THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 20598/2014

In the matter between:

KHOMOENG JANE MOTHUPI **APPELLANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF HEALTH FREE STATE PROVINCE **RESPONDENT**

Neutral Citation: *Mothupi v MEC, Department of Health Free State* (20598/2014) [2016] ZASCA 27 (22 March 2016)

Coram: Cachalia, Leach, Majiedt and Zondi JJA and Kathree-Setiloane AJA

Heard: 17 March 2016

Delivered: 22 March 2016

Summary: Application for condonation under s 3(4) of Act 40 of 2002 ─ requirements of ─ good cause established for condonation.

ORDER

On appeal from: The Free State Division of the High Court, Bloemfontein (Kruger, Moloi and Lekale JJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the court a quo is set aside and substituted with the following:

'The appeal is dismissed, with costs.'

3 The respondent is to pay the costs of the appeal, including the costs of two counsel. This order will exclude (i) the costs of the application for condonation for the late filing of the appellant's heads of argument, and (ii) 60% of the cost of preparing the appeal record, which costs are to be paid *de bonis propriis* by the appellant's attorney.

JUDGMENT

Leach JA (Cachalia, Majiedt and Zondi JJA and Kathree-Setiloane AJA concurring)

[1] What falls to be decided in this matter is whether the appellant was correctly granted condonation for failing to give proper notice under s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) in respect of a claim for damages against the respondent, the MEC of the Department of Health in the Free State Province. Although a single judge of Free State Division of the High Court (Rampai AJP) granted her such

condonation, that order was set aside on appeal by a full court. The appeal against the latter judgment is with this court's special leave.

[2] On the evening of 27 February 2002 the appellant, a woman now in her mid-thirties, was admitted to the Pelonomi Hospital, Bloemfontein, experiencing difficulties in child-birth. It was decided that the size of the foetus was such that it would be best for the child to be delivered by way of a Caesarean section. This procedure was carried out early on 28 February 2008. In order to perform the surgery, the appellant was given a spinal anaesthetic. A few hours after the delivery, the appellant found that she was unable to move her right leg. Thereafter, she developed a weakness on the left side. Her condition progressively deteriorated and she is now practically wheelchair bound.

[3] The appellant blames the alleged negligent administration of the spinal anaesthetic as being the cause of her paralysis. She contends that subsequent examination has shown her to have an acute scoliosis in the lumber region and that, had there been a thorough examination of the spinal column before the anaesthetic was administered, this condition would have been discovered and the anaesthetic would not have been given.

[4] Almost a year after the delivery of her child, the appellant consulted an attorney, with the view to instituting proceedings for damages as a result of the negligent administration of the anaesthetic. On 27 February 2009, her attorney, under the wrong impression that it was appropriate to sue the national Minister of Health, gave notice to the latter of the appellant's intention to institute legal proceedings for damages of R2 million. More than two months later, a member of the so-called 'Cluster: Legal Services' of the national Department of Health wrote to the appellant's attorney, stating that the complaint had been

'erroneously addressed to the Minister of Health' and advising him to direct his correspondence to the 'Bloemfontein Provincial Department of Health' Presumably what was meant by this is that the notice ought to have been addressed to the respondent, the MEC of the Free State Department of Health.

[5] Despite this warning, on 12 October 2008 the appellant's attorney served a summons on the national Minister of Health who, in due course, entered appearance to defend. Shortly thereafter, the appellant had a change of heart and, on 22 October 2009, gave notice of her intention to amend her claim by joining the respondent as a second defendant.

[6] In response to the notice of amendment, the State Attorney wrote to the appellant's attorney. He stated that he had been instructed to object to the amendment 'due to the fact that this is not an amendment to pleadings . . . but the addition of a new party, which is in fact a new cause of action, which can in my humble opinion only be done by way of an application to join a party'. He went on to suggest that the claim against the national Minister of Health be withdrawn and that the appellant could then give proper notice to respondent and a thereafter issue a fresh summons against the respondent.

[7] The appellant's attorney did not follow this advice. Instead, he persisted in seeking and obtaining the amendment. It was granted, unopposed, on 29 April 2010, with the court ordering that the amended particulars of claim be served on the respondent. Subsequently, on 11 August 2010, a plea was filed on behalf of both the Minister and the respondent.

[8] Section 3 of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the latter has been given a written notice within six months from the date in which the debt

became due, briefly setting out the facts giving rise to the debt and such particulars as thereof as are within the knowledge of the creditor. It is common cause that the plaintiff's claim for damages is a 'debt' as envisaged by this section, and it apparent from the history of the litigation summarised above that the appellant failed to give notice to the respondent of her claim for damages before instituting proceedings against the respondent by way of the amendment to the summons.

[9] However, the appellant's failure to give notice under s 3 of the Act is not necessarily fatal to her claim against the respondent. Section 3(4)(*b*) goes on to provide that condonation for non-compliance with such a notice may be granted if a court 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.'

[10] Relying on these provisions, on 16 February 2011 the appellant applied to the Free State High Court for an order condoning her failure to give the respondent the requisite notice before the institution of proceedings. As set out at the outset, the application succeeded but the order granting her condonation was subsequently set aside on appeal.

[11] As appears from s 3(4)(*b*) quoted above, there are three requirements that need be satisfied for condonation to be granted. The first and third of these creates no difficulty in the present case. In regard to the first, the appellant's claim for damages against the respondent had not been extinguished by prescription prior to the institution of proceedings. In regard to the third, the respondent was not unreasonably prejudiced by the failure to give notice timeously. As is readily apparent, by reason of the involvement of the claim

against the National Minister the State Attorney knew all about the matter early on.

[12] But more importantly, the respondent does not allege that it has suffered any prejudice. The object of a provision such as s 3 is to enable the State, a large and cumbersome organisation, to investigate claims so as to consider whether to settle or compromise a claim before costs escalate unnecessarily, or to properly prepare its defence – which may be frustrated if it is unable to investigate relatively soon after the alleged incident occurred. In the present case, however, the identity of the medical practitioner who administered the spinal anaesthetic which the appellant alleges led to her paraplegia, is not only known but an affidavit from her, in which she disputes any negligence on her part, has been filed of record. In these circumstances, the respondent cannot allege that the underlying purpose of the notice provisions has not been met or that it has been prejudiced by the lack of receiving notice.

[13] Consequently, the only relevant issue which needs be debated further is whether the requirement of good cause as set out in s 3(4)(*b*)(ii) has been satisfied. As I understand the judgment of the court a quo, it was of the view that good cause had not been established. Its reasoning appears to be that the delay in bringing the condonation application was due to the appellant's attorney's lack of diligence, that litigants must accept responsibility for the actions of their legal representatives, that there comes a point beyond which litigants cannot avoid liability for their legal representative's default and that litigation of this nature cannot be conducted in a manner as slip-shod as the appellant's attorney conducted himself in the present case.

[14] There can in my view be no doubt that the attorney displayed a woeful lack of expertise and made himself guilty of numerous unexplained delays. But

that is not the only factor to be considered. As was said in *Madinda v Minister of Safety and Security* 2008 (4f) SA 312 (SCA) para 10:

'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 of such possible factors become relevant. These may include prospects of success in the proposed action, the reason 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 therefore.'

[15] In considering the issue of good cause, it must be remembered that the claim of the appellant is a substantial one and that it is not disputed that her paraplegia developed after the spinal anaesthetic had been administered to her. The mere fact that this took place does not automatically mean that the medical practitioner who administered the anaesthetic was negligent, but it is at the very least of considerable relevance that what should have been a relatively straightforward medical procedure has resulted in catastrophic consequences. Of the information presently available it would be wrong to speculate on the likely outcome of a claim if it goes to trial, but expert medical opinion is presently available to the effect that the anaesthetic was negligently administered. At first blush, then, the prospects of success are more than reasonable.

[16] Moreover, given that the respondent does not rely upon any prejudice, it is clear that it is seeking to short-circuit the claim by relying solely upon a technical point. Had it been able to show that the conduct of its case had in fact been prejudiced in some way by reason of the delay and a failure to give notice timeously, the court may well have viewed its opposition to condonation with a less jaundiced eye. However, relying upon the failure to give notice when such failure did not cause any prejudice does not redound to the credit of the

respondent ─ Cf *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA) paras 17-22.

[17] In my view, given these circumstances, it is in the interests of justice that the appellant be allowed to attempt to prove her claim in a court of law. That being so, there is good cause to condone her failure to timeously comply with the notice requirement of the Act. The court a quo erred in concluding otherwise. It ought to have dismissed the respondent's appeal against the grant of condonation. The appeal must therefore succeed.

[18] I turn to the question of costs. As the successful party the appellant is entitled to her costs of appeal. There are certain items of the costs, however, that need more detailed attention.

[19] First, the appellant's heads of argument in this court were filed out of time, a fact that led to the appellant having to apply for condonation for her failure to act timeously. Although not opposed, the respondent understandably objected to the appellant's suggestion that the costs should be costs in the cause ─ which if ordered, would result in the respondent ultimately bearing all those costs in the event of the appeal succeeding, as it must. The general rule is that a party seeking an indulgence should bear the costs of obtaining it. The costs of the application to obtain condonation for the late filing of the heads (which was granted at the outset of the hearing) are likely to be minimal but, in my view, there is no room for the respondent to bear whatever costs it may have incurred in that application.

[20] By the same token, I see no reason for the appellant herself to be burdened by any portion of those costs. As is apparent from what I have already said, the conduct of the appellant's case has been bedevilled by the lax and slip-

shod practice of her attorney. The history of the litigation reflects a sad saga of the attorney floundering about, making himself guilty of undue and unexplained delays, failing to properly prepare, and disregarding the rules of court and well established legal principles relevant to the appellant's claim. One would have thought that he would have learned his lesson by the necessity to have applied for condonation in the court of first instance, but the presentation of this appeal indicates otherwise.

[21] This is borne out, first, by the failure to timeously file heads of argument in this court. In support of the application for condonation in that regard, the attorney filed an affidavit explaining how busy he had been with various matters and now he had experienced difficulty in obtaining funds from his client. It is unnecessary to deal with this in any detail. The simple truth is that the delay was due to his failure to act timeously, yet again.

[22] That is not the end of the matter. The appeal record in this court has been grossly inflated by the inclusion of unnecessary material, including the argument that was addressed to the court a quo, the application for leave for special leave to appeal lodged in this court, and the duplication of a number of documents. At least 60% of the record was totally superfluous and prepared at unnecessary cost. This too must be laid at the door of the appellant's attorney.

[23] This court has never hesitated to make an attorney who has acted in such a way liable for unnecessary costs – see eg *Jeebhai and others v Minister of Home Affairs and another* 2009 (4) SA 662 (SCA). Counsel for the appellant indeed conceded that the attorney should personally bear portion of the costs occasioned by his ineptitude and failure to comply with the rules. In my view, it would be appropriate to make him bear the costs of the condonation application relating to the heads of argument and 60% of the costs of the record.

[24] Finally, I should mention that the appellant asked for the costs of two counsel on appeal. The issues involved were by no means complicated, but sight cannot be lost at the fact that the order of the court a quo would non-suit the appellant in respect of probably an extremely large claim for damages. And in approaching this court for relief, it was necessary for her to persuade us that a full court had erred. In these circumstances, and in the light of the importance of the matter to the appellant, the employment of two counsel seems to me to have been a wise and reasonable precaution, and the cost should therefore be allowed.

[25] In the result, the following order is issued:

1 The appeal is upheld.

2 The order of the court a quo is set aside and substituted with the following:

'The appeal is dismissed, with costs.'

3 The respondent is to pay the costs of the appeal, including the costs of two counsel. This order will exclude (i) the costs of the application for condonation for the late filing of the appellant's heads of argument, and (ii) 60% of the cost of preparing the appeal record, which costs are to be paid *de bonis propriis* by the appellant's attorney.

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L E Leach
Judge of Appeal

Appearances:

For the Appellant:	T V Norman SC (C M Nqala) Instructed by: Ponoane Attorneys, Bloemfontein
For the Respondent:	G J M Wright Instructed by: State Attorney, Bloemfontein