6/10/17

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 21381/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

06/10/17
DATE

SIGNATURE

In the matter between:

HENDRIC CLEMENT VAN STADEN Applicant

and

THE MEMBER OF THE EXECUTIVE COMMITTEE FOR HEALTH, GAUTENG PROVINCE Respondent

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JUDGMENT

TEFFO, J:

INTRODUCTION

[1] This is an application for condonation of the non-compliance with the provisions of section 3 of the Institution of Legal Proceedings against Organs of State Act No 40 of 2002 ("*the Act*"), in terms of section 3(4) of the said Act.

[2] The applicant also seeks an order that the prosecution of his action against the defendant be condoned and that he be granted leave to proceed with the prosecution of the said action.

[3] The application is opposed.

[4] The applicant is the plaintiff in the action and the respondent is the defendant.

[5] For convenience sake the parties in this application will be referred to as the applicant and the respondent respectively.

BACKGROUND

[6] The applicant was examined by a doctor at Steve Biko hospital on 1 April 2014 for what he calls "*most urgent management of a retinal detachment*" on his left eye.

[7] He was discharged and subsequently re-scheduled for an urgent treatment on 18 June 2014.

[8] On 18 June 2014 the applicant was readmitted at the hospital for purposes of performing an emergency operative procedure.

[9] The scheduled operation could not be successfully completed due to the malfunctioning of the theatre equipment.

[10] Consequently a follow-up surgery that was scheduled for 9 July 2014 was re-scheduled to 21 July 2014.

[11] On 21 July 2014 the equipment failed again.

[12] The respondent sustained permanent damage and loss to his left eyesight. He had to undergo additional medical treatment and incur costs. He will also have to undergo medical treatment in the future and incur costs. He has experienced and will continue to experience pain and suffering and loss of amenities of life in that he had to adjust his lifestyle.

[13] He consulted with his previous attorneys of record on 12 August 2014.

[14] A notice in terms of Act 40 of 2002 was sent to the respondent on 3 June 2015 by the applicant's previous attorneys of record.

[15] Summons was issued against the respondent on 16 March 2016 for payment of the amount of R717 390,28 (seven hundred and seventeen thousand three hundred and ninety rand and twenty eight cents) as compensation for damages that the applicant allegedly suffered consequent upon the complication.

[16] The respondent delivered its plea on 10 June 2016 with a special plea stating that the applicant failed to comply with the provisions of the Act.

THE ISSUE

[17] Has the applicant made out a proper case for condonation?

THE LAW

[18] In terms of the provisions of section 3(1) of the Act no legal proceedings for the recovery of a debt may be instituted against an organ of state unless:

18.1 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

18.2 the organ of state in question has consented in writing to the institution of that legal proceedings –

18.2.1 without such notice; or

18.2.2 upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

[19] In terms of the provisions of section 3(2) of the Act, the notice must:

19.1 within six months from the date on which the debt became due, be served on the organ of the state in accordance with section 4(1); and

19.2 briefly set out –

19.2.1 the facts giving rise to the debt; and

19.2.2 such particulars of such debt as are within the knowledge of the creditor.

[20] Section 3(4) of the Act reads:

"*4.(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection 2(1), the creditor may apply to a court having jurisdiction for condonation of such failure.*

(b) The court may grant 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 creditors; and

(iii) the organ of state was not unreasonably prejudiced by the failure (see also Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at para [11]; Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA)).

(c) If an application is granted in terms of paragraph (b) a court may grant the relief to institute the legal proceedings in question, under such conditions regarding that the notice to the organ of state as the court may deem appropriate."

[21] The general principles applicable to condonation applications were set out in the case of *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) at 532C-D where it was held:

> *"In deciding whether sufficient cause was shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation."*

(See also *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at 316E-F.)

[22] In the case of *Kritzinger v CCMA and Others* JR 2254/05 (2007) ZALC 85 (November 2007) Molahlehi J said the following in relation to the test as initiated in *Melane v Santam Insurance Co Ltd*:

> *"These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing the factors for instance, a good explanation for the delay in lateness may assist the application in compensation for weak prospects of success. Similarly strong prospects of success may compensate for the inadequate explanation and the long delays."*

[23] At 320I-J the court in *Madinda v Minister of Safety and Security* said:

> *"The approach to the existence of unreasonable prejudice requires a common sense analysis of the facts, bearing in mind that the answer to whether the grounds of prejudice exists often lies peculiarly within the knowledge of the Respondent. Therefore, although the onus is on the applicant to bring the application within the terms of section 3(4), a court should be slow to assume prejudice for which the Respondent itself did not lay a basis."*

[24] The court in *Madinda* further held:

> *"In considering the requirements under section 3(4)(b), the court comes to an overall impression, bringing to bear a fair mind to the facts set up by the parties (par [8]). The explanation for the default must be sufficient to enable the court to understand how it really came about and to assess conduct and motives (par [11]). 'Good cause for the delay' is not simply a mechanical matter of cause and effect. An explanation for condonation must produce acceptable reasons for substantially nullifying culpability on her part for the delay (par [12])."*

[25] The court in *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* said the following at para [35]:

> *"An application for condonation is required to set out fully the explanation for the delay, the explanation must cover the entire period of the delay and must be reasonable."*

THE PARTIES' CONTENTIONS

[26] The applicant contended that the cause of action has not been extinguished by prescription in that prescription in respect of his claim as envisaged in section 12 of the Act, would only have begun to run once a debt as envisaged in the Act becomes due. He only became aware of the facts giving rise to his cause of action upon the advice of his attorneys, subsequent to receiving the hospital records of the incident and after establishing that it was in fact the respondent who stands in as an organ of state in its capacity as aforesaid. The action was instituted on 3 June 2015 timeously for purposes of interrupting the prescription of his claim.

[27] The respondent conceded that the applicant's claim has not yet prescribed.

[28] The respondent contended that there has been no medical negligence in postponing the operation. It would have been gross negligence if the medical staff have operated the applicant using a malfunctioning equipment.

[29] The applicant further contended that he only obtained legal assistance during August 2014. Prior to obtaining legal assistance, he was unaware of the provisions of the Act. Had he been aware of the provisions of the Act and of the fact that he factually had a claim to prosecute against the respondent, he would have cause annexure "A" ("*the notice of intention to institute legal*

proceedings against the respondent") to be delivered against the respondent within the six-month period.

[30] Because of the fact that he only obtained legal representation during May 2014, he only became aware of the said provisions of the Act. At that time the six month period envisaged in the Act had already prescribed.

[31] He is uneducated and not acquainted with medical science and the medico-legal areas of the legal practice. At the time of the incident, he did not bear any knowledge of contractual or delictual liability of hospitals towards their patients. He was not aware that he could prosecute an action of this nature against the respondent.

[32] It was only during August 2014 that he was advised that he may have a possible damages action to pursue against the respondent in view of claiming compensation. He only became aware of the substantial prospects of successfully prosecuting the action consequent upon the advice of his current attorneys of record and after obtaining the hospital records from the respondent.

[33] In response to the above allegations, the respondent contended as follows: that the applicant's lack of education is not an excuse. He stated under oath that he became aware of the provisions of the Act in May 2014. His lack of education is irrelevant. He was aware that the operation was postponed on 18 June 2014, 9 July 2014 as well as 21 July 2014 due to the

malfunctioning of the theatre equipment. At that time he was already aware of the provisions of the Act. He has failed to explain why the notice was only sent to the respondent on 3 June 2015. He has failed to show good cause for the failure to send the notice timeously.

[34] In his replying affidavit the following allegations are made in reply to the above:

> *"AD PARAGRAPH 39 THEREOF:*
>
> *31.1 The content of this paragraph is denied. It is specifically pleaded in paragraph 10 of Founding Affidavit that the first consultation with an attorney was on 12 August 2014 with the instruction to investigate the matter.*
>
> *31.2 It is further submitted that on 13 March 2015 the instruction was given to the attorneys of record to institute proceedings."*

[35] The applicant submitted that the prosecution of the application was not unduly delayed; the respondent will suffer no harm/prejudice as a result of the court granting the relief sought and should the court not grant the relief sought, it would have the result of closing the doors completely to him.

[36] In his answering affidavit the respondent contends that the fact that he has filed a plea does not mean that he is not unreasonably prejudiced. He submitted that the delay in delivering the notice unreasonably prejudiced him as human memory fades with time.

ANALYSIS

[37] The court may grant an application for condonation in terms of the provisions of section 3(4)(b) if it is satisfied that the following requirements have been complied with:

37.1 That the debt has not been extinguished by prescription;

37.2 That good cause exist for the failure by the creditor;

37.3 That the organ of state was not unreasonably prejudiced by the failure.

The debt has not been extinguished by prescription

[38] It is common cause between the parties that the debt has not been extinguished by prescription.

Good cause exists for the failure by the creditors

[39] In determining whether good cause exists for the failure by the creditors, the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case.

The degree of lateness and the explanation thereof

[40] The applicant submitted that he only became aware of the facts giving rise to his cause of action upon the advice of his attorneys, subsequent to receiving hospital records pertaining to the incident. This, he contended, was after he had established that it was in fact the respondent who stands in as an organ of state. The notice of the intention to institute an action (annexure "A") was sent to the respondent on 3 June 2015 after he first consulted with his previous attorneys on 12 August 2014.

[41] At paragraphs 15.7 and 15.8 of his founding affidavit the applicant makes the following allegations:

> *"15.7 It was only during August 2014 that I was advised that I may have a possible damages action to pursue against the respondent in view of claiming compensation in respect of our damages as aforesaid.*
>
> *15.8 I however only became aware of the substantial prospects of successfully prosecuting such an action consequent upon the advice of my current attorneys and after obtaining the hospital records from the defendant/respondent, when I became aware:*
>
> *15.8.1 of the facts recorded in paragraphs 5 to 6 above;*
>
> *15.8.2 that the staff of the hospital was in fact negligent in causing the incident;*
>
> *15.8.3 I had a claim against the Defendant/respondent and not the respondent."*

[42] The applicant does not state when did he obtain the hospital records and when did he consult with his current attorneys of record to settle the instruction of proceeding with the institution of the action.

[43] At paragraph 7.3 of the heads of his argument, it was submitted on his behalf that he only became aware of the prospects of a successful claim against the respondent at a later stage after the present attorneys of record obtained the hospital records from the respondent. It was further submitted that there was no intentional delay on the part of the applicant and the applicant did in fact act as soon as he became aware that he might have a successful claim against the respondent.

[44] If one takes all the facts in this matter into account there can be no doubt that the date of May 2014 was an error on the part of the applicant and/or the person who typed or settled the founding affidavit on his behalf. The applicant has explained that he consulted his previous attorneys of record in August 2014 in his founding affidavit (paragraph 15.1). This has been what he maintained in paragraph 31.1 of his replying affidavit. The issue of the date of May 2014 is referred to in paragraph 15.3 of his founding affidavit where he made the following allegations:

> *"However, consequent upon the fact that I only obtained legal representation during May 2014, I only became aware of the said provisions of the Act. At this stage the six months period envisaged in the Act had already prescribed."*

[45] Although I agree with the respondent and his counsel that as in May 2014 the cause of action was not complete and the six months period had not yet expired, I do not agree that the applicant was aware of the provisions of the Act long before 21 July 2014 (when his cause of action completed).

[46] The version of the applicant is that he only consulted with his previous attorneys of record on 12 August 2014. It does not make sense that he could have obtained legal representation prior to August 2014. His papers are clear that prior to him obtaining legal advice he was not aware of the provisions of the Act and neither did he know that he could have a claim against the respondent. It is unfortunate that the statement is contained in his founding affidavit. It makes more sense that after the completion of his cause of action in July 2014, he consulted his previous attorneys of record on 12 August 2014.

[47] He does not explain in his papers as to what happened between August 2014 and June 2015 when his previous attorneys of record sent the notice of his intention to institute the action against the respondent. The six months period for sending the notice expired in February 2015. After the expiry of the six months period, he still did not deliver the notice for a further three months.

[48] In my view his explanation for the delay is not reasonable. He did not fully explain the delay. His explanation for the delay did not cover the entire period (see *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd; Madinda*).

The prospects of success and the importance of the case

[49] Paragraphs 8 and 9 of the founding affidavit reads:

> "*8. The defendant and/or the professional medical staff (including the nursing staff), alternatively one or more of them, negligently breached their respective legal duties in the following aspects:*
>
> *8.1 They failed to provide the medical care and/or treatment with such professional skill, care and diligence as could reasonably be expected of doctors and the nursing staff;*
>
> *8.2 They failed to ensure operational medical equipment and functional operating theatres;*
>
> *8.3 They failed to perform most urgent surgery within a reasonable acceptable timeframe;*
>
> *8.4 They failed to refer me to an institution that could perform the emergency surgery;*
>
> *8.5 They failed to advise me about the urgency of my eye condition and/or to attend another institution that could perform the emergency surgery;*
>
> *8.6 They failed to prevent damage to my left eye when, by the exercise of reasonable care, they could and should have done;*
>
> *8.7 They failed to do a more simpler procedure which could have saved my eyesight.*
>
> *9. I, as a result of the breach by the Defendant of the aforesaid agreements, alternatively as a result of the negligent breach of the aforesaid legal duty/duties:*

9.1 Sustained permanent damage and loss of my left eye's sight;

9.2 Had to undergo additional medical treatment and incurred costs in respect thereof;

9.3 Will in future have to undergo medical treatment and incur costs in respect thereof;

9.4 Experienced and will continue to experience pain and suffering and loss of amenities of life in that I had to adjust in my lifestyle."

[50] In answer to the allegations the respondent contended that he has been advised that the applicant has failed to show good cause for the delay in giving notice. He has failed to substantiate as to the respondent's professional staff's failure to provide medical care reasonably expected of doctors and nurses.

[51] It is not in dispute between the parties that the operation of the applicant was postponed on three occasions due to the malfunctioning of the theatre equipment. According to the respondent the postponement of the operation due to the malfunctioning of the medical equipment shows that his medical personnel exercised professional skill, care and diligence by rescheduling the operation to another date. It was going to be gross negligence on their part if they were to operate the applicant using equipment which was malfunctioning.

[52] In my view after considering all the relevant facts, there are strong prospects of success for the applicant in this matter. This matter is important. The prejudice that the applicant will suffer should he not be allowed to proceed with his action far outweighs the prejudice that the respondent is likely to suffer. It is therefore in the interests of justice and fairness to the parties that I grant condonation as applied for by the applicant. Strong prospects of success will compensate for the inadequate explanation for the delay (*Melane v Santam Insurance Co Ltd*).

[53] It is the applicant who asked for the indulgence. It was not unreasonable for the respondent to have opposed the application. In my view the applicant has to bear the costs of the application.

[54] In the result I make the following order:

54.1 The applicant's non-compliance with the provisions of section 3 of the Institution of Legal Proceedings against Organs of State Act No 40 of 2002 is hereby condoned in terms of section 3(4) of the said Act.

54.2 The applicant's prosecution of the action against respondent is hereby condoned and the applicant is granted leave to proceed with the prosecution of the said action instituted against the respondent.

54.3 The applicant is ordered to pay the costs of the application for condonation.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant	D J G Thiart
Instructed by	Werner Boshoff Inc
For the Respondent	T T Tshivhase
Instructed by	State Attorney Pretoria
Date Reserved	25 May 2017
Date handed down	6 October 2017