



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2022-12482

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

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SIGNATURE

~~FANANA: NOMBUSO EMMA Applicant~~

and

MEC FOR HEALTH GAUTENG PROVINCE

Respondent

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## JUDGMENT

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[1] The applicant is the plaintiff in proceedings presently pending in which she claims damages against the respondent/defendant arising out of injuries sustained by her whilst a patient at Chris Hani Baragwanath Hospital (“the hospital”) in and during November, December 2019 and January 2020. The respondent is the MEC for Health Gauteng Province (“the MEC”).

[2] In this application, the applicant seeks declaratory relief to the effect that her notice in terms of section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State<sup>1</sup> (“the Act”) complies with the requirements of section 3(2) of the Act and was timeously served.

[3] In the alternative, the applicant seeks condonation in terms of section 3(4) of the Act for the failure to serve the notice timeously in terms of section 3(2)(a).

### SECTION 3 OF THE ACT

[4] Section 3(1) provides 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 or its intention to institute the legal proceedings in question.

[5] The notice referred to in section 3(1) must be given within 6 months from the date upon which the debt became due, and served on the organ of state in question in accordance with the provisions of section 4(1) of the Act.

[6] For the purposes of subsection (2), a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and the facts giving rise to the debt, but the creditor must

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<sup>1</sup> Act 40 of 2002.

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<sup>2</sup>.

[7] If an organ of state relies on the 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.<sup>3</sup>

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that:

- the debt has not been extinguished by prescription;
- good cause exists for the failure by the creditor; and
- the organ of state was not unreasonably prejudiced by the failure.<sup>4</sup>

[8] The following facts are relevant to the issues both in relation to the declaratory relief and the application for condonation<sup>5</sup>:

(1) The applicant was admitted to the hospital on 24 November 2019. She was 38 weeks pregnant and suffering from hypertension.

(2) She was readmitted on 30 November 2019 and assisted by medical staff at the hospital, gave birth to a baby boy through a Caesarean procedure and was discharged from the hospital on or about 1 December 2019.

(3) According to her pleadings, the applicant was in hospital from 30 November 2019 to 1 December 2019 during which period the Caesarean procedure took place and on 5 December was readmitted as she was bleeding from the operation and there was a smelly discharge from the site of the wound which caused her severe pain. On this occasion, the hysterectomy operation was performed. Somewhat contradictorily, she states that on 6 January 2020 she was operated on for the second time (which is clearly wrong) but this inconsistency has now been remedied by an amendment to her particulars of claim. It was during the course of the hysterectomy that she was advised by hospital personnel that the removal of her womb was necessary since her womb was not cleaned properly by the healthcare personnel and/or doctors who performed the first operation.

(4) In the present application, the applicant states that she was admitted to the hospital for the second time on 5 December 2019 but discharged on 2 January 2020<sup>6</sup> and then contradictorily states that she was discharged from hospital on 2 January 2019<sup>7</sup>. Both these dates of discharge are wrong and appear to be correctly recorded in the amended particulars of claim.

(5) In summary, it appears that the applicant was hospitalised for the Caesarean procedure for the period 30 November to 1 December 2019 and readmitted on 5 December 2019 when the hysterectomy operation was performed. These inconsistencies are explainable and do not detract from or impact upon the merits of the present application.

(6) Following her discharge, she frequented the hospital for regular medical check-ups until at least October 2020. In addition, she underwent a tracheotomy operation on 30 March 2020 since she was losing her voice due to the extensive time spent in ICU.

(7) Pausing here for a moment it seems to me to be reasonable to infer that the applicant was subjected to trauma, discomfort and ill-health.

(8) On 23 March 2021 she consulted Mr Samora Mabasa, an attorney, who, for the first time, advised her that she might have a serious case of medical negligence against the hospital. Her explanation for not consulting him at an earlier stage is in the circumstances reasonable. Until at least October 2020, she attended the hospital and being emotionally drained, she did not have the financial

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<sup>2</sup> Section 3(3) of the Act to all intents and purposes is identically worded to section 12(3) of the Prescription Act 68 of 1969 ("the Prescription Act") which reads: "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." It follows therefore that decisions in relation to section 12(3) are instructive and would be of assistance in interpreting the aim, scope and purview of section 3(3) of the Act.

<sup>3</sup> Section 4(a) of the Act

<sup>4</sup> Section 4(a) and (b) of the Act. Section 4(c) provides that "If the application is granted in terms of (b), the court may grant leave to institute legal proceedings in question on such conditions regarding notice of the organ of state as the court may deem appropriate". Action has already been instituted, so that the need for a direction from the court does not arise.

<sup>5</sup> They emerge from the affidavits filed in this application and the pleadings in the pending action. There are contradictions between the pleadings and the affidavits but in my view they do not affect the outcome of this application.

<sup>6</sup> para 3.4 of the application

<sup>7</sup> para 3.7 of the application

means to engage in a legal battle with the government who apparently she was advised to sue.

[9] Based on instructions given by Mr Mabasa, a notice in terms of section 3(2)(a) of the Act was delivered to the respondent on 9 April 2021 and summons was issued and served on 30 March 2022. It is common cause that the action against the respondent has not prescribed.

[10] In sum therefore, the applicant contends that the cause of action did not arise and the debt did not become due on 30 November 2019 but only on 23 March 2021 when she received legal advice that she had a strong case and that she should pursue a civil action against the hospital.<sup>8</sup> The applicant states that prior to that date, she did not know that she could institute against the “hospital” for what had occurred, and in addition, she still required medical attention and was emotionally drained and had no financial means to engage in a legal battle with the government.<sup>9</sup>

[9] It seems to me reasonable to accept that at least until she consulted with a legally qualified practitioner she would not have known that she had a claim against the hospital or the respondent as the official responsible for the negligent acts of the employees and staff of the Department of Health and Social Development.<sup>10</sup>

#### WAS NOTICE TIMEOUSLY FURNISHED?

[10] The resolution of this issue depends upon determination of when the debt became due, namely when can it be said that the applicant had knowledge of the identity of the debtor and of the facts from which the debt arose and whether, by the exercise of reasonable care, this knowledge could have been acquired at an earlier date.

[11] The affidavit of the applicant explains in some detail the material events which occurred prior to her consulting with her attorney in March 2021, and reasons for failing to initiate these proceedings at an earlier stage. The reason for not proceeding against either the hospital or respondent is plausible and understandable in the circumstances as it is unlikely that the applicant would have appreciated that she had a claim against the respondent.

[12] The scope and requirements of section 12(3) of the Prescription Act<sup>11</sup> were stated in *Drennan Maud and Partners v Pennington Town Board*<sup>12</sup> and were to the effect that a creditor exercising reasonable care requires diligence not only in the ascertainment of the facts underlying the debt but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.

[13] The applicant probably knew from at least 5 December 2019 that there was negligence in the performance of the Caesarean procedure. But she would not have known that she had a claim against the hospital or the respondent<sup>13</sup>. Indeed it is uncontradicted that she did not have knowledge that she could institute action against the hospital<sup>14</sup>.

[14] In the circumstances, I am satisfied the first occasion upon which applicant would have become aware of the identity of the debtor at any stage prior to this consultation was when she consulted her attorney in and during March 2021 and it is highly unlikely that given her personal circumstances, she would have been aware of the fact that the respondent was her debtor<sup>15</sup>.

[15] In the circumstances, I am satisfied that the notice was timeously given in terms of section 3(2) of the Act.

[16] In any event, even if notice was not timeously given, I am of the view that condonation should be

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<sup>8</sup> Apparently she was not told she could pursue an action against the respondent who is the official responsible in law for acts and/or omissions of persons in the employment of the Department of Health and Social Development.

<sup>9</sup> 10/12, para 5.2

<sup>10</sup> *MEC for Education KwaZulu-Natal v Shange* 2012 (5) 313 SCA

<sup>11</sup> 68 of 1969.

<sup>12</sup> 1998 (3) SA 200 SCA.

<sup>13</sup> Even in this regard, there is some uncertainty since in her affidavit, she states that before the hysterectomy was done she was advised by the medical staff at the hospital that the infection was caused by her negligence or was a normal occurrence associated with Caesarean sections. Para 3.6, pg. 10/10

<sup>14</sup> Affidavit, para 3.11, pg. 10/11. In any event, in terms of section 12(3) of the Prescription Act, if the debtor (*in casu*) is to succeed in proving the date from which prescription begins to run, he/she must allege and prove that the creditor had the requisite knowledge on that date. *Gericka v Sack* 1978 (1) SA 821 AD

<sup>15</sup> *Shange* supra at pg. 319 D-E

granted.

[17] A litigant seeking either condonation or an indulgence in relation to non-compliance with a legislative enactment is required to show good cause which involves the following, namely:

- (1) A reasonable explanation for the delay or default;
- (2) That the application is *bona fide*; and
- (3) There are reasonable prospects of success in the litigation in the sense that there is a *prima facie* case or defence<sup>16</sup>.

[18] The essential facts relating to the applicant's failure to give the notice earlier have been properly explained and there is no real challenge by the respondent to these essential facts. The applicant was obviously severely traumatised by the events which occurred at the end of November 2019 and the beginning of December 2019 and underwent further medical treatment and was in and out of hospital until at least October 2020. The delay from that date until she consulted her attorney on 23 March 2021 has been satisfactorily explained.

[19] The requirement of notice in terms of the Act is to afford the state institution an opportunity to investigate claims and decide before getting embroiled in litigation at public expense<sup>17</sup>. The present case is rather curious since initially on 17 August 2023 the respondent through the state attorney indicated that it would not be opposing the application for condonation provided the issue of costs was reserved. When the applicant did not accede to this request, the respondent decided to oppose the application which in the circumstances is rather strange. In my view, the requirements in relation to section 3(4)(b) have been satisfied. There is good cause, the debt has not been extinguished by prescription and there is no suggestion that the respondent has been prejudiced by failure to comply with the provisions of section 3 of the Act.

[20] In my view, the applicant is entitled to the declaratory relief sought and I make the following order:

- (1) It is declared that the applicant's notice dated 9 April 2021 complies with section 3(2) of the Act;
- (2) The respondent is ordered to pay the applicant's costs.

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D M FINE SC  
ACTING JUDGE OF THE HIGH COURT

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<sup>16</sup> *Ferns and Another v First Rand Bank Limited* 2014 (3) SA 39 CC

<sup>17</sup> *Madinda v Minister of Safety* 2008 (4) SA 312 (SCA)