



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 2017/48348

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

Signature: **Date:** 23

In the matter between:

N.A.M.

Applicant

and

MEC FOR HEALTH, GAUTENG PROVINCE

Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

MOULTRIE AJ

[1] This is an application brought in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002

seeking condonation for the late service of the applicant's written notice under section 3(1) thereof.

- [2] Section 3(1)(a) specifies 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 her intention to institute such proceedings. Section 3(2) requires *inter alia* that the notice must be served within six months from the date on which the debt became due. Section 3(3)(a) states that "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 ... she ... could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented ... her ... from acquiring such knowledge."

The contention that the applicant complied with section 3(2)(a)

- [3] It is common cause that the applicant's attorney did prepare and serve a section 3(1) notice on 22 May 2017 (i.e. prior to instituting her action on 14 March 2018). However, in a special plea delivered on 5 May 2022, the plaintiff alleged that, on the applicant's own version in her amended particulars of claim, the cause of action arose on 6 May 2015 and that the notice was therefore out of time. Of course, if the applicant did indeed dispute the factual contention that the notice was not out of time, she need not have launched the current application at all, as the issue could have been dealt with at the trial of the special plea.

[4] Despite this, the applicant's counsel sought to argue that the notice was not served out of time because the debt only became due when she consulted with her attorney for the first time on 18 May 2017. In support of this contention, he referred to *Sello v Minister of Police*,¹ where it was held that although "the debt became claimable" at an earlier stage, "the complete cause of action was only established after consultation with [the applicant's] attorneys". While that may have been correct on the facts before the Court in the *Sello* case, the only facts that have been placed before this Court in this regard are the following uncontradicted statements in the founding affidavit, which was deposed to by the applicant's attorney:

“5.1.1 the Applicant is a lay person;

5.1.2. the Applicant came to consult with me, her attorney, after the deadline for the submission of the Notice, service of which she now seeks to condone;

5. 1.3. the Applicant did not know that there are expectations on her to notice the Respondent of her intention to sue them, within a certain period of time.”

[5] The only lack of knowledge alleged here relates to the notice requirement in section 3 of the Legal Proceedings Act. While this is undoubtedly relevant to the question of good cause for the purposes of condonation, there is no allegation that the applicant was not aware of the identity of the respondent and of the facts giving rise to her claim, or that the respondent

¹ *Sello v Minister of Police N.O and Another* [2022] ZAGPPHC 233 (13 April 2022) paras 13 – 16.

wilfully prevented her from acquiring such knowledge. Indeed, the detailed notice that was served shortly after the consultation suggests either that she was aware of this information or that she could have acquired it by exercising reasonable care.

- [6] In the circumstances, I conclude that the notice was served late, and that condonation is required.²

Condonation

- [7] In order to obtain the relief that she seeks under section 3(4) of the Legal Proceedings Act, the applicant is required to satisfy the Court that (i) her claim has not prescribed; (ii) good cause exists for the late service of the notice; and (iii) the respondent was not unreasonably prejudiced by the late service.

- [8] Counsel are agreed that that the applicant's claim has not prescribed, and that the only aspects requiring consideration are thus those of good cause and unreasonable prejudice.

- [9] The respondent's answering affidavit indicates that it opposes the application partly on the basis that the contents of the founding affidavit submitted in support of the condonation application constitute inadmissible hearsay evidence because the affidavit was not deposed to by the applicant, but by her attorney, and because she did not depose to a confirmatory affidavit at the time. The respondent also points out that the

² In reaching this conclusion, I have purposefully not taken into account the somewhat alarming statement of the applicant's attorney that "the deadline for the submission of the notice" had already expired at the time that he consulted with her.

body of the founding affidavit is extremely sparse and contains no express allegations of fact (other than those set out above) that are relevant to the question of good cause. The applicant then belatedly delivered a replying affidavit (to which no objection has been taken), this time deposed to by her personally confirming the content of her attorney's founding affidavit and annexing a separate confirmatory affidavit of her own to the same effect.

[10] While it is correct that some of the allegations contained in the founding affidavit constitute hearsay evidence, and that the affidavit itself is extremely sparse, a number of facts that are relevant for the purposes of this condonation application may be established from the non-hearsay and undisputed portions of the founding affidavit and from the answering affidavit. In particular, a copy of the respondent's very detailed plea is annexed to the founding affidavit, and it is unsurprisingly admitted in the answering affidavit. The respondent's counsel accepted that, insofar as the respondent's plea contains factual allegations that are relevant to the condonation application, the Court can regard them as admitted by the respondent and can take its contents into account.

[11] The facts established in this manner for the purposes of this application are as follows:

(a) Shortly before undergoing a biopsy operation at Sebokeng Hospital on 6 May 2015 the applicant tested positive for HIV with a very low CD4 count;

- (b) on 7 May 2015, the applicant returned complaining that she had suffered burns on her buttocks during the biopsy;
- (c) the applicant had in fact suffered burns as a result “of liquid that was applied to her cervix during biopsy”, although the respondent disputes the seriousness thereof;
- (d) the applicant returned to hospital whereupon she was admitted and only discharged 14 days later, on 25 May 2015;
- (e) the biopsy test result revealed that the applicant had HPV (Human Papilloma Virus) and cervical mosaic, which can lead to cancer but that the applicant was “likely to progress into cancer faster” as a result of her HIV status and low CD4 count;
- (f) on an unknown date in the period between 25 May 2015 and 9 August 2015, the respondent’s staff performed a hysterectomy on the applicant, after which she was evidently in pain, since she “was on painkillers”;
- (g) the applicant returned to hospital on 9 August 2015, complaining of urinary leaking, after which she was referred for further investigation and it was discovered that she had sustained a bladder injury during the hysterectomy;
- (h) upon her discharge, a date during May 2016 was set for surgery to repair the injured bladder;
- (i) the bladder repair surgery in fact initially took place on 30 March

2016;

- (j) the initial bladder repair surgery was unsuccessful, and had to be repeated, though it is not apparent on what date the second surgery took place;
- (k) the Applicant is a layperson and did not know about the six-month limitation period in section 3(2) until she consulted with her attorney, which she did on 18 May 2017; and
- (l) the section 3(1) notice that was served by the applicant is dated 18 May 2017, and it was served on 22 May 2017.

[12] I am satisfied that the above facts establish good cause for the delay. Even assuming that the notice was required to be served six months after 6 May 2015, on or before 6 November 2015 (it seems to me that at least one of the applicant's causes of action might well have arisen only during August 2015, when it was discovered that she had sustained bladder injury during the hysterectomy), the applicant cannot reasonably have been expected to have turned her mind to legal proceedings while she was still undergoing a series of medical procedures following the performance of the biopsy. These continued until at least March 2016, and indeed for some time after that. It is not *per se* unreasonable for a person in the position of the applicant to have been unaware of the six-month limitation period until such time as she approached an attorney. While the exact period that elapsed between the second bladder repair surgery and the time that the applicant consulted with her attorney is not apparent from

the papers, it appears that it could have been no more than 12 months. Given the applicant's life-threatening and undoubtedly distressing health challenges, and her not unreasonable lack of knowledge of the six-month limitation period, I do not think that delay is undue.

[13] With regard to prejudice, the deponent to the respondent's answering affidavit (an attorney in the employ of the State Attorney) complains that a period of over seven years has elapsed between the biopsy procedure and the delivery of the condonation application on 13 September 2022. She observes that in cases involving long delays, "some witnesses resign from being employees of the organ of state and in this event, it becomes very difficult to trace them" and that "some witnesses die and in this event the Respondent would have lost their evidence". While I have no doubt this may indeed sometimes occur, the allegations of prejudice are entirely speculative. There is no evidence, or even allegation, that the respondent has actually suffered any such prejudice in this particular case as a result of the delay prior to the serving of the section 3(1) notice in May 2017.

[14] I am thus satisfied that the respondent was not unreasonably prejudiced by the applicant's failure to deliver the notice on time.

[15] Finally, the respondent argues that the Court should take into account the fact that the condonation application was only launched in September 2022, some five and a half years after the section 3(1) notice was served. I do not think that this is correct, for two reasons. In the first place, section 3(4)(a) of the Legal Proceedings Act only requires a court to consider whether good cause exists "for the failure by the creditor", i.e. in this case

for the applicant's delay in serving the section 3(1) notice. On the wording of the section, the enquiry is not a general one into good cause for condonation, as with other condonation applications known to our law, where a delay in seeking condonation could itself be a relevant factor.³ Secondly, there is no suggestion that the respondent raised any concerns about the late service of the section 3(1) notice until it delivered its special plea on 5 May 2022, and this was confirmed by the respondent's counsel. It was only on this date that the applicant became aware that the respondent "relies on [the applicant's] failure to serve a notice in terms of subsection (2)(a)", as contemplated in section 3(4)(a), and that it became apparent that it would be necessary to apply for condonation. Indeed, the plain wording of section 3(4)(a) even suggests that a creditor may only apply for condonation after the organ of state has indicated its reliance on the late notice. To the extent that the enquiry is indeed a general one, as appears to have been assumed in the *Chauke* case to which the respondent's counsel refers in her heads of argument (but which I have not been able to locate), my view is that the four month delay after the delivery of the plea should be condoned in view of the absence of any evidence that the respondent suffered any prejudice as a result of this delay.

Conclusion costs and order

[16] In the circumstances, the applicant has established all the requirements for the grant of condonation. As to costs, the applicant is seeking an

³ See, for example, *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I – 41E.

indulgence, and I don't consider that the respondent's opposition was unreasonable given the deficiencies of the founding affidavit. It would consequently not be appropriate to mulct the respondent in costs, and no order will be made as to costs.

[17] It is consequently ordered that:

1. Condonation is granted for the applicant's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 within the period laid down in section 3(2)(a) of that Act.

R J MOULTRIE AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 17 November 2023

JUDGMENT DELIVERED: 23 November 2023

APPEARANCES

For the applicant: A Maluleka instructed by Mmusetsi Sefanyatso Attorneys

For the respondent: L Liphoto instructed by the State Attorney