THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1149/2020

In the matter between:

NMZ OBO SFZ **APPELLANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH AND SOCIAL DEVELOPMENT
OF THE MPUMALANGA PROVINCIAL GOVERNMENT **RESPONDENT**

Neutral citation: *NMZ obo SFZ v MEC for Health and Social Development of the Mpumalanga Provincial Government* (Case no 1149/2020) [2021] ZASCA 184 (24 December 2021)

Coram: ZONDI, MOLEMELA and HUGHES JJA, MEYER and WEINER AJJA

Heard: 17 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 24 December 2021.

Summary: Prescription – notice in terms of s 3(4)*(b)* of Institution of Legal Proceedings Against Certain Organs of State Act – application for condonation – requirements restated – condonation granted as good cause having been established.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Kgoele J sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of Mpumalanga Division of the High Court, Mbombela is set aside and is replaced with the following order:

'The application for condonation for the late service of the notice in terms of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 is granted with no order as to costs.'

JUDGMENT

Hughes JA (Zondi and Molemela JJA, Meyer and Weiner AJJA concurring)

[1] On 3 October 2012, the appellant (NMZ), gave birth to SFZ at Piet Retief Hospital, Piet Retief. SFZ was born following prolonged labour, and was subsequently diagnosed with cerebral palsy due to asphyxia during delivery. NMZ instituted an action in the Mpumalanga Division of the High Court, Mbombela (the High Court) on behalf of SFZ for damages arising from the alleged negligent conduct of the employees of the respondent, the MEC for Health and Social Development of the Mpumalanga Provincial Government (the MEC), during her birth. On 24 October 2019 NMZ applied to the High Court for an order in terms of s 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Act). She sought condonation for her failure to serve a notice of intention to bring legal proceedings against the MEC within the period specified in s 3(2)*(a)* of the Act (s 3 notice). The MEC opposed the application. The High Court dismissed her application on the ground that the delay was unreasonable and the claim lacked any prospect of success. The matter is before this Court with leave of the High Court.

[2] The issue in this appeal is whether the High Court was correct in dismissing the appellant's condonation application for failing to give timeous notice under s 3 of the Act.

[3] On 1 October 2012, NMZ who was 38 weeks pregnant experienced labour pains. She went to Piet Retief Hospital for a medical examination. She was seen by members of the hospital staff. After the review was conducted she was admitted to the maternity ward at 19h30 for an induction to be performed on the following day. The plan ahead was for the nursing staff to monitor the feto-maternal condition every 4 hours.

[4] On the following day, 2 October 2012, NMZ complained of abdominal pains, however, it was noted that there were no 'palpable contractions'. At 9h25 bearing down commenced and she experienced expulsive contractions of 4:10 which resulted in her being admitted to the labour room to prepare for delivery. Delivery only took place on 3 October 2012 at 9h45 with the assistance of an episiotomy. The baby girl was alive but delivered with the cord loose around her neck. The Apgar scores commence at 3/10 to 9/10 with the child not crying and tired; the neonatal diagnosis was 'aspiration pneumonia'. Both the appellant and the child remained in hospital until they were discharged on 1 November 2012 at 11h00.

[5] The appellant alleges that on discharge she was 'informed by the hospital staff that [her] child will take some time to develop'. From the expert reports it is recorded that as at 24 October 2012, that is 21 days after the birth, an additional diagnosis was added to that of the above, being 'Birth Asphyxia' and it was recorded that the child suffered a 'neurological deficit' in that 'she had poor sucking reflex, poor grasp reflex, incomplete Moro and brisk limb reflexes'.

[6] She stated that she was informed on discharge that her child had cerebral palsy and that the child's development would be slower. She observed over time that, indeed, her child was not developing as she ought to and that her development was much slower as compared to other new born babies. The appellant attributed the delay in the delivery of her child as the cause of the child's severe brain injury which resulted in the cerebral palsy.

[7] Sometime in October 2013 the appellant's family had discussions with her pertaining to the medical condition of her child. As a consequence of these discussions she approached her attorneys, Denga Incorporated Attorneys, on 30 October 2013. At this meeting she signed a 'mandate and fee agreement' and was advised to obtain the medical records in order for them to assist her, as they were not able to inform her what went wrong with the delivery without these records.

[8] In terms of the mandate and fee agreement, the attorneys' mandate was to 'render professional legal services to [her], which shall include the right to prosecute or defend proceedings in any competent court and on [her] behalf to take all necessary steps in connection with medical negligence against MEC of Health Mpumalanga'. Notably, the appellant only signed the contingency fee agreement with her attorneys on 11 July 2014.

[9] The appellant claims that she first requested the hospital to provide the required hospital records during the course of November and December 2013. She was advised by the staff to return in 2014 as they had to first locate her file. She returned during April – May 2014 and was told, yet again, to return after a month. Upon her return a month later, she was only given a document that confirmed that she was an outpatient at the hospital. These claims were not disputed by the respondent at all.

[10] On 11 July 2014 she took the document to her attorneys and consulted with them. They advised that the document was not sufficient to make an informed decision regarding the merits of her case and to determine whether the hospital was the responsible party. So, off she went back to the hospital, this time armed with correspondence from her attorneys dated 11 July 2014. This informed the hospital that they acted on her behalf as the letter enclosed a power of attorney and consent from the appellant to inspect her hospital records in its possession.

[11] In September 2014 she returned to her attorneys to enquire if there was any response from the hospital whereupon she was informed that they had not been graced with a response to their enquiry. This was when she became 'discouraged and disillusioned and decided to accept that there was nothing to be done' as even the

attorneys were unsuccessful, so she stated in her founding affidavit. She decided to focus her attention on the wellbeing of her child. However, for good measure, around August 2015 she enquired again from her attorneys if there had been any response from the hospital. Unsurprisingly, nothing was forthcoming from the hospital.

[12] The appellant decided to go back to the hospital in person to follow up on the availability of the hospital records. She was fortunate to encounter a willing female staff member who advised her that her file was kept in a storeroom which was only accessed by the Superintendent of the hospital. This staff member sought some time to get the file on her behalf. Encouraged and assured of her assistance, the appellant allowed her adequate time to locate the file. This produced positive results as she obtained her hospital records in June 2016.

[13] On 11 July 2016 she delivered the hospital records to her attorneys for their attention. Having received the records so requested the attorneys caused the s 3 notice to be delivered to the respondent on 13 July 2016.

[14] In terms of s 3 of the Act, legal proceedings against an organ of state to recover a debt must be instituted by written notice within six months from the date that the debt became due. Such notice should briefly set out the facts giving rise to the debt and such particulars that are within the knowledge of the creditor. If a creditor serves the notice out of time, a state organ may refute the claim, leaving the creditor with no option but to seek condonation in terms of s 3(4) of the Act.[1]

[15] The mandatory compliance with the prescripts of the s 3 notification has been restated in numerous judgments of this Court, including *Mothupi v Member of the*

[1] '(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.
(c) If an application is granted in terms of paragraph *(b)*, the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.'

Executive Council, Department of Health Free State Province where the following was said:[2]

'The object of a provision such as section 3 is to enable the State, a large and cumbersome organisation, to investigate claims so as to consider whether to settle or compromise a claim before costs escalate unnecessarily, or to properly prepare its defence – which may be frustrated if it is unable to investigate relatively soon after the alleged incident occurred.'[3]

[16] Informed from the facts set out above, it is common cause that the claim of the appellant is against the MEC of the Department of Health and Social Development, an organ of State, for damages. This amounts to a 'debt' as envisaged by s 3. It is further common cause that the summons was only served on 7 November 2017 to which the MEC raised a special plea, citing non-compliance with s 3. According to the MEC the s 3 notice ought to have been given 'on or before April 2013'. The MEC's contention is based on the allegation that the cause of action arose in October 2012 when the appellant was admitted to the hospital.

[17] The respondent contends that, at the latest, the appellant consulted an attorney and signed a 'Mandate and Fee Agreement' on 30 October 2013, thus by then the appellant and her attorneys were both aware of the debt. Consequently, so it is contended, by 30 April 2014 the s 3 notice ought to have been transmitted.

[18] Pertinently in the special plea, the respondent placed reliance on that agreement. According to the agreement, the appellant had given her attorneys a mandate to 'take all necessary steps in accordance with medical negligence against the MEC of Health Mpumalanga' and 'to represent [her] and perform the following acts and deeds arising out of the medical negligence in which [she] or [her] child by the name of [SZ] which occurred 30 October 2012'.

[19] In response to the special plea, the appellant applied for condonation in terms of s 3(4)*(b)* for the late delivery of the s 3 notice. Section 3(4)*(b)* sets out the three requirements which must be satisfied for a court to grant condonation for the failure to

---

[2] *Mothupi v Member of the Executive Council, Department of Health Free State Province* [2016] ZASCA 27; [2016] JOL 35575 (SCA).
[3] Ibid para 12.

service a notice in accordance with the prescript of s 3(2)*(a)*. The requisites are the following: the debt ought not to have been extinguished by prescription, there must be good cause for the failure by the creditor and lastly, the state organ must not be unreasonably prejudiced by the creditors' failure. It is instructive to bear in mind that the standard of proof to establish the s 3(4)*(b)* requirements is not on a balance of probabilities but rather, the 'overall impression made on a court which brings a fair mind to the facts set up by the parties'.[4]

[20] It is necessary to reiterate the trite position in terms of s 3(2)*(a)* the time period for the service of the notice is six months from the date on which the debt becomes due. The failure to adhere to such period engages s 3(4)*(b)* which sets out the factors that a court must be satisfied with in order to grant condonation or not. It is well known that these factors are conjunctive for the grant of condonation.[5]

[21] In addition to the s 3(4) requirements set out above, the trite principles for the grant of condonation have to be borne in mind. These were eloquently restated by this Court in *Ethekwini Municipality*:[6]

'Furthermore, the factors set out in s 3(4), must be considered in light of the well-settled principles on condonation. In *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd* this Court restated the factors which need to be taken into account when considering an application for condonation as follows:

"A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."'

---

[4] *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) para 8 (*Madinda*).

[5] *Ethekwini Municipality v Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel* [2021] ZASCA 96; [2021] JOL 50669 (SCA) (*Ethekwini Municipality*) para 8; *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] ZASCA 27; [2010] 3 All SA 537 (SCA) para 11.

[6] *Ethekwini Municipality* para 10; *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); para 26.

[22] I turn to the analysis of the facts of the present case. The first of the requirements of prescription is not in issue as the appellant was not claiming in her personal capacity but rather on behalf of her minor child, which claim has not been extinguished by prescription. This was accepted by the court a quo as common cause and requires no further attention. It was also affirmed by the appellant's counsel during argument before us that the appellant had not instituted a claim in her personal capacity.

[23] The second requirement of 'good cause' encompasses the issue of the delay in instituting the claim, the prospects of success of the claim, the explanation advanced, the bona fide's of the appellant and any contribution in the delay by another party other than the appellant.[7]

[24] This Court stated in *Madinda* that s 3(4)*(b)*(ii) creates an explicit link between good cause and the delay in the institution of the claim.[8] In this regard, the appellant's evidence was that she first sought legal assistance on 30 October 2013 when the first consultation was held with her attorneys and the mandate and fee agreement was signed. This was followed by the signing of the contingency fee agreement on 11 July 2014. She received the hospital records on 11 July 2016. She therefore claims that this is the date on which she acquired knowledge of the facts on which to formulate a claim against the MEC.

[25] The difficulty that the appellant is facing is that on her own version she was informed on discharge from the hospital on 1 November 2012 by the hospital staff that her baby had cerebral palsy. A further difficulty, was that she was informed that her child's growth would be slower and verily she observed this first hand. This led to a family conclave in October 2013 where her family advised her to seek legal advice, which she did on 30 October 2013.

[26] In my view, at best the appellant acquired knowledge of the material on which her claim was based on 11 July 2014, when she received her outpatient documents

---

[7] *Madinda* para 10.
[8] Ibid para 12.

from the hospital which she handed to her attorneys. These documents confirmed her admission, delivery of the child at the hospital and that the child had cerebral palsy. At such time, in my view, the appellant had at her disposal all the relevant facts necessary to issue the s 3 notification, as she had knowledge of the identity of the debtor and the facts which gave rise to the debt.[9] This to my mind is when prescription would have been initiated. Thus, the service of the notification on 13 July 2016 was clearly out of time and not served within the prescribed six months from when the debt became due.

[27] It is necessary to point out that because the appellant had all the relevant facts pertinent to pursue her claim, as at 11 July 2014, there was no need to have the hospital records on hand for service of the s 3 notification. This is demonstrated by the fact that the notice in question served by the appellant does not even contain factors therein which are established from the hospital reports.

[28] Nevertheless the enquiry does not end here in respect of 'good cause'. In this case the cause of the delay needs to be weighed against the assessment of the merits of the case to ascertain whether the merits mitigate fault, thus advance prospects of success on the merits. In *Madinda* this Court stated that prospects of success on the merits could mitigate fault.[10]

[29] The court a quo summed up the case of the appellant alluding to the merits thereof as follows:

'As far as prospects of success is concerned, the legal representative of the applicant submitted in this regard that it is clear from the facts given by the applicant that since she was admitted and complaining of lower abdominal pain on 2 October, a period of 8 hours passed by without being checked. The last time she was checked was the previous day at 22h30 and then again on the 3rd at 6h30, and she delivered the baby three hours thereafter. She indicated that every time when she requested for help, she was not attended to except to be told that it was not yet her time for delivery.'[11]

---

[9] Section 12(3) of the Prescription Act 68 of 1969 -
'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.'

[10] *Mabinda* para 12.

[11] Para 40 of the court a quo judgment.

In my view, the court a quo committed a misdirection, when the learned judge ignored the fact that the hospital staff failed to adhere to the mandatory 4-hourly monitoring and concluded that the appellant had failed to establish a prospect of success and that her explanation on 'good cause' was found wanting.

[30] In addition, we should not lose sight of the fact that on admission of the appellant it was clearly stated that feto-maternal monitoring should be conducted at 4-hourly intervals, which from the records appears not to have been adhered to at all. An example is that the decision to monitor 4-hourly was mandated on 1 October 2012 at 19h30. The next monitoring recorded was 2 October 2012 at 6h02. Further, examination of the records reflect that a maximum of 8 hours passed and a minimum of 6 hours passed in between examinations of appellant. This strongly suggests that adherence to the initial protocols mandated were not followed by the respondent.

[31] It is apparent that there was no feto-maternal monitoring at 4-hourly intervals as recommended on admission. The hospital records indicate that from admission at 19h30 on 1 October 2012 the next examination was at 06h02 on 2 October 2012 and thereafter at 08h35, 11h00, 16h20 and 22h30. Subsequently, on the same day we find entries dated 2 October 2012 at 06h30, 08h30, 09h15 and delivery on 3 October 2012 at 09h45.

[32] In my view, based on the aforesaid alone, a prima facie case of negligence has been established. As I have stated above the standard to be satisfied in terms of s 3(4)*(b)* is not on a balance of probabilities but rather on 'the overall impression made on a court which brings a fair mind to the facts' advanced by the parties.[12]

[33] I now turn to deal with the expert reports at hand. Dr Archer, an Obstetrician/Gynaecologist, asserted that there was a sentinel type of event which could not have left a 'footprint'. Conversely, Professor Cooper, Paediatrician/ Neonatologist, initially opined that '[i]t therefore seems that the neonatal encephalopathy that … manifested was due to a preceding severe hypoxic ischaemic insult…. [T]here did not appear to be any subsequent sentinel event … the acute

[12] Footnote 4.

profound hypoxic ischaemic brain injury occurred during the 45-50 minutes prior to delivery'.

[34] The report of Paediatric Neurologist, Dr Janse van Rensburg, revealed that there was no sentinel event. She concluded that possibilities for the neonatal encephalopathy and the subsequent neurological deficit could be a case of: 'hypoxic-ischaemic brain injury suggested by the MRI report; Metabolic-genetic disorders, either mimicking hypoxic-ischaemic injury, or predisposing the brain to, and/or causing this kind of injury. Other causes that need to be excluded are toxic and infective conditions, etc. There is no evidence on the MRI [scan] that the latter played a role.'

[35] Dr Janse van Rensburg was also adamant that there was no sentinel event. She opined that the hypoxic ischaemic injury was likely to have occurred at some point or points during the pregnancy rather than in labour.

[36] Having received the report from Dr Janse van Rensburg, Professor Cooper concluded that '[i]t is probable that [SZ] suffered an injury to the periventricular white matter prior to 34 weeks gestation resulting in the spastic diplegia component of the brain injury and then a second brain injury of the acute profound type during the last 45-50 minutes prior to delivery'.

[37] I am therefore persuaded that this is a matter that ought to proceed to trial as there are conflicting expert opinions and inconsistent views which require ventilation with the aid of oral evidence. It therefore appears that on the conspectus of the evidence before it, the court a quo misdirected itself by concluding that based on the medical and expert reports, there was nothing to demonstrate that the appellant had reasonable prospects to succeed with her daughter's claim.

[38] A further factor which must also be considered in this matter is that the respondent also contributed to the delay that occurred. In about November/December 2013 the appellant requested hospital records from the hospital. The hospital could not provide her with the required documents as the hospital staff was unable to locate her file. When she returned to the hospital some six months later her file was still missing and the only documents the hospital was able to trace were those that were in her

outpatient file which confirmed her admission and the child's diagnosis. The delay and the reasons therefor are not disputed by the respondent.

[39] Having regard to the respondent's own delay and the lack of explanation for it, in my view the respondent's contention that it has suffered unreasonable prejudice as a result of the appellant's delay is opportunistic and self-serving.

[40] It must be borne in mind that this is a claim for a minor and as such, until it prescribes, there would be every opportunity for the minor's claim to be pursued. This is yet a further indication that there can be no unreasonable prejudice suffered by the respondent.

[41] For the reasons alluded to above, I am satisfied that the appellant established the requirements as set out in s 3(4) for the granting of condonation. Consequently, the court a quo erred when it refused the application for condonation in terms of s 3(4) and the appeal must succeed.

[42] Turning to the issue of costs, as it has been determined that the appellant should have been granted condonation, the appropriate order was for costs to follow the result. However, in this case the appellant and her attorneys were both far too lackadaisical, and at some stage the appellant even gave up on this case. Thankfully, she came to her senses for the sake of the minor child. The respondent's opposition was not unreasonable. In these circumstances, the appropriate order would be that there be no order as to costs in this court and the court a quo was correct in ordering no costs.

[43] In the result the following order is granted:

1 The appeal is upheld with no order as to costs.

2 The order of Mpumalanga Division of the High Court, Mbombela is set aside and is replaced with the following order:

> 'The application for condonation for the late service of the notice in terms of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 is granted with no order as to costs.'

_____

W HUGHES

JUDGE OF APPEAL

Appearances

For appellant:	Adv. G Skakoane SC and Adv. DD Mosoma
Instructed by:	Denga Inc. Mbombela
	Matsepes Inc., Bloemfontein
For respondent:	Adv. H Van Eeden and Adv. Cassim
Instructed by:	Adendorff Theron Attorneys, Mbombela
	Lovius Block Inc.,Bloemfontein.