THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 529/11

In the matter between:

The MEC for Education, KwaZulu-Natal Appellant

and

Simphiwe Shange Respondent

Neutral citation: *The MEC for Education, KZN v Shange* (529/11) [2012] ZASCA 98 (1 June 2012)

Coram: FARLAM, NAVSA, HEHER, SNYDERS JJA AND PETSE AJA

Heard: **8 May 2012**

Delivered: **1 June 2012**

Summary: Condonation – Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – knowledge of the identity of the joint debtor.

ORDER

On appeal from: On appeal from Kwa-Zulu Natal High Court, Durban (Govindasamy AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

SNYDERS JA (FARLAM, NAVSA, HEHER JJA and PETSE AJA concurring)

[1] During June 2003 the respondent, a 15 year old Grade 9 learner, suffered a blunt force injury to his right eye, allegedly at the hand of one of his teachers who was administering corporal punishment with a belt to another learner. The tip of the belt struck the respondent on the side of his eye. An action was instituted by the respondent to recover damages from the appellant. Before the matter proceeded to trial an application was launched by the respondent to seek condonation for what seemed an acknowledged non-compliance with the provisions of the Institution of Legal Proceedings against Organs of State Act 40 of 2002 (the Act). The court below (Govindasamy AJ sitting as court of first instance) granted the application for condonation and awarded the respondent the costs of the application. The appellant sought and obtained leave to appeal from the court below.

[2] For the purpose of the condonation application in terms of s 3(4) of the Act, the facts alleged by the respondent are essentially undisputed. The incident occurred during June 2003. The respondent, who was born on 27 August 1987, was 15 years and 10 months old at the time. After the incident the relevant teacher told him that the injury he suffered was caused ‘by mistake’. The respondent accepted that explanation. During January 2006, when he was 18 years and 5 months old and still a minor, comments by a friend of the respondent’s family, who noticed the latter wearing an eye patch, motivated him to bring the incident to the attention of the office of the Public Protector. An advocate from that office not only advised him to see an attorney, but informed him

that he had a claim against the appellant. Consequently, he consulted with and instructed his attorneys of record to proceed with an action. On 2 February 2006 the attorney dispatched a notice in terms of s 3 of the Act to the Minister of Education. The relevant provisions of s 3 are:

'(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

(b) . . .

(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 it by exercising reasonable care, unless the organ of state willfully prevented him or her or it from acquiring such knowledge; and

(b) . . . . '

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 *(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) . . . .' [1]

[3] On 3 December 2008 the respondent's summons was served on the appellant. The appellant delivered a special plea in which she sought the dismissal of the respondent's claim for non-compliance with ss 3(1)*(a)* and 3(2)*(a)* of the Act. This prompted the respondent's attorneys to do two things. First, on 7 May 2010, they dispatched a notice in terms of s 3 of the Act to the appellant, and second, they brought an application for

1 Subsection (3)*(a)* largely echoes the provisions of s 12(2) and (3) of the Prescription Act 68 of 1969.

condonation in terms of s 3(4)*(a)* of the Act.

[4] The court below granted condonation on four bases.[2] First, it concluded that 'a child whose cause of action arose before the commencement of s 17 of the Children's Act 38 of 2005 is still entitled to the same period of time in which to institute his or her claim for damages as he or she would have been, had the age of majority not been changed. Second, that the respondent became 'aware of his claim' on 18 January 2006, the date of the first consultation with an attorney. Third, that notice to the Minister of Education and not the appellant (until much later) was an oversight on the part of the respondent's attorney that should not be attributed to the respondent. Fourth, that 'any prejudice which the [appellant] may have suffered as a result of failure to give notice, could not be regarded as unreasonable or insurmountable in the circumstances'.

[5] This appeal turns on a question that had not been previously asked nor answered. The facts alleged by the respondent, if proven during the trial, indicate that from the outset, two joint debtors were liable for the delict that the respondent suffered - first, the teacher that committed the assault on the respondent whilst acting within the course and scope of his employment and second, the teacher's employer, the appellant. No claim has been pursued against the teacher. The primary question that should have been asked was whether the court could be satisfied that the condition in s 3(4)*(b)*(i) has been met in respect of the debt the respondent was trying to enforce against the appellant.

[6] The answer to the question is to be found in the facts alleged by the respondent, which are mostly unchallenged, applied to the requirements of s 12(3) of the Prescription Act 68 of 1969. In order to appreciate the full context of the section, I quote the entire s 12 and emphasize those portions that are pertinent to the question posed:

'(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the

2 The judgment of the court below has been reported as *Shange v MEC for Education, KwaZulu-Natal* 2012 (2) SA 519 (KZD).

debt.

(3) 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 arise: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[7] Immediately after the incident occurred, the respondent knew almost all the facts from which the debt arose: he experienced the event; he knew how it happened; he knew that it was a teacher who inflicted the injury; that it happened during school hours and at school. Insofar as his claim against the teacher was concerned, that debt became due immediately. However, whether he, as a 15 year old rural learner, knew the identity of the appellant as joint debtor, is not apparent from those facts.

[8] The respondent's attorney of record made an affidavit as part of the founding papers filed on behalf of the respondent. At paragraphs 29, 31 and 32 she states:

'29 The delict giving rise to the [respondent's] claim against the [appellant] ("the incident") occurred in June 2003 at which stage the [respondent] was 15 years old and a minor. More importantly, at the time of the incident, the [respondent] was told that the incident was a mistake. This is what he understood it to be until early in January 2006 when, following questions from a friend of his mother's about the eye patch he was wearing, it was suggested to him that the Deputy-Principal's conduct was wrongful. Following this suggestion in early January 2006 and further advice from his mother's friend that he should lay a complaint with the Public Protector, the [respondent] swiftly set about doing so.

30 . . .

31 Until January 2006, either early in that month when he received advice from his mother's friend, or later in that month when he was given advice by an Advocate at the office of the Public Protector, the [respondent] understood the incident to have been a mistake. He knew at whose hand the incident was committed but only after receiving advice in January 2006 did the [respondent] appreciate that the Deputy-Principal had acted wrongfully.

32 It was this appreciation in January 2006 that would have set prescription in motion but for the fact that the [respondent] was 18 years old at the time. He was therefore a minor against whom prescription did not run, minority being a statutory impediment to prescription.'[3]

3 The legal statements that minority prevented the running of prescription are incorrect, but for purposes of this judgment it is not necessary to explore. See *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd* 1999(3) SA 924 (SCA) para 15.

[9] In his own affidavit the respondent explains that he went to the office of the Public Protector where he was requested to furnish them with an affidavit of the incident, which he did. He then sets out what had happened:

'In response to my complaint, an advocate at the Public Protector's office telephoned me to say that I should seek the help of a private lawyer. She said that I should bring a civil claim against the Department of Education. Before she told me this I did not know that there was anything I could do about what had happened. I thought that Mr Biyela had hit me by mistake and that that was the end of the matter.' (My emphasis)

[10] The affidavit by the attorney from which I have quoted above, illustrates that the relevant question of the identity of the appellant as the respondent's debtor is not addressed. Instead the attorney focuses on allegations of wrongfulness that, in a long line of cases in this Court, has been held to be an irrelevant consideration when the provisions of s 12(3) of the Prescription Act are considered.[4]

[11] The respondent's affidavit comes closer to addressing the real question. He states that an advocate in the office of the Public Protector advised him, in January 2006, to institute a civil claim against the appellant. Unfortunately the respondent's legal representatives did not appreciate the significance of this fact. Its disclosure, evidently for the first time, informed the respondent of the identity of the appellant as the joint debtor of the teacher who injured him. He was a rural learner of whom it could not be expected to reasonably have had the knowledge that not only the teacher was his debtor, but more importantly, that the appellant was a joint debtor. Only when he was informed of this fact did he know the identity of the appellant as his debtor for the purposes of the provisions of s 12(3) of the Prescription Act.

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4 *Gericke v Sack* 1978 (1) SA 821 (A); *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B-F; *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (HHA) para 8-11 and 13; *Truter v Deysel* 2006 (4) SA 168 (SCA) para 18; *Minister of Finance & others v Gore NO* 2007 (1) SA 111 (SCA) para 17; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* [2009] 3 All SA 475 (SCA) para 37. In *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA) this Court accepted the expert evidence of the mental, emotional and psychological condition of the victim of a sexual offence as proof that she did not know the identity of her creditor within the meaning of s 12(3) of the Prescription Act. Insofar as that case could conceivably be interpreted as an attempt to broaden the provision of s 12(3), that prospect was removed by the legislature by the introduction of s 12(4) of the Prescription Act by Act 23 of 2007 on 16 December 2007 which deals with the running of prescription in relation to sexual offences as in the case of *Van Zijl*.

[12] Section 3(4)*(b)* of the Act requires a court to be 'satisfied' that the debt has not become extinguished by prescription, before it could grant an application for condonation. In *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) para 8 this Court held:

'The phrase "if [the court] is satisfied" in s 3(4)*(b)* has long been recognised 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. See eg Die *Afrikaanse Pers Beperk v Neser* 1948 (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context.'

I am satisfied that a careful scrutiny of the unchallenged facts put up by the respondent taken together with the circumstances in which he found himself give rise to the overall factual conclusion, fairly arrived at, that the condition in s 3(4)*(b)*(i) of the Act does not operate against the respondent. On the facts, the respondent, in consulting an advocate in the office of the Public Protector and his attorney during January 2006, should reasonably have become aware, for the first time, that he had a claim against the appellant. If prescription commenced running at that time it would, by 1 July 2007, when the respondent, ex lege, achieved majority, have already run for some eighteen months. By reason of s 13(1) of the Prescription Act, the respondent was entitled to the benefit of the full relevant period of prescription, ie three years, before his claim would be extinguished. That was until at least January 2009. Summons was in fact served on the appellant on 3 December 2008.

[13] There was therefore no need for the court below to have entered into the involved investigation of the effect of s 17 of the Children's Act, which changed the age of majority to 18 years, on the running of prescription in respect of the respondent's claim.[5]

[14] The next enquiry is in terms of s 3(4)*(b)*(ii) of the Act, whether good cause exists for the failure by the respondent to have given timeous notice to the appellant. The notice was given after the issue of summons, on 7 May 2010, very much outside six months from the date on which the debt became due as required by s 3(2)*(a)* of the Act.

[15] The provisions of s 3(4)*(b)*(ii) of the Act have been considered in several

5 The change in the age of majority occurred on 1 July 2007 when s 17 of the Children's Act 38 of 2005 came into operation, simultaneous with the repeal of the Age of Majority Act 57 of 1972.

judgments.[6] For present purposes it is not necessary to repeat all of the relevant considerations, but only to state that the court is to exercise a wide discretion;[7] that 'good cause' may include a number of factors that is entirely dependent on the facts of each case;[8] that the prospects of success of the intended claim play a significant role.[9]

[16] As has already been pointed out, the respondent was totally reliant on prompting by others with more insight to take steps to enforce his claim. The way in which he has been gravely let down in this regard, is a distinguishing feature of this case. The absence of the guidance of his legal guardian is glaringly evident. His own teacher led him to believe that nothing could be done about the incident. The respondent's bona fide belief that his teacher's explanation put an end to the matter was never challenged by the appellant. It serves to adequately explain the delay in any steps having been taken until January 2006. The respondent's misfortune did not end when he consulted his attorney. After January 2006 the respondent's attorney took reasonably prompt action in dispatching a notice, but, incorrectly to the Minister of Education and not the appellant. The court below, with ample justification, referred to the 'devil's brew of mistakes, failures and delays in the prosecution of the [respondent's] claim', caused by the respondent's attorneys.

[17] The court below excused the respondent for his attorney's mistake in directing the notice to the Minister of Education and not the appellant, in the following words:

'However, as a result of an oversight on the [respondent's] attorney's part, notice, on the [respondent's] behalf, was sent to the Minister of National Education and not to the Respondent. Smith's affidavit reveals a devil's brew of mistakes, failures and delays in the prosecution of [respondent's] case. Clearly the oversight on her part arose from a failure to appreciate the fact that the Minister of Education and the [appellant] are two distinct organs of State. Mr Bedderson submitted that the [respondent's] attorney's failure cannot be attributed to the [respondent]. I agree that any failure on the part of the [respondent's] attorney should not be held against the [respondent].'

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6 *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA); *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA); *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* 2010 (4) SA 109 (SCA); *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA).
7 *Madinda* para 8; *Lakay* para 14.
8 *Madinda* para 10; *Rance* para 36.
9 *Rance* para 37.

[18] This conclusion does not specifically take account of the law relating to whether attorneys' mistakes are to be attributed to their clients.[10] There was, however, no need to approach the matter from this perspective. The facts referred to above provide ample indication that no blame for any delay or failure is to be attributed to the respondent. In the circumstances he is not to be treated as an ordinary litigant, he was a minor, who sought assistance in order to advance a legitimate claim. Those who had the responsibility of looking after his interests, failed him miserably. It is possible to prevent the prejudice consequent upon those failures to continue to adversely affect the respondent.

[19] The appellant has never suggested that the respondent has not acted reasonably or has not been bona fide in his attempts to enforce a legitimate claim that arises from an infringement of his rights. The appellant has also not disputed, in these proceedings, the merits of the respondent's allegations, which indicate strong prospects of success.

[20] In *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) paras 5, 11 and 13 it was held that condonation in terms of s 3(4)*(b)* of the Act could appropriately be granted even if no notice was given, or notice was given after the service of summons, provided that the debt had not prescribed.

[21] I am satisfied, for purposes of s 3(4)*(b)*(ii) of the Act that good case exists for the failure by the respondent to have given timeous notice to the appellant.

[22] The last question to consider relevant to condonation arises from the provisions of s 3(4)*(b)*(iii) of the Act. The court below had to be satisfied that the appellant was not unreasonably prejudiced by the failure to give timeous notice. The facts limit the investigation to only two considerations. First, the complaint of prejudice raised by the appellant is general and unspecified in its terms and unrelated to any facts that indicate prejudice. Second, the respondent's allegations that the teacher involved is now the principal of the same school and that pupils that were present during the incident,

10 *Saloojee & another NNO v Minister of community Development* 1965 (2) SA 135 (A) at 141H; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G.

identified by name, are still available, are unchallenged. The absence of any prejudice is therefore illustrated by these facts.

[23] Consequently, the conclusion by the court below to grant condonation to the respondent, is to be upheld.

[24] The court below granted the respondent the costs of the application for condonation. At first glance that seems to be incongruous, bearing in mind the usual order made when a party seeks condonation for a procedural failure and the opposition to the application is not unreasonable. However in *Lakay*, Cloete JA explained the difference in reasoning as follows:

'Ordinarily, in applications for condonation for non-observance of court procedure, a litigant is obliged to seek the indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter's costs if it does oppose, unless the opposition was unreasonable. I doubt that this is the correct approach in matters such as the present, as an application for condonation under the 2002 Act has nothing to do with non-observance of court procedure, but is for permission to enforce a right, which permission may be granted within prescribed statutory parameters; and such an application is (in terms of s3(4)) only necessary if the organ of State relies on a creditor's failure to serve a notice. In the circumstances there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result.'[11]

I am in full agreement with this view and therefore see no reason to interfere with the costs order by the court below.

[25] The appeal is dismissed with costs, including the costs of two counsel.

11 Para 25.

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S SNYDERS

Judge of Appeal

APPEARANCES:

For the Appellant:	A K Kissoon-Singh SC
	Instructed by:
	The State Attorney, Kwazulu-Natal
	The State Attorney, Free State
For the Respondent:	M Pillemer SC (with him B Bedderson)
	Instructed by:
	Norman, Wink & Stephens, Cape Town

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