

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 14625/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
13 September 2022

In the matter between:

M[....]2 A[....] M[....] obo

M[....] K[....]

APPLICANT

and

**MEC FOR THE DEPARTMENT
OF EDUCATION GAUTENG PROVINCE**

FIRST RESPONDENT

MATLAKALA BOKABA

SECOND RESPONDENT

MVULANE CONSTANCE MOKGADI

THIRD RESPONDENT

JUDGMENT

MANAMELA AJ (Ms)

INTRODUCTION

1. This is an opposed condonation application, as contemplated in Section 3(4) of Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (as amended) (hereinafter referred to as “the Act”).

2. The Applicant instituted action in her personal and representative capacity as a mother and legal guardian of a child with special needs, K[....] M[....] (“minor child”) who was born with cerebral palsy, mental retardation and muteness.

3. The claim arises out of alleged wrongful, unlawful and negligent breach of a duty of care by the Respondents, in that the minor child was unaccompanied and unassisted when he left the school, M[....]3 Special School, and sustained severe injuries.

4. The First Respondent is enjoined with the direct control, authority and responsibility over the school as a public school for special needs in terms of section 12(3)(ii) of the South African Schools Act, 84 of 1996 (“the Schools Act”). The Second and the Third Respondents are the employees of the First Respondent, respectively, and for whom the First Respondent is vicariously liable. Reference to Respondents hereinafter refers to all the Respondents collectively.

FACTUAL BACKGROUND

5. The facts of the case are that, on 26 August 2016, the minor child was violently assaulted and stabbed with a sharp object in the back of his head during school hours. He suffered a severe head injury and extensive scarring at the back of

his cranium. As a result, he received medical treatment at George Mukhari Hospital, he continues to suffer sequelae, and his mental state has worsened.

6. The Applicant apparently appointed, her attorneys of record on 2 November 2016. A notice of intention to institute legal action against organ of state in terms of section 3(2)(a) of the Act, was issued on 27 September 2017, being more than 6 months after the date of cause of action.

7. Summons were issued on 27 February 2020 and were served on 20 February 2020. The Respondents filed its plea on 6 August 2020. The Respondent did not raise any special plea relating to the non-compliance with section 3(2)(a) of the Act, as at the date of the hearing of this condonation application.

ISSUES OF DETERMINATION

8. Whether the failure by the Applicant to have timeously given notice to the Respondent in terms of section 3(2)(a) of the Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act") can be condoned in terms of section 3(4) of the Act.

LEGAL FRAMEWORK

9. Section 34 of the Constitution states:

"Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal, or forum".

10. Section 3 (1) and (2) of the Act states: -

"(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 intention to institute legal proceedings in question, or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings (i) without such notice; or (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(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) briefly set out -the facts giving rise to the debt and such particulars of such debt which are within the knowledge of the creditor..."

11. Section 3(4) states:

(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) If an application is granted in terms of paragraph (b), 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....".

DISCUSSION

12. The point of contention in this matter, is the lateness of the section 3(2)(a) notice, which gave rise to the application of condonation sought by the Applicant. Section 3(4) of the Act states that a creditor may apply for condonation of the late filing of the notice and the court may grant such condonation if; (1) the debt has not

been extinguished by prescription, (2) good cause exists for the failure by the creditor to comply with the notice requirements, and (3) the organ of state was not unreasonably prejudiced by that failure. Moreover, when applying for condonation, the creditor must provide a full explanation for the late filing and non-compliance.

13. The purpose of condonation is to forgive non-compliance provided the above prerequisites in terms of s 3(4) are met. Condonation is not a right and therefore cannot be guaranteed.

14. The Act stipulates that no legal proceedings may be instituted against an organ of state unless the claimant has provided written notice of its intended litigation. The only instance where this written notice is not a prerequisite is when the applicable organ of state has given consent in writing to the institution of impending litigation.

15. Such notice, generally termed as a section 3 notice, should contain the particulars of the claims, such as parties involved, date the debt became due and amounts to be claimed. In other words, the notice should include sufficient details as to the facts giving rise to the debt.

16. Before the commencement of the Act different statutes were applicable to different organs of state and each statute had its own unique prescription periods and its own specific requirements to commence litigation, which led to a breach of section 34 of the Constitution. Generally, Rule 27 of the Uniform Rules of Court deals with extensions of time, removal of bar and condonation of late pleas. Under this rule, the court may condone non-compliance with the rules where “good cause” is shown by the party seeking condonation. Subsequently, the Act was passed with the purpose of regulating and harmonising the prescription periods of claims against organs of state. Consequently, civil action brought against any national, provincial or local governmental department, amongst others, must comply with the provisions of the Act. Perhaps the greatest harmonisation created by the Act is that a creditor has six (6) months from the date the debt became due to serve a section 3 notice on the relevant organ of state. It is further important for creditors to note that litigation may

not commence against an organ of state before the expiry of 30 days after the section 3 notice was served.

17. These three requirements are conjunctive, and the court must be satisfied that the requirements have been met before it can exercise its discretion and condone noncompliance with the Act (*Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA) para 13. *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* [2010] ZASCA 27; 2010 (4) SA 109 (SCA) para 11).

18. The purpose of a section 3(1) notice was explained in *Mogopodi v Member of the Executive Council for the Free State*, 1996 ZACC 20, 1977 (1) SA 124 (CC) par 7, that, the underlying purpose for giving of notice in terms of section 3 of the Act was one of convenience in order to assist the particular organ of state to conduct proper investigations into the claim and then decide whether to make payment or defend the intended action.

19. In *Mohlomi v Minister of Defence*, para 9, Didcott J explained the general purpose of clauses such as section 3(1): “*The conventional explanation for demanding prior notification of any legal action to sue an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.*”

Prescription

20. The first requirement under section 3(4)(b)(i) of the Act is that the debt has not been extinguished by prescription. In respect of the minor child’s mental condition it is undisputed that this requirement is met, as the minor child was born with cerebral palsy and mental retardation, in that regard the mental condition of the minor child creates a clear impediment contemplated in section 13(1)(a) of the Prescription Act 68 of 1969 (as amended), this requirement cannot be considered further. I am therefore satisfied that the debt has not been extinguished by prescription.

Good Cause

21. The second element under section 3(4)(b)(ii) of the Act, is that the Applicant must demonstrate that 'good cause' exists for the failure by the creditor, to give notice timeously. That means a full explanation for the entire period of delay, must be provided. The South African courts have previously considered what is required to demonstrate whether good cause has been shown. Relevant factors include whether a reasonable and acceptable explanation for the default has been demonstrated; whether the party seeking condonation is acting in good faith; and whether there is a *bona fide* prospect of success.

22. The Applicant explains that, she lacked knowledge of the Act, ~~in~~ in her own statement, from the founding affidavit, the Applicant states that '*I did not know that I was supposed to gather all the necessary information to deliver a Notice in terms of section 3(1) on the First Respondent immediately after the incident*'. I am of the view that there was no fault on her part nor the attorneys. From the aspect of prospects of the case, the Applicant mentioned that the condition of the minor child as a mentally retarded person has worsened as a result of the incident. The particulars of the debt which ought to be set out in the notice, justifies the reason for obtaining an investigation report from the assessors, a full report was issued on 9 October 2017.

23. The later needed further documentary evidence to evaluate liability and quantum. An assessor was appointed on 24 August 2017 to investigate the case. The assessors issued a preliminary report confirming that the school is a public school governed by section 12(3)(ii) of the Schools Act at the end of August 2017.

24. The Respondents argues that the action proceeding instituted by the Applicant against the Respondent bears no prospects of success and is *malice* and that the condonation application is not *bona fide*. The Respondents states that it is not clear why summons were only issued on 27 February 2020, and as to why the Applicant failed and/or refused to fully account for the period between 26 August 2016 to 27 February 2020, and between 2 November 2016 to 27 September 2017 before the Notice in terms of section 3(1)(a) of Act 40 of 2002.

25. The Respondents further contends that the Applicant failed to attach a copy of the full investigation report by the Assessor, which is alleged to have been submitted on 9 October 2017. Furthermore the Respondents contents that the Applicant failed to make available copies of the Case Docket under CAS No: 546/2016, including statement A1 dated 27 September 2016. The Respondents also argues that the claim has prescribed. In the First Respondents' Answering Affidavit, under paragraph 16.1, the Respondent raises the common law maxim ***ignorantia juris non excusat***. The Respondents also states that it would be unreasonably prejudiced if the condonation is granted.

26. The Respondents argues that the application for condonation does not satisfy the requirements of s 3(4)(b), and that there is no good cause shown by the Applicant for not filing a notice in terms of section 3 of the Act and that the court in the exercise of its discretion should refused condonation. The Respondents states that the Applicant failed to give full account of what happened.

27. The Applicant had to serve the notice on the Respondents on or before 26 February 2017, seven (7) months late, the explanation provided demonstrates that of a lay person with a lack of knowledge of the Act, it would be impractical to expect even a person with a special condition child to think of specific requirements of the Act, whilst facing medical treatment of the minor child, such expectations would amount to a miscarriage of justice.

28. It is understandable that the court should not look favourably on procedural non-compliance without good cause. Section 3(4)(b)(ii) requires the party approaching the court to explain the reasons why it was not possible to comply with the Act and the party is expected to explain each and every day to the best of its ability.

29. In Madinda v Minister of Safety and Security [2008] ZASCA 34; 2008 (4) SA 312 (SCA) para 8 has held that the test for the court being satisfied that the requirements mentioned in s 3(4) are present involves, not proof on a balance of probabilities but, 'the overall impression made on a court which brings a fair mind to

the facts set up by the parties. According to the judgment the first of these requires 'an extant cause of action'.

Unreasonable Prejudice

30. The second element under section 3(4)(b)(iii) of the Act, requires that the organ of state ought not to be unreasonably prejudiced by the failure to give notice.

31. The Respondents argues that they are being unreasonably prejudiced by the late notice, without stating the basis of their statement. The failure to provide investigation reports, and dockets as requested by the Respondent under Rule 35(9), cannot be used to demonstrate any prejudice, as the same could have been cured by an appropriate application to compel. In Marumo v Minister of Police (37401/2011) [2014] ZAGPPHC 640 (25 August 2014), Modiba AJ held:

“The defendant made various averments illustrating the undue prejudice that it stands to suffer if the section 3 notice is not filed timeously. He has not advanced facts that show that he has suffered actual prejudice as a result on the plaintiff’s omission. It was submitted on behalf of the defendant that it cannot trace some of its witnesses. However, he failed to indicate which witness cannot be traced. In her particulars of claim, the plaintiff alleges that she was arrested by one police officer at her home. Counsel for the plaintiff argued that the fact that the defendant has pleaded evidences the absence of prejudice because he could not have pleaded unless the defendant had consulted with the officer who was involved. He also could not plead unless he had referred to documentation regarding the incident that gave rise to the plaintiff’s claim. In my view, the defendant has failed to show that he stands to suffer prejudice if the application is granted.”

32. I therefore find this requirement to be lacking as well.

CONCLUSION

33. In conclusion, the provisions of section 3 of the Act, have to be balanced with section 34 of the Constitution. The Applicant has met all three requirements under section 3(4) of the Act, and the condonation sought stand to succeed, based on the overall impression of this case.

ORDER

34. The following order is granted:

1. The Applicant's late service of a notice of intention to institute legal proceedings against the Respondent is condoned in terms of section 3(4)(a) and (b) of Act 40 of 2002.
2. The Applicant is granted leave to continue with the legal proceedings already instituted against the Respondents under case number 14625/2020.
3. Costs in the cause.

P N MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing:

22 August 2022

Judgment delivered:

13 September 2022

APPEARANCES:

Counsels for the Applicant:

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