# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

Case No: 184/11

In the matter between:

**PREMIER OF THE WESTERN CAPE PROVINCIAL GOVERNMENT NO** Appellant

and

**BERENAY LAKAY** Respondent

**Neutral citation:** *Premier of the Western Cape Provincial Government NO v Lakay* (184/11) [2011] ZASCA 224 (30 November 2011).

**Coram:** NAVSA, CLOETE, MALAN and THERON JJA and PETSE AJA

**Heard:** **14 November 2011**

**Delivered:** **30 November 2011**

**Summary:** **Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002**: **definition of 'creditor'** includes natural guardian acting for minor, with the result that natural guardian is obliged to give notice of minor's claim; requirements for condonation under **s 3(4)(*b*)** for failure to give notice, discussed and applied.
**Prescription Act 69 of 1969**: provisions relating to extinctive prescription must be kept separate from notice provisions of Act 40 of 2002.

## ORDER

**On appeal from:** Western Cape High Court, Cape Town (Blignault J sitting as court of first instance):
The appeal is dismissed, with costs.

## JUDGMENT

CLOETE JA (NAVSA, MALAN and THERON JJA and PETSE AJA concurring):

[1] The appellant is the Premier of the Western Cape. The respondent is the mother and natural guardian of her minor child, Junate. It is convenient to refer to the Premier as such and to the respondent as 'the applicant'. On 12 December 1998 Junate was born at the Tygerberg Hospital (a provincial hospital) severely brain damaged. On 9 February 2006 the applicant, as the plaintiff and acting in her capacity as aforesaid, instituted an action for damages against the Premier, claiming that it was the negligence of the Province's employees at the Tygerberg Hospital that caused Junate's condition. In March 2009 the Premier delivered a special plea alleging that the applicant had not timeously given notice of the proceedings as required by s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the 2002 Act). In response, the appellant brought motion proceedings for a declaratory order that the 2002 Act was not applicable and in the alternative, for condonation of the non-timeous service by her of a notice at the end of October 2003. I should say immediately that the Premier did not contend that the notice did not comply, so far as its contents are concerned, with the 2002 Act.

[2] The court a quo (Blignaut J) granted an order declaring that the applicant's action was not barred by reason of non-compliance with the

provisions of s 3 of the 2002 Act (the reason for the formulation of the order in these terms will become apparent shortly) and ordered the Premier to pay the applicant's costs occasioned by the opposition to the application. Leave to appeal to this court was subsequently granted by the court a quo.

[3] It would be convenient to set out the relevant provisions of the 2002 Act at this point. I shall begin with s 3:

'(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 or its intention to institute the legal proceedings in question;

. . .

(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);

. . .

(3) For purposes of subsection (2)(*a*) ─

(*a*) 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; and

(*b*) a debt referred to in section 2(2)(*a*), must be regarded as having become due on the fixed date.

(4)(*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.'

Other relevant provisions are s 2(2) which is referred to in s 3(3)(*b*) (it is convenient to quote the transitional provisions in ss 2(3) and (4) as well) and certain definitions:

'2(2) Subject to section 3 and subsections (3) and (4), a debt which became due ─

(*a*) before the fixed date, which has not been extinguished by prescription and in respect of which legal proceedings were not instituted before that date; or

(*b*) after the fixed date,

will be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act 68 of 1969), read with the provisions of that Act relating thereto.

(3) Subject to subsection (4), any period of prescription which was applicable to any debt referred to in subsection (2)(*a*), before the fixed date, will no longer be applicable to such debt after the fixed date.

(4)(*a*) The expired portion of any period of prescription applicable to a debt referred to in subsection (2)(*a*), must be deducted from the said period of prescription contemplated in Chapter III of the Prescription Act, 1969, read with the provisions of that Act relating thereto, and the balance of the period of prescription so arrived at will constitute the new unexpired portion of prescription for such debt, applicable as from the fixed date.

(*b*) If the unexpired portion of the period of prescription of a debt referred to in paragraph (*a*) will be completed within 12 months after the fixed date, that period of prescription must only be regarded as having been completed 12 months after the fixed date.'

The relevant definitions are these.

'Creditor' means

'a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings, and includes such person's tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be.'

'Debt' means

'any debt arising from any cause of action ─

(*a*) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any ─

(i) act performed under or in terms of any law; or

(ii) omission to do anything which should have been done under or in terms of any law; and

(*b*) for which an organ of state is liable for payment of damages.'

'Fixed date' means

'the date of commencement of this Act',

which was 28 November 2002.

'Organ of State' includes

'(*a*) any . . . provincial department'.

The essence of these provisions is that a 'creditor' must give an 'organ of state' written notice of intention to institute legal proceedings for the recovery of a 'debt', within six months from the date on which the 'debt' became due, before the legal proceedings may be commenced; and if this has not been done, and if the 'organ of state' relies on the failure to do so, a court may grant condonation to the 'creditor' within defined parameters.

[4] The court a quo held that the 2002 Act was not applicable as the applicant did not fall within the definition of 'creditor'. The court nevertheless went on to deal with the applicant's application for condonation in case its interpretation was incorrect, and found that the applicant would have been entitled to condonation had she been a creditor ─ hence the terms of the order made.

[5] In finding that the respondent was not a creditor, the court a quo found support in the general principle that where a guardian acts on behalf of a minor, it is still the minor who is a party to the action: *Guardian National Insurance Co Ltd v Van Gool NO* 1992 (4) SA 61 (A) at 66H-I. The court a quo also found support for its interpretation in two sections of the Prescription Act 68 of 1969, namely:

(a) Section 13(1)(*a*) which provides that the completion of prescription is delayed 'if . . . the creditor is a minor or is insane or is a person under curatorship . . . '. The learned judge said that this section made it clear that the term 'creditor' in the Prescription Act refers to a minor and not his or her guardian, and went on to say that the provisions of the Prescription Act, including s 13(1)(*a*) thereof, were expressly incorporated in the 2002 Act by s 2(2)(*b*); and

(b) section 12(3), which provides:

'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

This section was interpreted in the following passage, quoted by the court a

quo, in *Brand v Williams* 1988 (3) SA 908 (C) at 912F-913A:

'The mere fact that a creditor who is a minor would not be able to institute proceedings without the assistance of his guardian is no reason for construing the word "creditor" in s 12(3) as a reference to his guardian, or for imputing the knowledge of the guardian to the creditor for the purpose of the section. To the extent that the decision in *Jacobs*[1] case is in conflict with this approach, I decline to follow it and prefer instead the decision in the *Greyling*[2] case.

There is nothing in the Prescription Act to suggest that the word "creditor" in s 12(3) is to be construed as meaning the creditor's guardian, if the creditor is a minor. Such a construction would in effect involve a rewriting of the section and in my judgment cannot be supported.

In certain circumstances knowledge acquired by an agent may be imputed to his principal. This does not mean, of course, that, for the purpose of s 12(3) of the Prescription Act, knowledge acquired by a minor's guardian as to the identity of the minor's debtor is necessarily to be imputed to the minor. Moreover, I can find nothing in the section to justify such a construction. On the contrary, if regard is had to the nature of the protection afforded by the Act to minors, it appears that the intention of the Legislature was not simply to impute to a minor the knowledge and maturity of his guardian. As already observed, a claim arising during the minority of the creditor cannot become prescribed until the expiry of at least one year from the day on which the creditor attained his majority (see s 13(1)). This is so regardless of the fact that the creditor's guardian may have been in a position to institute action on the creditor's behalf for many years during the latter's minority and indeed for a period much longer than the relevant prescriptive period.'

[6] The court a quo also found support for the conclusion that the respondent was not a 'creditor' in the common law, as set out in *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 773E-H:

'The principles of prescription, including both acquisitive and extinctive prescription (verkrygende en bevrydende verjaring) are discussed by numerous Roman Dutch writers; such writers are not in complete agreement on all aspects but one principle in particular seems to have been universally accepted, namely that prescription did not run against a minor or other person under disability during such disability. One writer, *Troplong*, seems to have suggested that this principle did not apply if the minor had a guardian who would sue on his behalf, but *Pothier* did not hold the same view and

1 *Jacobs v Kegopotsimang* 1937 GWLD 43.
2 *Greyling v Administrator, Natal* 1966 (2) SA 684 (D).

none of the Dutch writers seemed to have mentioned such an exception; see Wessels, *Law of Contract*, 2nd ed, vol 2, p 748, para 2764 *et seq*.'

[7] I cannot agree with the approach or the conclusion of the court a quo. The provisions of the Prescription Act were not incorporated in the 2002 Act by s 2 thereof for purposes of defining who is a creditor under the latter Act. Section 2(2) provides that a debt such as the present will be prescribed as contemplated in Chapter III of the Prescription Act read with the provisions of that Act relating thereto. This means that the question of prescription of Junate's claim is to be determined according to the way in which the Prescription Act deals with the claims of minors, and prescription does not run against a person who acts on behalf of a minor. But that has nothing to do with the notice that has to be given in terms of s 3 of the 2002 Act by a 'creditor' that is defined in the latter Act to include persons who act on behalf of minors, the aspect to which I now turn.

[8] What requires interpretation is the definition of 'creditor' in the 2002 Act. In that Act neither the definition of 'creditor' nor the definition of 'debt' requires that the creditor's claim must be for a debt owing to the creditor. Normally, that would be the case: in ordinary parlance, a creditor is a person to whom a debt is owed. But here the words 'includes such person's tutor or curator if such person is a minor or mentally ill or under curatorship' make it clear that 'creditor' is to be interpreted as extending to a person who acts in a representative capacity in respect of, amongst others, a minor. The definition seems to distinguish between a minor and a person who is mentally ill. So far as a minor is concerned, a tutor is a type of guardian. Thus, Lee and Honoré[3] under the heading 'Kinds of guardians (tutors)' say that 'modern South African Law recognises the following kinds of guardians (tutors)' and list a testamentary tutor (nominated in a will or other written instrument), an assumed tutor (assumed as co-tutor by a tutor who has the power of assumption under the will or written instrument nominating him or her) and a tutor dative (appointed by the Master). *Wille's Principles of South African Law*[4]

3 *Family Things and Succession* 2 ed (1983) by H J Erasmus, C G van der Merwe and A H van Wyk para 166 at 193.
4 9 ed (2007) general editor Francois du Bois at 208ff.

under the heading 'Types of Guardians' includes a testamentary tutor and a tutor dative together with natural guardians, testamentary guardians and assigned guardians. So far as testamentary appointments are concerned, s 72 of the Administration of Estates Act 66 of 1965 and s 27 of the Children's Act 38 of 2005 both deal with the appointment of a third party in a will by a parent who is the sole guardian of a minor child. In the former case, the appointment of the third party is 'to administer the person [of the minor] as tutor, or to take care of or administer his property as curator'. The two functions of guardianship are thus dealt with separately. In the latter case, the appointment of the third party is 'as guardian of the child', comprehending both functions.

[9] The primary purpose of the 2002 Act is to require that a notice of intention to institute legal proceedings be given at an early stage to an organ of state, obviously to enable it to investigate the basis of the proposed claim: *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 9 and cases quoted therein in footnote 5. There is no conceivable reason why the legislature in the case of a minor's claim would seek to impose the obligation to give such a notice only on those who have the capacity to act on behalf of minors because they were appointed by will or the Master, and exclude such a requirement in respect of persons who would most commonly act on behalf of minors, namely, their natural guardians. In my view, to give effect to the primary purpose of the 2002 Act, the word 'tutor' must be interpreted as including a natural guardian.

[10] In conclusion on this point, I would say the following. The Prescription Act is generous in protecting the rights of minors against prescription. The 2002 Act, however, adds a procedural hurdle to the enforcement of all rights to which it applies, including the rights of minors represented by natural guardians, by requiring that a notice be given within six months of the date on which the debt became due before such rights can be enforced. However, in the case of all rights governed by the 2002 Act, including the rights being enforced by natural guardians representing minors, there will always be one and in some cases, two safeguards: s 3(3)(*a*), and s 3(4) which permits

condonation for the late delivery of the notice and with which this case is concerned. The provisions of s 3(3)(*a*) do not apply in the present case, because of the provisions of s 3(3)(*b*) read with s 2(2)(*a*).[5] But to avoid confusion in future, it is desirable to say this. Section 3(3)(*a*) deals with the question when a debt is regarded as having become due for the purposes of the requirement of s 3(2)(*a*) that a notice be sent within six months of such date. The section contains provisions similar to the provisions of s 12(3) of the Prescription Act, which deal with when a debt is deemed to be due for the purpose of extinctive prescription. But the sections must not be conflated. They serve different purposes and a creditor under the Prescription Act includes a minor but not a minor's natural guardian enforcing the minor's claim, whereas a creditor under the 2002 Act includes such a guardian.

[11] I therefore conclude that the applicant in bringing the action in her capacity as mother and natural guardian of Junate fell within the definition of 'creditor' in the 2002 Act, and that she accordingly had to give the notice required by that Act.

[12] The next question is whether the court a quo was correct in its conclusion that condonation should be granted for the applicant's failure timeously to give notice of the action to the Premier. In terms of s 3(4), a court may grant an application for condonation for such failure if it is satisfied on three matters:

(i) that the debt has not been extinguished by prescription;
(ii) that good cause exists for the failure by the creditor; and
(iii) that the organ of state was not unreasonably prejudiced by the failure.

[13] This court said in *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA):

'The phrase "if . . . [the court] is satisfied" in s 3(4)(*b*) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See eg *Die Afrikaanse Pers Bpk v Neser* 1948 (2) SA 295 (C) at 297. I see

5 See para 22 below.

no reason to place a stricter construction on it in the present context.'

[14] Before considering the three requirements on which the court must be satisfied, I wish to deal with what is said in para 27 of *Madinda*:

'The question then arises as to whether condonation should have been granted. We are by reason of the misdirections entitled to reconsider this question.'

To the extent that this passage suggests that a court of first instance exercises a narrow discretion and that a court of appeal may not interfere in the absence of a misdirection,[6] I do not, with respect, consider that it correctly states the law. Condonation of a procedural irregularity in court proceedings would ordinarily involve the exercise of such a discretion, because the court is master of its own procedure;[7] but the discretion here has nothing to do with the court's procedure and is conferred by statute. The phrase 'good cause' is usually encountered in applications for failure to comply with court procedure, but principles set out in those cases should not be applied uncritically to the requirement of 'good cause' in s 3(4)(*b*)(ii). I shall return to this aspect when dealing with costs. At this stage I would merely add that if condonation is refused by a court, an appellate court is in my view at liberty to decide the same question according to its own view as to whether the statutory requirements have been fulfilled, and to substitute its decision for the decision of the court of first instance simply because it considers its decision preferable.

[15] The first question on which a court must be satisfied is that the debt has not been extinguished by prescription. Section 2(1) of the 2002 Act, read with the Schedule thereto, amended or repealed a number of previous Acts with effect from 28 November 2002. If the debt was extinguished by prescription in terms of any of those Acts or the Prescription Act,[8] condonation cannot be granted ─ for the obvious reason that no purpose would be served

6 *Naylor & another v Jansen* 2007 (1) SA 18 (SCA) para 14 and cases referred to therein in footnotes 16 to 23; *Malan & another v Law Society, Northern Province* 2009 (1) SA 216 (SCA) para 13.

7 *Bookworks (Pty) Ltd v Greater Johannesburg Transitonal Metropolitan Council & another* 1999 (4) SA 799 (W) at 807 *in fine*, approved in *Giddey NO v J C Barnard & Partners* 2007 (5) SA 525 (CC) para 21.

8 Note the transitional provisions in s 2(3) and (4), quoted above. They are not of importance in the present matter, for the reasons appearing from the next paragraph of this judgment.

by granting condonation for the late giving of a notice in respect of a debt which no longer exists and cannot accordingly be enforced. The purpose of the 2002 Act is not to revive debts that have already prescribed.

[16] There are two possible Acts that may be of application (and the Premier relied on both): the Prescription Act and the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 (the 1970 Act). In each case it may be assumed in favour of the Premier that the debt due to Junate became due immediately he was born. Section 13(1) of the Prescription Act provides:

'(1) If ─

(*a*) the creditor is a minor . . .

. . .

(*h*) . . . and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (*a*) . . . has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

Junate is still a minor. His action has accordingly not prescribed under the Prescription Act. Nor has his action prescribed under the 1970 Act, which provided:[9]

'2(1) Subject to the provisions of this Act, no legal proceedings in respect of any debt shall be instituted against an administration, local authority or officer (herein after referred to as the debtor) ─

(*a*) . . .

(*b*) . . .

(*c*) after the lapse of a period of twenty-four months as from the day on which the debt became due.'

The reason is that the period of 24 months is not a 'vervaltermyn' but a period of prescription, because there is no inconsistency, as contemplated in s 16(1) of the Prescription Act,[10] between the provisions of the 1970 Act and the

9 The 1970 Act was repealed in its entirety by s 2(1) of the 2002 Act, read with the Schedule thereto, with effect from 28 November 2002.

10 '16(1) [T]he provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the

general provisions of Chapter III of the Prescription Act: *Meintjies NO v Administrasieraad van Sentraal-Transvaal* 1980 (1) SA 283 (T). The provisions of the Prescription Act quoted above accordingly postpone the completion of the 24-month period specified in the 1970 Act until a year after Junate ceases to be a minor.

[17] The second question on which a court must be satisfied is that 'good cause' exists for the failure by the creditor to give the notice. The minimum requirement is that the applicant for condonation must furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess his/her conduct and motives: *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H-353A, quoted in the context of the 2002 Act in *Madinda's* case.[11] Beyond that, each case must depend on its own facts. As Innes CJ said in *Cohen Brothers v Samuels* 1906 TS 221 at 224 (in the context of an application for leave to prosecute a lapsed appeal, but the remarks are equally appropriate to s 3(4)(*b*)(*ii*) of the 2002 Act):

'In the nature of things it is hardly possible, and certainly undesirable, for the Court to attempt to [define good cause]. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown.'

[18] In the present matter the court a quo set out in full the explanation proffered by the applicant. I shall do the same:

'By way of background, I am a machinist at Sugar Bay in Elsies Rivier, Cape Town. I completed standard eight at school, and have no other formal education. I have never been married. I live in a wendy house in a back yard in Bishop Lavis with my sons Jamie and Junate, and my boy friend.

When Junate was born in December 1998, a female doctor told me at the hospital that his brain was damaged and that he would never be able to care for himself. The doctor said that she would speak to the professor about the reasons for Junate's condition, but she never came back to me. She or anyone else at the

institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.'

11 Para 11.

hospital never told me that Junate was injured because the hospital had made mistakes, and I was never told about any of the facts or circumstances described in the hospital's clinical records which, my experts say, show that the hospital's negligence caused Junate's brain injury. Therefore, I never even suspected that the hospital might have been negligent or that facts which could support that conclusion existed.

Between December 1998 and October 2003 I took Junate to the hospital for treatment on numerous occasions, but no one there ever told me that I had not been properly monitored during my labour when Junate was born, or that he had suffered a lack of oxygen in my womb which could have been prevented. I just assumed that Junate's condition occurred for reasons which could not have been prevented. No one ever showed my or Junate's medical records to me at the hospital. And before 2003, no one at the hospital or anyone else told me or suggested to me that the hospital had been negligent or that Junate had not been properly monitored during my labour when he was born.

It was only sometime in 2003 that a friend of mine whose son had been injured in a car accident told me that De Vries Shields, my attorneys of record, are willing to investigate cases like Junate's and that sometimes a baby is born retarded because of a hospital's negligence. I went to see Ms Marietjie Hall of De Vries Shields in August 2003 and gave her permission to order Junate's and my medical records from the hospital. In October 2003, Ms Hall told me that she had obtained the opinion of a medical expert who said that the hospital records showed I and Junate had not been properly cared for or observed during my labour with Junate, and that is was the likely reason for his mental retardation.

I am told by Ms Hall that the hospital's clinical notes which she obtained showed that during the evening of 11 December 1998 while I was in labour at the hospital (Junate was born shortly after midnight), the hospital staff did not properly monitor Junate's condition and that the hospital staff did not follow the doctor's orders that I be monitored every two hours because of slow progress with my labour, and that if I did not make satisfactory progress an emergency caesarean should be performed. As a result, Junate was only born shortly after midnight in a severely asphyxiated state.

I then gave De Vries Shields permission to institute a claim against the defendant and, according to Ms Hall, she then sent a letter . . . on 29 October 2003 giving notice of my intended legal proceedings, which letter the defendant received by 31 October 2003.'

[19] The court a quo concluded on this aspect:

'Given applicant's socio-economic background and the difficulties that she faced in ascertaining the facts upon which her cause of action is based, her explanation for her failure to give the notice to respondent within the requisite six month period, is in my view acceptable.'

With respect, I entirely agree.

[20] The court also had regard to the evidence on affidavit by the experts on both sides in regard to the applicant's prospects of success and the defences raised on behalf of the Premier. I do not propose repeating the exercise. It suffices to say that I am not satisfied that the court a quo erred in its approach or the conclusion to which it came on this aspect, both of which appear from the following passages in the judgment:

'Counsel for respondent argued that the court should approach the question of prospects of success as in ordinary motion proceedings ie on the basis of the facts admitted or alleged by defendant. I do not agree with this submission. Prospects of success is but one of the factors to be taken into account and the proper test at this stage, as set out in the *Madinda* judgment, is to judge the issue on the basis of all the facts set up by both parties. The court furthermore, is not called upon at this stage to decide the merits of the action.

It is clear that there are material differences between the experts to be called by applicant and respondent. This is not unusual in an opposed medical negligence trial. Upon a conspectus of the medical evidence to be adduced by applicant, I am however of the view that she has fair prospects of success in the action.'

[21] The ultimate conclusion of the court a quo on the second requirement for condonation was that the applicant had shown that good cause existed for her failure to give the notice timeously. That conclusion cannot be faulted.

[22] The third and final question on which the court must be satisfied is that the Premier was not unreasonably prejudiced by the failure to give notice. Section 3(2)(*a*) requires the notice to have been given within six months of the date on which the debt became due. Because the debt became due before the fixed date, had not been extinguished by prescription and no legal proceedings had been instituted in respect of it, it is debt contemplated in s

2(2)(*a*) of the 2002 Act. Accordingly, in terms of the provisions of s 3(3)(*b*) of that Act, it 'must be regarded as having become due on the fixed date', ie 28 November 2002. The six-month period for the giving of notice expired on 27 May 2003. Notice was given some five months late, on or about 29 October 2003. It is this five-month period that is relevant, as the court a quo correctly held.

[23] The deponent to the affidavits filed on behalf of the Premier pointed to: the fact that records relating to the respondent had become illegible over time; the unavailability of witnesses; the fact that it was not possible any longer to obtain contemporaneous statements from those who treated the respondent; and the inability of those who may have treated her to remember what had happened. But counsel representing the Premier found herself unable to point to any prejudice that had not already been suffered by 27 May 2003, the latest date on which the notice could have been given. There was therefore no prejudice at all and that is the end of the enquiry on this point.

[24] In the circumstances, all three requirements set out in s 3(4)(*b*) have been satisfied and the applicant was entitled to condonation for the late service on the Premier of the notice required by the 2002 Act.

[25] The court a quo ordered the Premier to pay the applicant's costs occasioned by the former's opposition to the application. Counsel on behalf of the Premier initially argued that the applicant should have been ordered to pay the Premier's costs as, it was submitted, the applicant was seeking condonation and the Premier's opposition was not unreasonable.[12] Ordinarily, in applications for condonation for non-observance of court procedure, a litigant is obliged to seek the indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter's costs if it does oppose, unless the opposition was unreasonable. I doubt that this is the correct approach in matters such as the present, as an application for condonation under the 2002 Act has nothing to do with non-observance of

12 cf *Meintjies NO v Administrasieraad van Sentraal-Transvaal*, above, at 288B-C and 294G-295F; *Dauth & others v Minister of Safety and Security & others* 2009 (1) SA 189 (NC) para 10.

court procedure, but is for permission to enforce a right, which permission may be granted within prescribed statutory parameters; and such an application is (in terms of s 3(4)) only necessary if the organ of state relies on a creditor's failure to serve a notice.[13] In the circumstances there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result. It is not, however, necessary to consider the question further as the Premier's counsel, when asked if the Premier really insisted on attempting to obtain a costs order against a person such as the applicant in the circumstances of the present case, quite properly abandoned this part of the appeal; and there is no cross-appeal by the respondent.

[26] The appeal is dismissed, with costs.

T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

| | |
|---|---|
| APPELLANTS: | Ms P Weyer SC (with her Ms N Bawa)<br>Instructed by The State Attorney, Cape Town<br>The State Attorney, Bloemfontein |
| RESPONDENTS: | J Samer<br>Instructed by DSC Attorneys, Cape Town<br>Rosendorff Reitz Barry, Bloemfontein |

13 Compare s 17 of the Prescription Act, which provides:
'(1) A court shall not of its own motion take notice of prescription.
(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.'