IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 58704/09

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

18/12/19
DATE

[redacted]
SIGNATURE

In the matter between :

PAULINAH MATLOU	**FIRST APPLICANT**
and	
MEC OF HEALTH GAUTENG PROVINCIAL GOVERNMENT	**FIRST RESPONDENT**
CEO OF KALAFONG HOSPITAL	**SECOND RESPONDENT**

In re:

PAULINAH MATLOU	**PLAINTIFF**
and	
MEC OF HEALTH GAUTENG PROVINCIAL GOVERNMENT	**FIRST DEFENDANT**
CEO OF KALAFONG HOSPITAL	**SECOND DEFENDANT**

JUDGMENT

A.J. LOUW AJ

[1] This is an application for condonation for the Applicant's failure to serve the notice contemplated in terms of section 3(1)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (hereinafter "Act 40 of 2002").

[2] The matter started on 22 September 2009 when the Applicant as Plaintiff sued as Defendants one Dr NW Lighthelm as First Defendant, Kalafong Hospital as Second Defendant and the Minister of Health as Third Defendant.

[3] The purported claim arose from the fact that the Applicant was admitted at the Kalafong Hospital on 14 August 2006 in order to undergo a sinus drainage. The Applicant had proper vision in both eyes at the time. A surgical procedure was performed on the 14 August 2006 by Dr Lighthelm on the Plaintiff/Applicant. On 21 August 2006 it appeared that the Applicant was losing or had already lost sight in her left eye. According to the heads of argument filed on behalf of the Applicant by 28 September 2006 one Dr Carrim declared that the Applicant's left eye was blind. She never regained sight in her left eye.

[4] On 14 July 2008 the Applicant consulted an optometrist who found that the Applicant was blind in her left eye. She was referred to an eye specialist, one Dr Nhlapo for a second opinion. On the 23rd September 2008 (the heads of argument incorrectly refers to the year as 2006) the eye specialist declared the Applicant's left eye blind.

[5] Summons was served on the Defendants as listed in the paragraphs above on the 23rd September 2009.

[6] The summons cited three Defendants, namely Dr Lighthelm, Kalafong Hospital and the Minister of Health (hereinafter referred to as "the erstwhile Defendants").

[7] On 2 May 2010 (as per the founding affidavit of the Applicant) the erstwhile Defendants filed a plea on the merits as well as three special pleas. The first special plea was that the wrong Defendant or Defendants were sued in that the Kalafong Hospital and the Minister of Health were not liable as the said hospital is under the control of the MEC of Health for Gauteng who is responsible for hospital services. Thus the Kalafong Hospital is a provincial hospital within the Gauteng Provincial Government. It was expressly pleaded that the Provincial Department of Health (the member of the Executive Council) and not the Minister of Health or National Department of Health is potentially liable. The special plea further says that it was not competent to cite Dr Lighthelm as the First Defendant and neither was it competent to cite the Kalafong Hospital as the Second

Defendant and thirdly that it was also not competent to cite the Minister of Health as a party to the action.

[8] The second plea was that the claim arose on the 15th August 2006 and therefore prescribed because summons was only served on the Defendants on the 23rd September 2009.

[9] The third special plea wants that the claim prescribed without any notice under Act 40 of 2002 having been delivered to the Defendants and therefore the Plaintiff is precluded from instituting the claim.

[10] The Applicant states in the application for condonation that the purpose of the application is indeed to apply for condonation for the failure to give notice under section 3(1)(a) of Act 40 of 2002.

[11] The case presented by the Applicant in the founding affidavit is that she became aware of the facts on the 14th July 2008 and that knowledge of the facts as intended by section 12(3) of the Prescription Act 68 of 1969 (hereinafter "the Prescription Act") accordingly must be calculated from no earlier than the 14th July 2008. However, her case is that she actually finally became aware thereof that she is permanently blind in her left eye on the 26th September 2008 when she consulted Dr Nhlapo, the eye specialist. I will assume, without deciding in the Applicant's favour in this regard, that she became aware of the facts giving rise to her claim on the 26th September 2008.

[12] The summons was served on the erstwhile Defendants on 23 September 2009. This occurred without any compliance with the provisions of section 3(1)(a) of Act 40 of 2002.

[13] From delivery of the plea on the merits and the special plea on the 2nd May 2010 it appears that for a number of years nothing further happened in making this matter progress through the courts.

[14] The notice of motion of the application for condonation is dated the 7th November 2016.

[15] The Applicant also filed a supplementary affidavit dated the 4th July 2017 in support of the application for condonation wherein she alleges that the First Respondent is the MEC of Health, Gauteng, the Second Respondent is the Chief Executive Officer of Kalafong Hospital and wherein no further mention is made of Dr Lighthelm. The purpose of the supplementary affidavit is to deal, as it is stated, pertinently with the question of the special plea of prescription as she had omitted to deal with that plea pertinently.

[16] The matter, according to the supplementary affidavit was enrolled for the 17th March 2017 and postponed for a decision on whether the claim had not extinguished by prescription. It is alleged that the court order of the 17th March 2017 is annexed as Annexure "PM6". However, I cannot find such an annexure in the papers.

[17] In short the supplementary affidavit says that she could not have known, without the expert opinion of Dr Nhlapo, that she is permanently blind in the left eye as a result of the operation of the 15th August 2006.

[18] From the opposing affidavit by Mr Lekgothoane who deposed to the affidavit in his capacity as legal admin officer for the Gauteng Provincial Department of Health it appears that the erstwhile Defendants were purportedly replaced by the Respondents/Defendants as referred to, being the MEC of Health Gauteng Provincial Government as First Respondent, CEO of Kalafong Hospital as Second Respondent and also as respectively First Defendant and Second Defendant (hereinafter referred to as "the present Applicants/Defendants").

[19] Mr Lekgothoane explains in his answering affidavit that the present Defendants were not parties/Defendants in the proceedings as instituted in 2009 or when the plea was filed in May 2010. He then points out that paragraph 6.5.1 of the Applicant's founding affidavit of 11 October 2016 says that her current attorneys of record have substituted the erstwhile Defendants by way of amendment in 2015.

[20] The answering affidavit disputes that the MEC of Health Gauteng Province is properly before court. It is pertinently disputed that an amendment procedure could substitute the Defendants as was purportedly done here.

[21] He also raises the fact that the present Defendants were never given any notice under section 3 of Act 40 of 2002 and therefore never had an

opportunity to consider whether they will grant condonation or refuse condonation.

[22] The deponent on behalf of the present Respondents/Defendants again raises the fact that the claim prescribed and that condonation therefore cannot be granted.

[23] He raised an issue regarding the commissioning of the founding affidavit of the 11th October 2016. This issue falls away as the position of Mr Rammutla, who commissioned the affidavit is explained. It is clear that Mr Rammutla does not have any involvement in the practise of the Applicant's attorneys of record.

[24] In the replying affidavit the Applicant as represented by her attorney of record Mr Phadu, alleges that a notice of intention to amend was delivered to the State Attorney on the 24th March 2015 and no objection was received. In terms of the notice of amendment under Rule 28, which is attached to the replying affidavit, the heading still refers to the erstwhile Respondents/Defendants and then gives notice that Dr Lighthelm will be substituted by the MEC of Health, Gauteng Provincial Government as First Defendant and by deletion of the reference to Kalafong Hospital as Second Defendant and to be substituted by the CEO of Kalafong Hopsital as Second Defendant and by deletion of the reference to the Minister of Health as Third Defendant. The notice of amendment further deals with the grounds of negligence of Dr Lighthelm and her treatment by the optometrist and the eye specialist Dr Nhlapo who declared that the

Applicant was left with a blinded left eye on the 26th September 2008. The damages suffered is then also set forth in the annexure to the amendment.

[25] I emphasise that the notice of amendment was filed in the court file on the 25th March 2015.

[26] I digress for a moment to refer to the date of hearing of this application. The matter was enrolled for hearing for the 19th August 2019 at 10h00. When the matter was called, only Mr Mojapelo, for the Respondents, was present in court. Mr Mojapelo informed me that Applicant's counsel could not be contacted and the Respondents' advocate then informed me that the Applicant requested a postponement of the application. I was informed that the Respondents require me to proceed with the matter. I requested Mr Mojapelo to again phone the attorney for the Applicant and I stood the matter down for this purpose. On my return to court I was informed that the phone call was made but that the Applicant's attorney could not be contacted as at the time his telephone was off. At 10h40 I instructed Mr Mojapelo to proceed with the matter. Mr Majapelo argued the matter fully. For purposes of this judgment I considered the heads of argument that were filed by the Applicant and adjudicate upon the matter as if it was fully argued by both parties, although I did not have the advantage of oral argument on behalf of the Applicant. The argument took until approximately 11h15 and then I adjourned. At no time until the adjournment did any legal representative for the Applicant turn up. It needs

to be added that the court file shows that the Applicant enrolled the matter for hearing.

[27] Mr Mojapelo pointed out that, despite the fact that the replying affidavit deals with factual issues regarding the prescription of the claim, the replying affidavit was made by the Applicant's attorney of record.

[28] Section 3(1) of Act 40 of 2002 says that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question notice in writing of his or her intention to institute the legal proceedings in question. It then says that if the organ of state in question consented in writing to the institution of that legal proceedings without such a notice or upon receipt of a notice which does not comply with the requirements set out in subsection 2, the legal proceedings may still be instituted. It then says in section 3(2) that the notice must be given within 6 months from the date on which the debt became due and must briefly set out the facts giving rise to the debt and such particulars of the debt as are within the knowledge of the creditor. Subsection 3 then says 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 wilfully prevented him or her or it from acquiring such knowledge.

[29] Section 4(3) then says that if an organ of state relies on a creditor's failure to serve a notice as referred to above, the creditor may apply to a court having jurisdiction for condonation of such failure. The court may grant such an application 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.

If an application is granted 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.

[30] Section 4 prescribes where and how service of the notice must be effected.

[31] The only notice that was delivered under the provisions of Act 40 of 2002 is a letter dated 19 January 2009 that was directed to the Minister of Health, i.e. the Third Defendant of the erstwhile Defendants/ Respondents.

[32] Condonation is now sought for the failure to have served the section 3(1)(a) notice on the present Defendants/Respondents.

[33] It will be recollected that section 3(4)(b)(i) says that a court may grant an application for condonation if it is satisfied that the debt has not been extinguished by prescription.

[34] On the Applicant's own version she was aware of the claim against the erstwhile Defendants (according to her) on the 26th September 2008 when

Dr Nhlapo declared her permanently blind in the left eye as a result of Dr Lighthelm's actions. The summons was served on the erstwhile Defendants on the 23rd September 2009.

[35] No summons was ever served on the present Respondents/Defendants. The only documents served on the present Defendants/Respondents was the notice of amendment that was served on the 25th March 2015 and amended pages arising from that notice of amendment.

[36] The Applicant was fully informed of the fact that the erstwhile Defendants were not the correct Defendants and of who the Defendants ought to be in the action proceedings by way of the special plea and plea of 2 May 2010. This fact is common cause on the papers.

[37] The Applicant through her attorney of record says in the replying affidavit in the application for condonation that the notice of intention to amend was filed on the 24th March 2015 and the amended pages were filed on the 6th May 2015, thereby effecting the proposed amendment. The amended pages are also attached as an annexure to the replying affidavit.

[38] The attorney for the Applicant then alleges that the National Minister of Health was properly "substituted as a party by virtue of the said amendment".

[39] The Applicant knew that prescription is raised and who the Defendants/Respondents ought to be by no later than May 2010. The notice of amendment, introducing the present Respondents/Defendants

was only filed on the 25th March 2015, therefore 4 years and approximately 10 months after the special pleas informed the Applicant of the correct Defendants in the action.

[40] Indeed no summons was ever served upon the present Defendants /Respondents. No notice in terms of section 3 of Act 2 of 2002 were served on the present Defendants/Respondents.

[41] The joinder of a new party to proceedings does not take place through a notice of amendment in terms of Rule 28. It is done by way of a formal application for joinder in terms of Rule 12 of the Uniform Rules of Court. The purported joinder by way of the notice of amendment is irregular. See: ***Gainsford and Other NNO v Tanzer Transport*** 2013 (4) SA 394 at para 32 and 33 on pp405D – 406A. It is not competent for a court to substitute on application of a plaintiff a person who is not a party to a dispute for an existing defendant by means of an amendment to the summons without such person's consent. See: ***Hip Hop Clothing Manufacturing CC v Wagener NO and Another*** 1996 (4) SA 222 (CPD) at 230A – B. There is no consent in this case to such a procedure. The attempt at substituting defendants is wholly inappropriate. It must be said that any person is entitled to notice of institution of proceedings against that person. No service of a summons was ever effected on the present Defendants/Respondents. Failure to serve a summons means that the person is not properly cited. The attempt at substituting Defendants in the fashion that the Applicant did, cannot and did not substitute the

Defendants/Respondents. See: ***MEC for Safety and Security, Eastern Cape v Mtokwana*** 2010 (4) SA 628 (SCA) at para 19, 20, 21, 22 at pp 633D – 634C. The proceedings against the present Respondents/Defendants are void. ***Vidavsky v Body Corporate of Sunhill Villas*** 2005 (5) SA 206 (SCA) par 14.

[41] The service of the combined summons on the erstwhile Defendants could not and did not interrupt prescription against the present Defendants. The present Defendants, as already found, could not be substituted in the fashion that the Applicant attempted.

[42] In terms of section 3(4)(b)(i) condonation can only be granted if a court is satisfied that the debt has not been extinguished by prescription.

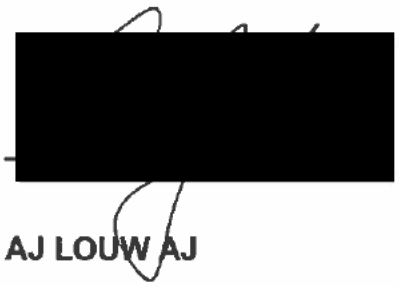
[43] I find, as explained above, that the Applicant's purported claim against the present Defendants, being the MEC of Health Gauteng Provincial Government as First Respondent/First Defendant and the CEO of Kalafong Hospital as Second Respondent prescribed. The first document that was delivered to the present Respondents/Defendants was the notice of amendment. Even if it could be effective to interrupt prescription (and it is not) the delivery took place nearly five years after the Applicant became aware of who the correct Defendants are and approximately seven years after she became aware that she has a purportedly valid delictual claim arising from Dr Ligthelm's conduct.

[44] As is clear from the exposition above, the application for condonation stands to be dismissed. I find it necessary to specifically state in the order to be made that the claim of the Applicant as set forth in the combined summons and particulars of claim accordingly must be dismissed with costs.

[45] I accordingly make the following order:

1. The application for condonation is dismissed with costs.

2. The Plaintiff's claim is accordingly dismissed with costs.



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