IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA **REPORTABLE**

CASE NO: 15860/2008

In the matter between:

SIMPHIWE SHANGE Applicant

and

THE MEC FOR EDUCATION KWAZULU NATAL Respondent

JUDGMENT

Heard: 7th March 2011
Delivered: 17 June2011

P. GOVINDASAMY AJ

[1] This is an application for condonation in terms of Section 3 (4) of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002 ("the Act") for Applicant's non-compliance with Section 3 (2) (a) of the Act.

[2] Applicant's cause of action is based on a claim for damages arising from an alleged assault upon him by Mr Biyela, the deputy principal in June 2003 when he was a 15 year old learner at Gcwalulwazi High School in Eshowe, Kwazulu Natal.

[3] The background to the application is relatively straight forward. On 26 January 2006 when the applicant first consulted with his Attorneys Norman, Wink & Stephens he was approximately 18 years and 5 months

old. On 2 February 2006, his attorney, Caroline Emma Smyth sent a Notice in terms of Section 3 of the Institution of Legal Proceedings

against certain Organs of State Act 40 of 2002 to the National Minister of Education in Pretoria. This notice briefly set out the facts giving rise to the applicant's claim and stated that the applicant intends to institute legal proceedings against the Minister of Education.

[4] On 1 December 2008 Ms Smyth caused a summons to be issued, on the applicant's behalf, against the MEC for Education, KwaZulu-Natal, the respondent. The Summons which was served on the Respondent on 3 December 2008 was met with a special Plea on 18 March 2009.The respondent also pleaded over, but for present purposes it is not relevant to go into details thereof.

[5] In the special plea respondent asks for the applicant's claim to be dismissed on the basis that he failed to comply with the provisions of Section 3(1)(a) and Section 3(2)(a) of the Act in that no notice as contemplated was given to the respondent nor served on the respondent. Indeed notice was not given to the respondent in terms of Section 3 of the Act. Ms Smyth took the blame for this omission. At paragraph 11 of her affidavit to the founding papers she states:

> "I wish to stress at the outset that the Applicant was neither aware of nor responsible for the failure to comply with Section 3(2)(a) and that the responsibility for such failure is my own, for which I am deeply sorry."

This oversight on her part is the subject of the present application.

[6] It is important to mention that Ms Smyth upon receiving the respondent's Special Plea and Main Plea consulted with Senior Counsel in March 2009. As regards the respondent's Special Plea, Ms Smyth's then understanding was that respondent took issue with the fact that the

Applicant had not given notice within 6 months of the delict itself. In the light of her instructions that the applicant had no appreciation of the fact that a delict had been committed against him until January 2006 and since the notice was sent to respondent on 2 February 2006, she was unconcerned about the Special Plea. Above all, Senior Counsel's advice was that the Special Plea could be dealt with at the trial and accordingly she did not advise the applicant to address the Special Plea there and then.

[7] Instead, Ms Smyth continued to advance the main action and with Senior Counsel's assistance a notice of exception to the respondent's Plea on the merits was filed on 7th April 2009. Thereafter the respondent delivered its amended Plea on 27 May 2009.

[8] After pleadings closed and before applying for trial dates, Ms Smyth and Senior Counsel consulted with the applicant and his witnesses. Due to various difficulties she was unable to timeously arrange consultations with the applicant and his witnesses. However this delay was not due to her fault. The witnesses were based in KwaZulu Natal and were difficult to contact. It was only then that she appreciated for the first time that the notice had been dispatched to the National Minister for Education and not to the respondent and that these were distinct Organs of State in terms of the Act. She also then understood for the first time that the respondent's Special Plea may have pertained, not only to the Applicant's failure to give notice within 6 months of the incident, but also to the fact that it had not received notice at all.

[9] Ms Smyth dispatched a further Notice dated 7 May 2010 in terms of Section 3 of the Act to the respondent and at the same time brought the application for condonation. The respondent opposed the application primarily as the applicant's claim has prescribed in terms of section 3(4)

(b)(i) of the Act. In addition the respondent alleged that the

requirements in terms of section 3(4)(b)(ii) and (iii) have not been satisfied.

[10] The issue for determination is whether or not the Applicant has satisfied all three requirements of Section 3(4)(b) which must be interpreted in light of the spirit and purpose of the Act. The purpose of the Act is described in the preamble as follows:

> "to regulate the prescription and to harmonise the periods of prescription of debts for which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debt;…"

What the Act does is that it "brings together and rationalizes under one statutory umbrella provisions which were previously scattered through many statutes".[1]

[11] The need for procedural requirements for litigating against organs of state has been sanctioned by our courts and held to be constitutional.[2] In Mohlomi v Minister of Defence[3], Didcott J pointed out that:

> "Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones

1 Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) para 7 at 315H

2 Minister of Safety and Security v De Wit 2009 (1) SA 457 (SCA) para 2 at 458E;

Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd 2010 (4) SA 109 (SCA) para 13 at 113 E

3 1997 (1) SA 124 (CC) para 11 at 129H-I-30A

whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have

disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."

[12] It appears to be common cause that the applicant's claim for damages is a claim for the recovery of a debt as envisaged and defined in Section 1 of the Act and that the respondent is an organ of state.

[13] Section 3 of the Act reads as follows:[4]

" (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 sub-section (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 or State wilfully prevented him or her or it from acquiring such knowledge;"

[14] The giving of notice in terms of the Act is a pre-emptory requirement. Condonation may be granted for non compliance with the notice period provided there has been compliance with Section 3 (4) (b)of the Act which reads as follows:

"The court may grant an application referred to in paragraph (a) if it is

4 Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

satisfied that -

i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditors; and

(iii) the organ of State was not unreasonably prejudiced by the failure."

[15] All three requirements must be satisfied in order for the court to grant condonation.[5]

[16] In order to exercise its discretion and grant an application in terms of Section 3 (4) (b) the court must be satisfied that there is an extant cause of action[6]. This is clearly evident if one has regard to the provision of Section 3(4)(b)(i).

[17] The provisions of the Act must however, as a starting point, be read in conjunction with the provisions of the Prescription Act, 68 of 1969, specifically those provisions that relate to minors. Section 13 of the Prescription Act reads as follows:

"(1) If –

a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1);…

b)

(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), (b), (c), (d), (e), (f), (g) or (h) 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)."

5 Madinda supra para 16 at 318C; De Witt supra para 13 at 462F; Minister for Agriculture supra para 11 at 112 I-J-13A.

6 Madinda supra para 9 at 316D

[18] Thus ordinarily prescription would have been delayed for a period of a year after the plaintiff had become a major. The incident giving rise to the Applicant's claim against the Respondent occurred in June 2003 when the Applicant was 15 years old and a minor. More importantly, at that time, the Applicant was told that the incident was a mistake. This is what he understood it to be until early in January 2006 when, following questions from a friend of his mother's about the eye patch he was wearing, it was suggested to him that the Deputy Principal's conduct was wrongful and that he should lay a complaint with the Public Protector, which he did, on 19 January 2006. He consulted with his Attorney Ms Smyth on 26 January 2006. He knew at whose hand the incident was committed but only after receiving advice in January 2006 did the Applicant appreciate that the Deputy Principal had acted wrongfully. This is not in dispute.

[19] It was this appreciation in January 2006 that would have set prescription in motion but for the fact that the Applicant was 18 years old at the time. He was therefore a minor against whom prescription did not run, minority being a statutory impediment to prescription.

[20] The Applicant who was a minor at the time when the envisaged claim arose, prior to the commencement of the Children's Act[7] and in terms of the Prescription Act, would have had a year after he turned 21 to institute the envisaged action, ie. by 26 August 2009.

[21] On 1 July 2007, however, with the commencement of section 17 of the Children's Act, which reduced the age of majority to 18 years, and in terms of the Prescription Act the plaintiff had one year from 1 July 2007 to institute his envisaged action. i.e by 30 June 2008.

7 Section 17 of the Childrens Act 38 of 2005

[22] It is necessary to refer to the applicable general principles referred to in section 6 of the Children's Act which read as follows: -

"(1) The general principles set out in this section guide-

(a) the implementation of all legislation applicable to children, including this Act; and

(b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.

(2) All proceedings, actions or decisions in a matter concerning a child must-

a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights,… and the rights and principles set out in this Act, subject to any lawful limitation;

b) respect the child's inherent dignity;

c) treat the child fairly and equitably;

d) protect the child from unfair discrimination on any ground …;"

[23] When applying the Children's Act[8], it is clear that the rights which a child has in terms thereof, supplement the rights which a child has in terms of the Bill of Rights and all organs of state in any level of government are obliged to respect, protect and promote the rights of Children contained in the Children's Act. In terms of the Constitution of the Republic of South Africa, the rights of children are of paramount importance.[9] The Applicant was a child at the time his cause of action arose and accordingly the Constitution applied to him.

[24] In my view the proper approach to this matter is to consider the effect of the repealed law in terms of the common law principles of the interpretation or the relevant provisions of section 12(2) of the Interpretation Act 33 of 1957 which reads as follows:

"Where a law repeals any other law, then unless the contrary intention

8 Section 8 (1) read with Section 8 (2) of the Children's Act

9 Section 28 (2) of the Constitution of the Republic of South Africa Act 108 of 1996

appears, the repeal shall not-

(a) …;

(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed;

(d) …

(e) affect any investigation , legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

[25] In Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd and Another,[10] Goldstone AJA, quoted with approval the *dictum of Friedman J in Teblanche v South African Eagle Insurance Co Ltd* 1978 (2) SA 501 (N) at 504F-H when he had to consider the 1987 amendments to the Prescription Act to section 24 (1) of the Compulsory Motor Vehicle Insurance Act 56 of 1972, as follows:

"It is a rule of statutory interpretation that the Legislature is presumed to be acquainted with the state of the law… when it passed the amending Act."

[26] On 1 July 2007 the Children's Act 38 of 2005 came into operation and changed the age of majority from 21 to 18 years. The Applicant was then 19 years and 10 months old and therefore already a major in terms of that statute. On that day the statutory impediment ceased to exist. It followed, therefore, that if taken literally, the effect of this change in the age of majority would be to impinge upon the applicant's accrued rights. That is because the effect of the reduction of the age of majority read with Section 13 of the Prescription Act was that he now had to institute his

claim within one year of his achieving majority ie. 18 years or, at very

10 1990 (2) SA 693 (A) at 697D-E

best for him, within one year of the commencement of the Children's Act.

[27] Although the effect of the amending Act is not procedural in nature, it impacts negatively upon the applicants substantive right to a claim for damages by impairing and limiting its enforcement. The interpretation given to Section 17 of the Children's Act, that is, to allow the impediment and the right to Applicant's claim to be exercised sooner than age 21, has the effect of abolishing his right, which is protected in terms of Section 6 read with section 28 (2) of the Constitution. In this regard I refer to the explanation of Marais JA in Minister of Public Works v Haffejee NO[11] as follows:

> "Thus, even if s 12(2) of the Interpretation Act is applicable to a case where some provisions of a law (as opposed to the entire law) are repealed (as was held to be the case in *Bell* v *Voorsitter van die Rasklassifikasierraad en Andere* 1968 (2) SA 678 (A) at 683 H -684A), I am unable to accept that the amending Act affected any right or privilege of the respondent's within the meaning of those expressions in s 12(2)(c). Counsel for respondent conceded, correctly so it seems to me, that once s 12(2)(c) is found to be inapplicable, no succour for the respondent can be found in s 12(2)(e).
>
> That is because the latter provision can operate only when a 'right, privilege, obligation or liability' within the meaning of the former provision has been found to exist."

[28] The legislature must have been aware that when the age of the majority changed from 21 years to 18 years under the Children's Act it did not intend to affect the Applicants right to a claim for damages against the Respondent under the Age of Majority Act. I am of the view that once that date is established ie. 29 August 2009, it remains immutable and any change in Applicants status, read with the Prescription Act, would not affect that date. This construction does not offend the plain wording of Sections 6 and 8 of the Children's Act read with Section 28 (2) of the Constitution. Any other interpretation in terms whereof the Applicant would be deprived of his acquired right or accrued

11 1996 (3) SA745 (A) at 755 I-J-56 A-B

right would lead to an absurdity. Moreover it may be said to be irrational and discriminatory of the Applicant. As between the general run of plaintiffs and Applicant whose case Section 17 of the Children's Act affected, to his disadvantage, there is inequality[12], which was not intended by the legislature.

[29] It is surely not in the interests of justice or fairness and equity that Applicant's right may be taken away by the stroke of a pen. Imagine waking up on 1 July 2007 to find that not only your status has changed but also certain rights which you were entitled to or which accrued to you no longer exist. The barring of Applicant's common law claim because overnight he became a major is untenable. This unjustifiable consequence could not have been intended by the legislature, as it imposes unreasonable hardship. This interpretation cannot be sustained[13].

[30] The interpretation advanced by the Applicant and assistance therein may be found in Section 39 (2) of the Constitution finds favour with me because to construct it in any other way would be unduly strained and would infringe upon the right of access to courts[14] protected by Section 34 of the Constitution.

[31] Nothing in the Children's Act indicates that it will operate retrospectively. In this context, I refer to Minister of Public Works v Haffajee[15], where Marais JA after reviewing the authorities had the following to say;

> 'In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive

12 Moholmi v Minister of Defence 1997(1) SA 124 (CC) para 21 at 134 B-C
13 Mankayi v Anglogold Ashanti Limited 2011(5) BCLR 453 (CC) para 69 at 471H
14 Mankayi supra para 62 at 470B
15 Minister of Public Works supra at 753B-C

> rights and obligations. If those substantive and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not.'

In my view therefore the amending statute will not always be interpreted as having retrospective effect. It will depend on the impact of Applicant's substantive rights. Accordingly, the Children's Act must be interpreted in a manner which promotes the spirit purport and objects of the Bill of Rights as contained in the Constitution.[16] At the time when the Applicant's cause of action arose he had accrued rights which were protected by statute[17] until he had attainted the age of 22, within which time he may bring his claim for damages.

[32] As indicated, Section 28 (2) of the Constitution protects the rights of children. The Children's Act must therefore be read in such a manner as to not interfere with any accrued rights of a child. Accordingly on a proper interpretation of Section 17 of the Children's Act read with the relevant provisions of the Prescription Act, a child whose cause of action arose before the commencement of Section 17 of the Children's Act is still entitled to the same period of time in which to institute his or her claim for damages as he or she would have had, had the age of majority not been changed.

[33] Obviously, the same does not apply to children whose cause of action arose after the commencement of Section 17. It must be stressed however, that Section 17 could never have been intended to take rights away from a child. Any other construction offends the plain wording of section 12 (2)(b) and (c) of the Interpretation Act. In the circumstances, the Applicant's claim has not prescribed.

---

16 Section 39 (2) of the Constitution

17 Section 1 of the Age of Majority Act 57 of 1972; Section 13 of the Prescription Act 68 of 1969

[34] I now turn to the other two criteria referred to in Section 4(b) of the Act. Firstly, does good cause exist for the failure for the Applicant to give notice to the Respondent, notifying it of his intention to sue for his damages. It emerges from the undisputed facts that Applicant became aware of his claim on 18 January 2006, when he was approximately 18 years and 5 months old. In this regard Applicant's claim would in the ordinary course have prescribed on 19 January 2009, ie 3 years after he had become aware of his claim. The fact that summons was served on Respondent on 3 December 2008, prescription was thereby interrupted[18].

[35] For similar reasons to those set out hereinabove, the Applicant did not initially give the Respondent notice in terms of the Act. He did not appreciate that the Respondent was responsible for his injury and therefore that he had a claim against it. However, as a result of an oversight on Applicant's Attorneys part, notice, on the Applicant's behalf, was sent to the Minister of National Education and not to the Respondent. Smyth's affidavit reveals a devil's brew of mistakes, failures and delays in the prosecution of Applicant's case. Clearly the oversight on her part arose from a failure to appreciate the fact that the Minister of Education and the Respondent are two distinct organs of State. Mr Bedderson submitted that the Applicant's Attorney's failure cannot be attributed to the Applicant. I agree that any failure on the part of Applicants Attorney should not be held against the Applicant.

[36] Secondly, was the Respondent not unreasonably prejudiced by Applicant's failure to give notice timeously? Any prejudice which the Respondent may have suffered as a result of failure to give notice, could not be regarded as unreasonable or insurmountable in the circumstances. Furthermore, the teacher in question remains at the Applicant's former school and is therefore easily contactable.

18 Section 15 of the Prescription Act

[37] The Applicant has at the very least, reasonable prospects of success in the main action. Despite the Respondent's bare denial of the incident in question, there are least two witnesses who will testify for the Applicant that they witnessed the Deputy Principal in question inflict the injury. In addition there is a third witness who may also be able to testify. There is without doubt a prima facie case against the Respondent. The Applicant has a fundamental right to have his evidence and that of his witnesses evaluated in a fair trial against any admissible opposing testimony that the Respondent's witnesses may give at the hearing.

[38] Furthermore, this case is of vital importance to the Applicant. The particulars of claim explain how the injury to his eye has set him back in life. The psychologist's report annexed to the particulars of claim supports this view. The outcome of this case will have an enormous impact on the future of the Applicant's quality of life.

[39] The Applicant in his own words sets out his prima facie case against the Respondent and that this case is of extreme importance to him. Since January 2006 it has been the bona fide intention of the Applicant to pursue his claim against the Respondent and the oversight of Smyth should not prevent him from doing so. It must be stressed that the Applicant was neither aware of nor responsible for the failure to comply with Section 3 (2) (a).

[40] Under the circumstances I am of the view that a proper case for condonation has been made out. The Applicant is entitled to the benefits of constitutional dispensation that promotes rather than inhibits access to courts of law.

[41] In the result the application for condonation is granted with costs.

_____

P Govindasamy AJ

Appearances

for Applicant:	Advocate B S M Bedderson
Instructed by :	Livingstone Leandy Inc
for Respondent:	Advocate J I Henriques
Instructed by:	State Attorney