Republic of South Africa
In the High Court of South Africa
(Western Cape High Court, Cape Town)

In the matter between: Case No: 19221/10

JEFREY JACOBUS VAN RHYN Applicant/Plaintiff

And

THE PROVINCIAL MINISTER OF HEALTH, WESTERN CAPE Respondent/Defendant

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Judgement delivered: 29 February 2012

LOUW J.

[1] On 1 September 2007 the applicant was injured in a motor vehicle accident. His most significant injury was a mid-shaft fracture of his left femur. He was admitted to the Worcester hospital (then known as the Eben Dönges Hospital) on the same day and on 3 September 2007 he underwent a surgical procedure for the internal fixation or 'pinning' of the left femur fracture. Complications arose and on 4 September 2007, the applicant was transferred to Tygerberg hospital where on 6 September 2007, an amputation of his left leg was performed.

[2] Pursuant to these events the applicant sued the respondent, the Provincial

Minister of Health, Western Cape, for damages. The applicant's contention is that the staff of the Worcester hospital was negligent in their treatment of his leg injury.

[3] In its plea, the respondent has taken the point that the applicant has failed to serve the requisite notice of intention to bring legal proceedings against the respondent in terms of Section 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 (the Act), within the period of six months specified in Section 3(2)(a) of the Act. The first formal notice to the respondent was given by the applicant's attorneys on 21 July 2010.

[4] Section 3(4)(a) of the Act provides that if an Organ of State relies on the failure of a claimant to serve the required notice timeously, the claimant may apply for condonation of that failure. This is the application brought by the applicant for condonation in terms of Section 3(4)(a) of the Act.

[5] Section 3(4)(b) provides that a Court may grant condonation if it is satisfied that:

1. the debt has not been extinguished by prescription;
2. good cause exists for the failure by the creditor; and
3. the organ of state was not unreasonably prejudiced by the failure.

[6] It is common cause that the plaintiff's claim has not prescribed and that the onus rests on him to establish the other two requirements.

[7] The judgment of the Supreme Court of Appeal in Madinda v Minister of Safety

and Security, RSA 2008 (4) SA 312 (SCA) has set out what the considerations are that should be taken into account in an application under section 3 (4)(b) of the Act.

[8] Regarding to the second requirement, that is, that good cause exists for the failure of the creditor to serve the statutory notice in terms of section 3(2), the court held as follows at paragraph 10

> 'Good cause' looks at all those factors which bear on the fairness of granting the relief 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'.

[9] In paragraph 11 of the judgement, the court with reference to Silber v Ozen Wholesalers Pty 1954 (2) SA 345 (a) at 352(h) - 353(a) pointed out that an applicant must at least furnish an explanation of his default sufficiently to enable the court to understand how it really came about and to assess his conduct and motives.

[10] The factual basis for the plaintiff's claim is the alleged lack of proper medical treatment that the applicant received at the Worcester hospital during September 2007. The applicant personally and in writing raised the issue of his treatment in letters to the Worcester hospital dated 19 June 2008, 29 September 2008 and 16 January 2009. The hospital responded to the applicant's letters on 24 July 2008 and 22 January 2009. He was informed in both letters that his hospital records had gone missing. In the letter directed at the applicant by the hospital on 24 July 2008 he was informed that his complaint was being referred to the respondent's medico legal department. According to Dr David Bass, the senior medico – legal adviser to

the respondent, the applicant's complaints only came through to his office in January 2009.

[11] It may be argued that the Worcester hospital itself constitutes an organ of state for purposes of section 4 of the Act and that the applicant's letter of 19 June 2008 therefore constituted a due notice. It is not necessary to decide this issue in view of the conclusion to which I have come in the light of what was held in Madinda namely that, in applications of this nature, the primary consideration is the fairness of granting the relief as between the parties, bearing in mind the proper administration of justice.

[12] The applicant states that he was unhappy right from the inception with the manner in which he was treated at the Worcester hospital and by the fact that no explanation of what had gone wrong had been given to him. Although he threatened that steps would be taken, he points out that he did not know that he in fact had a claim for the payment of money against the respondent and that his attorneys only informed him in July 2010 that expert medical opinion indicated that he in fact had a claim against the respondent. He was also then only told by his attorneys of the statutory requirement of notice that had to be given within six months to the organ of State.

[13] The applicant first saw his attorneys in Worcester during November 2007 to institute a claim against the Road Accident Fund. There was an initial delay in instituting the claim against the RAF because the applicant's medical records could not been found at the Worcester hospital. The claim was finally instituted on the 25th

August 2008. The RAF formally repudiated the applicant's claim on the 10th February 2009. When the RAF did not respond to request for the reasons for the repudiation, the applicant's summons was served on the RAF on 27 July 2009. In the interim, the Cape Town attorney acting for the applicant decided to investigate the possibility that negligence of the staff of the Worcester hospital was an independent cause of the amputation of the applicant's leg and searched for and managed to obtain certain of the records relating to the applicant's case from Tygerberg hospital. These records were presented to Professor BL Warren, the head of the department of surgical sciences at the Tygerberg hospital and the University of Stellenbosch, who opined that the medical personnel at the Worcester hospital had culpably failed to identify what was clearly evidence of deficient blood circulation to and ischaemia in the applicant's left lower leg, which was likely to lead to tissue damage, resulting in amputation, if left untreated. In fact this condition was left untreated and the lack of proper treatment resulted in the amputation of his left leg. The applicant's attorney received the expert opinion on 20 July 2010 and pursuant thereto a formal notice in terms of section 3(2) of the Act was immediately served on behalf of the applicant on the respondent on 21 July 2010, that is some twenty two months after the event.

[14] It is evident from these facts that a significant contributory cause for the delay in giving formal notice to the respondent as required by section 3(2) of the Act was the fact that the Worcester hospital had lost or misplaced the applicant's file.

[15] On behalf of the respondent it is contended that since the applicant clearly from the outset soon after the incident personally formed the belief that the doctors

and the medical personnel at the Worcester hospital had been negligent in his treatment and that the applicant would, given his firm belief, have conveyed his view to his attorneys right from the beginning. It is therefore contended that the delay was in effect due to the applicant's attorneys who were negligent in failing to formally notify the respondent of the applicant's claim for some twenty two months and instead, pursued a claim against the RAF.

[16] This delay, so it is contended, unreasonably prejudiced the respondent who had as a result 'lost valuable evidence' which would otherwise had been available to it. In this regard, it is true that Dr Titus, the surgeon who attended to the applicant at the Worcester hospital had left the employ of the Worcester hospital at the end of September 2007, that is, soon after the applicant's treatment at the hospital.

[17] These contentions must be seen against the background that the opinion of the applicant regarding his treatment was that of a lay person. In the absence of the Worcester hospital records, the applicant's attorneys pursued a claim for all the damages suffered by the applicant as a result of the injuries sustained by him, against the RAF. The issue of whether the treatment at the hospital constituted a *novus actus* could not sensibly be considered because the applicant's attorneys were initially unable to trace the hospital records of his treatment at the Worcester hospital.

[18] In addition, as to unreasonable prejudice, as pointed out earlier, the applicant himself approximately nine months after the event personally and in writing conveyed his complaints regarding his treatment at the Worcester hospital to the

hospital itself. In his letters of 19 June 2008, he clearly conveyed in detail why, in his view, the conduct of the medical personnel constituted negligence. The respondent contends that the notice to the hospital however, only 'filtered through' to the respondent's senior medical legal adviser in January 2009, despite the fact that the Worcester hospital informed the applicant during July 2008 that it was forwarding his complaint to the respondent's medico legal department. It is clear from the papers that although Dr Titus had left the employ of the Worcester hospital he was easily traced by the applicant's attorneys through one telephone call during September 2011. The principal complaint against and criticism of the applicant's treatment at the hospital is stated by Professor Warren to be the fact that the doctors and medical personnel at the Worcester hospital failed to identify what was clearly an ischaemic leg which as a result of lack of blood supply to the lower leg, was likely to cause tissue damage, resulting in amputation, if untreated. The necessary treatment was not given at the Worcester hospital nor was the applicant timeously transferred to the Tygerberg hospital. Once the attending surgeon is traced and available to comment, the respondent is not in fact prejudiced by the delay in giving the statutory notice. In this regard it must further be borne in mind that the loss of the hospital records cannot be laid at the door of the applicant.

[19] The expert medical opinion of Professor Warren clearly establishes at least on a prima facie basis, that the applicant has very good prospects of success. The reasons for the delay was clearly and fully explained and there can be no doubt about the bona fides of the applicant. In the context, the applicant would reasonably have accepted that his personal notice had been addressed to the correct entity namely at the hospital he was treated. In fact the hospital indicated that it had

referred his complaint to the respondent's medico legal department during July 2008.

In Madinda it was held:

> 'ignorance, inexperience, naivety and simple lack of intelligence, individually or in any combination, could ... conduce to a reasonable belief, that once a complaint has been laid, the State, with the resources at its disposal ..., will follow it up.'

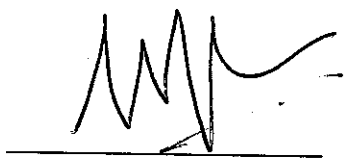
The applicant has adequately explained his failure to timeously give notice in terms of section 3(2) of the Act. As indicated earlier, this court is in a position to understand how the delay came about and to assess the conduct and motives of the applicant. Further, in my view the respondent has not been unreasonably prejudiced by the failure to give timeously formal notice in terms of section 3(2) of the Act.

[20] It follows that in my view the application for condonation must succeed. In addition, the respondent has opposed the application and the costs occasioned by the respondent's opposition must be paid by the respondent.

[21] The following order is made:

1. The Applicant's failure to serve a notice in terms of section 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Act") on the Respondent, in respect of a claim for damages suffered as a result of alleged medical malpractice that arose on 1 September 2007, within 6 (six) months of the foresaid date, is condoned in terms of section 3(4)(a) of the Act.

2. The Applicant is granted leave to proceed with the action that has been instituted under case number 19221/10 in respect of the aforementioned claim against the Respondent, in terms of section 3(4)(c) of the Act.
3. The Respondent is ordered to pay such costs of the application as was occasioned by its opposition to this application.



W.J. LOUW
Judge of the High Court