued to mean that the prospects of success are minimal. At this stage the minor child allegedly has suffered a brain damage as a result of the hospital personnel, which attracts vicarious liability to the Respondent. The Applicant should be given opportunity to present the claim of the minor child before a trial court. In my opinion, it is in the interest of justice that the Applicant be allowed to present the claim of the minor before a trial court in the main case.

[39] In reaching this conclusion, I am acutely mindful of the judgment of this Division per Kgoele J in the matter of *N Z* on behalf of *S Z v MEC for Health and Social Development: Mpumalanga,* **Case No: 1572/2017** where she dismissed the claim on the basis that prospects of success were minimal. The Court in the *N Z* case was provided with medical records and experts reports and could therefore decide whether or not prospects of success were present.

[40] The above is not the case here. The Applicant *in casu* has provided the bare minimum but sufficient to enable her to be elevated to trial. Had this Court been furnished with similar information, it probably would have been forced to assess the merits of the main case to determine whether it would be in the interest of justice to burden the trial court with a case whose prospects of success were

stillborn. The two cases are as such radically different. Any attempts to treat them analogously ought to be discouraged.

[41] Lastly, the issue is whether or not the Respondent has suffered any prejudice as a result of the Applicant's late service of the Section 3 notice. This aspect need not detain this Court for long. The Respondent has referred this court to the matter of Mohlomi *supra* where the Constitutional Court set out instances where inordinate delays in the institution of these kind of actions might cause prejudice to a respondent. Some of these are that 'inordinate delays damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, 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.'

[42] As pointed out by the Applicant, none of the prejudices referred to in the Mohlomi case *supra* form part of the Respondent's argument on prejudice albeit that it is canvased at length in its heads. In any event, it is manifest that the Respondent cannot claim to have suffered any prejudice in circumstances where it is before court defending the matter and it is not part of its case that witnesses are no longer available or that those who are, their memories have faded or that documentary evidence on which it is required to rely is not available anymore. All the factors referred to in Mohlomi are not raised as part of the Respondent's defence. In the circumstances, I am compelled to conclude that there is no prejudice to the Respondent.

CONCLUSION

[43] I am satisfied that the Applicant has persuaded this Court that the conditions laid down in Section 3(4)(b) of the Act have been observed and complied with. In the

result, her condonation application in respect of the minor child must succeed and I make the following order:

1. The Applicant's failure to serve the notice referred to in Section 3(2)(a) of the Act upon the Respondent within six months of the date of the occurrence of the debt is condoned;

2. The notice dated 16 April 2018 served on the Respondent by registered mail on 19 April 2018 is proper and sufficient notice to the Respondent of the Applicant's intention to institute legal proceedings against the Respondent;

3. The action instituted by the Applicant against the Respondent on 20 June 2018 under Case Number 1674 / 2018 was validly instituted and stands; and

4. The costs of this application shall be in the action.

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B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 28 June 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv L P Mkize**
Instructed by:	**Charles Mkize Attorneys**
Counsel for the Respondent:	**Adv H Van Eeden SC**
Instructed by:	**Adendorff Theron Inc**
Date of Hearing:	**8 December 2020**
Date of Judgment:	**28 June 2021**