IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:756/2014

DELETE WHICHEVER IS NOT APPLICABLE

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

7/3/2018 ..... 7/3/18
DATE SIGNATURE

In the matter between:

HESTER JOHANNA MARIA KLOPPERS **PLAINTIFF/APPLICANT**

and

MEC FOR HEALTH GAUTENG PROVINCE **1ST DEFENDANT/RESPONDENT**

DR MAHLANGU **2ND DEFENDANT/RESPONDENT**

JUDGMENT

RANCHOD J:

[1] This is an application for condonation by the applicant for her failure to give timeous notice of her intention to institute legal action against the first respondent as required in section 3 of the Institution of Legal Proceedings

against certain Organs of State Act 40 of 2002, (the Act) i.e. within six months of the cause of action having arisen on 18 March 2013.

[2] The applicant avers that on 18 March 2013 she was admitted to Leratong Hospital where she gave birth to twins. The delivery was performed by caesarean section by the second defendant. She alleges she experienced undue pain and discomfort due to complications to her wounds which led to further surgery performed by another unknown doctor at the Leratong Hospital. The complications were of a serious nature. She was transferred to Coronation Hospital where a third operation was performed and she was in intensive care. Thereafter she was transferred to Helen Joseph Hospital for further remedial treatment and discharged on 10 May 2013.

[3] The applicant says she 'never realised' that her 'terrible condition was due to medical negligence until, during a later visit to a doctor at Coronation Hospital, I was informed that the doctors did terrible work. I went back on my attorneys (*sic*) request and the hospital refused my records and I could not verify the dates or the doctor.' She does not give the date when she was made aware that the doctors did 'terrible work'. This date would be significant with regard to the issue of prescription.

[4] Regrettably, it gets worse. The founding affidavit is vague in numerous respects such as when she consulted 'numerous attorney firms' to assist her but they would not because she had no funds. She also says –

> 'I approached the Son newspaper to assist and also contacted Mr Vorster who informed and approached the office of the First Defendant.'

When it was that she approached the Son newspaper is not stated; who 'Mr Vorster' is, is not explained.

[5] She says further –

> 'My attorney of record agreed to assist after I contacted her via the media and she has on various occasions attempted to obtain full instructions from me to proceed with the case. Which I did not respond

to because of my depression and embarrassment *(sic)*. I also changed emails and cellphone numbers due to financial restraints.'

Again, nothing is said about exactly when she contacted her attorney of record. No doubt her attorney would have this information and the affidavit was in all probability prepared by the attorney so this information could have easily been included but was not.

[6] The applicant says she went on numerous occasions to the several hospitals where she was treated to obtain her medical records without success. It is not at all clear why her attorneys did not undertake this task as would be expected of a diligent attorney who should be aware of issues such as prescription of a claim.

[7] A further reason proferred for not giving the required notice timeously in terms of the Act is that her attorney took some time to find a gynaecologist who was prepared to examine her and to give an opinion regarding her condition and the cause thereof. Once again, this explanation leaves a lot to be desired. In my view, an examination by a gynaecologist was not a prerequisite to sending a notice to the first defendant in terms of the Act. She had been previously told by a doctor at Coronation Hospital that the doctors at Leratong had done a 'terrible job' in treating her. By her own admission, she was aware of at least some of the serious consequences of the alleged negligence of the second respondent.

[8] The applicant says further that she is a lay person who has no knowledge of the law and the legislative requirements for the institution of claims against government institutions. Yet again, this explanation is unacceptable. The applicant's attorneys had already issued summons on 16 March 2016 and had it served on the first respondent on the same day. (There is no record in the papers before me of the summons having being served on the second defendant). The founding affidavit in this condonation application was deposed to on 18 October 2016 which is some seven months after service of the summons. The application was signed by the applicant's attorney on 2 November 2016. A diligent attorney would have known at the

very least when summons was issued and the notice served on the first defendant shortly before that that a condonation application would have to be made and would have done so immediately thereafter rather than more than seven months later.

[9] The first respondent filed a special plea on 29 April 2016 in response to the summons that was served on him (or her) and pleaded that the claim has prescribed as the requisite notice in terms of s3 of the Act had not been given to the first defendant within six months of the cause of action having arisen.

[10] The first defendant (1st respondent in *casu*) had also raised a point in limine in the answering affidavit in this application that although the notice in terms of the Act is dated 8 March 2016 there was no proof that the notice was given before 18 March 2016 i.e. before the three years from 18 March 2013 expired.

[11] The applicant then sought leave to file a supplementary affidavit during the hearing which was granted. A copy of the notice in terms of s3(1) of the Act was attached together with a 'track and trace report' from the post office which shows that a registered article was handed in at the applicant's post office on 8 March 2016. On 11 March 2016 the first respondent's post office sent out a 'First Notification to recipient' and the item was collected by a N.N Nicholas Mangezi (presumably on behalf of the first respondent) on 18 March 2016. Section 4(1) of the Act provides for sending an article by 'certified mail.' In *Madinda v Minister of Safety and Security* 2008 (4) SA 312 SCA at 315B – D Heher JA dealt with the words 'certified mail' by reference to the Interpretation Act 33 of 1957 which refers to sending a document by registered post and said-

> 'I shall assume for present purposes, there being no evidence to the contrary, that there is no material difference between registered and certified post.'

With respect, I shall assume likewise in this matter before me.

[12] Further annexures to the supplementary affidavit appear to indicate that the notice was also sent by email to 'qedani.mahlangu@gauteng.gov.za' of the first respondent on 8 March 2016. The applicant has not included proof of delivery of the email in the supplementary affidavit.

[13] In *Sebola v Standard Bank* 2012 (5) SA 142 CC at 168D–F para [87] Cameron J, writing for the majority, held, in the context of delivery of a notice to a debtor by a creditor as contemplated in s129 and s130 of the National Credit Act 34 of 2005-

> '87. To sum up. The requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. The statute, though giving no clear meaning to "deliver", requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery.'

[14] It seems to me that on an analogy with the case in *Sebola* it is sufficient in this instance, and I find it to be so, that the first notification to sender on 11 March 2016 is sufficient proof of delivery on that date which would be within the three year period. If I am wrong on that score then the fact that the registered article was collected from the post office by someone from the first respondent's office on 18th March 2016 means that it was collected on the last day of the three year prescription period.

[15] However, an issue that concerns me is that section 5 of the Act provides –

> **'Service of process-**
>
> (1) (a) Any process by which any legal proceedings contemplated in section 3(1) are instituted must be served in the manner

prescribed by the rules of the court in question for the service of process.

(b) . . .

(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of 30 days after the notice, where applicable, has been served on the organ of state in terms of section 3(2)(a).

(3) If any process referred to in subsection (1) has been served as contemplated in that subsection before the expiry of the period referred to in subsection (2), such process must be regarded as having been served on the first day after the expiry of the said period.'

[16] Assuming that the applicant's attorneys served the notice in terms of s3 of the Act on the date the respondent was notified by the post office as stated in the track and trace report, i.e. 11 March 2016 then summons should not have been served before the expiry of 30 days from that date i.e. before 10 April 2016. But then the claim would have prescribed. As I said, summons was served on 16 March 2016.

[17] The applicant only seeks condonation for not having given notice to the first respondent within six months of the cause of action having arisen in terms of s3 of the Act. No condonation has been sought for non-compliance with section 5(2) of the Act.

[18] I am inclined to grant condonation for the failure to serve the notice within six months of the cause of action having arisen – in spite of the problems I have identified (many of which can be attributed to an apparent lack of diligence on the part of the applicant's attorney) but in the interests of justice, fairness to the applicant and, in my view, the lack of any apparent prejudice to the first respondent. In *Madinga* at 323D-G at para [28] it was held-

'Applications for condonation should in general be brought as soon after the default as possible. Thereby possible further prejudice to the

other party and misconception as to the intentions and bona fides of the applicant can be lessened. A delay in making the application should be fully explained. The failure to do so may adversely affect condonation or it may merely be a reason to censure the applicant or his or her legal advisers without lessening the force of the application. I think that the latter is the correct attitude to take in the present matter in relation to the evaluation of whether condonation should be granted. . . . Nor has the respondent suggested that it was prejudiced or misled by the additional delay.'

[19] However, the lack of an application for condonation for lack of compliance with s5(2) of the Act may yet be a hurdle that the applicant may face but I need not decide the issue as it has not been raised in the papers.

[20] The first respondent was entitled to oppose the relief given the manner in which the applicant's case was advanced. Hence, even though the applicant succeeds the respondent should not be mulcted in costs.

[21] I make the following order:

21.1 The applicant's failure to give notice in terms of the provisions of section 3 of Act 40 of 2002, within 6 (six) months after the cause of action arose be and is hereby condoned and the notice dated 8th March 2016 forwarded to the 1st respondent and attached to the founding affidavit as annexure "A" be and is hereby declared to be a proper notice in terms of the above-mentioned Act.

21.2 Each party to pay their own costs.

RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv. S.J Coetzee
Instructed by	:Geyser & Coetzee Attorneys
Counsel on behalf of Respondent	: Adv. I.S Vobi
Instructed by	:Mdlulwa Nkuhlu Attorneys
Date heard	: 26 October 2017
Date delivered	: 7 March 2018