IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 4393/2022

In the matter between:

HLONGWANE MARIA **APPLICANT/PLAINTIFF**

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH **RESPONDENT/DEFENDANT**

CORAM:	MTHIMUNYE, AJ
HEARD ON:	30 NOVEMBER 2023
DELIVERED ON:	11 MARCH 2024

[1] The applicant seeks an order:

(i) Confirming that her notice of intention to institute legal proceedings in terms of section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (“the Legal Proceedings Act”) was timeously filed; alternatively

(ii) Condonation of the late filing of her notice of intention to institute legal proceedings in terms of section 3 of the Legal Proceedings Act. The respondent opposes this application and seeks its dismissal with costs.

[2] The factual matrix of this matter is as follows: During the later stage of her pregnancy, the applicant was referred to Fezi Ngubentombi Hospital by Nsimaholo Clinic as a high risk pregnancy. On presenting herself on 13 May 2020, she was informed by the staff of Fezi Ngubentombi Hospital that there has been a mix up with dates and was told to return on 20 May 2020 to give birth by caesarean section.

[3] She presented herself on 20 May 2020 and was admitted to give birth by caesarean section. On 21 May 2020 at about 13:50 a caesarean section was performed on her and a live baby girl was extracted from her. No complications were recorded. For purposes of this application I do not deem it necessary to tabulate the progress notes of what happened after the delivery, save to state that at about 16:30, it was recorded that a broad ligament pedicle was accidentally pricked during the caesarean section, which caused other complications. She was then transferred to Boitumelo Hospital by ambulance and when she woke up from ICU, she was informed that her

womb had been removed as it was damaged. She was discharged on 01 June 2020.

[4] On 10 April 2021, the applicant consulted an attorney for the first time and the attorneys requested medical records on 14 April 2021. Although the applicant, in its founding affidavit averred that the medical records were received only on 26 January 2022, in her replying affidavit she conceded that they were received in October 2021. She had a follow up consultation with her attorney on 03 February 2022, on which date she gave her attorney instructions to proceed with the claim for damages. On 06 June 2022, the attorney served the section 3 notice to the respondent.

[5] This court is called upon to determine, if the applicant has complied with the provisions of Section 3 of the Legal Proceedings Act. In the event that the court finds that she did not, then the court is asked to condone the non-compliance. It follows therefore that if the court finds that the applicant did comply, there will be no need to deal with the condonation application.

[6] The respondent opposes the primary part of this application purely on the basis that the applicant did not comply with the six months' notice period and in respect of condonation, that the applicant's case has no merits; that no good cause has been shown for the court to grant condonation and that the respondent will be prejudiced if condonation is granted.

[7] Section 3 of the Legal Proceedings Act reads as follows:

"3 (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 legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceeding (s)-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

(a) within 6 (six) months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of subsection (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 of state wilfully prevented him or her from acquiring such knowledge"

[8] Subsection (2)(a) requires that the statutory notice be issued within a period of 6 months <u>from the date on which the debt became due</u> (my emphasis). The question that follows then is when does the debt become due for purposes of subsection (2)(a). Subsection (3) answers that question as the date on which the creditor acquires '*knowledge of the identity of the organ of state and the facts that give rise to the debt*'. The pertinent question therefore for this court to answer in this matter is, when did the applicant acquire the knowledge referred to in subsection (3); on 21 May 2020 or thereabout when the caesarean section was performed or the womb was removed, OR on 10 April 2021 when she consulted an attorney. The statutory notice was served on 06 June 2022, which was two years after the caesarean section was performed and almost 14 months after the applicant first consulted with her attorneys.

[9] The applicant argues that the Section 3 notice was served approximately 5 (five) months after receipt of hospital records and 4 months from the date on which she gave the attorney instructions to proceed. This argument falls flat in the face of the fact that the medical records were made available in October 2021 and not in January 2022 as initially averred by the applicant. She submits that she did not know of the facts giving rise to the debt and the identity of the debtor as well as about the statutory notice requirement until she was so informed by her attorney.

[10] The applicant has argued further that she was deprived of an opportunity to serve and file the statutory notice within 6 months of her consultation with her attorney by the respondent's delay in providing medical records. She consulted on 10 April 2021. The medical records were requested on 14 April 2021. It cannot be argued that no attorney can make a proper assessment and be able to so advise his / her client on whether or not they have a claim having not had sight of medical reports. The medical reports were made available to the attorney in October 2021 which was six months from the date of request. Even if this court were to be with the applicant in this regard, she still served the notice in June 2022, eight months after the medical records were received. From a simple reckoning of days method, it is apparent that when regard is had to all the days upon which the applicant can be said or deemed to have acquired knowledge as envisaged by sub-section 2(a), the serving of the notice falls outside of the statutory six months. Consequently, the applicant did not comply with the provisions of section 3 of the Legal Proceedings Act in respect of the six months' notice.

[11] I now turn to deal with the condonation application. Section 3(4)(b) of the same Act sets out the requirements for condonation of non-compliance with the timeframes set out in section 3(1) and (2) and provides that a court may grant an application for condonation if it is satisfied that:

> *"(i) the debt has not been extinguished by prescription;*
> *(ii) good cause exists for failure by the creditor; and*
> *(iii) the organ of state was not unreasonably prejudiced by the failure."*

[12] In **Minister of Agriculture and Land Affairs v C R Rance 2010 (4) 109 (SCA)** at 113A, it was stated that the requirements for condonation listed in section 3(4)(b) are conjunctive and must all be established by the party seeking condonation. The phrase *'if [the court] is satisfied'* has long been recognised as setting a standard which is not proof on a balance of probabilities but the overall impression made on a court. This principle was clearly enunciated in **Madinda v Minister of Safety & Security [2008] 3 All SA 143 (SCA)** at para 8 as follows:

> *"a standard which is not proof on a balance of probabilities but rather an overall impression made on the court which brings a fair mind to the facts set up by the parties"*

I now turn to deal with the three requirements individually.

Prescription

[13] In my view, it is not necessary to discuss this requirement in any detailed form as it is common cause that the claim had not prescribed when the summons was issued on 14 September 2022.

Good Cause

[14] The respondent averred that the applicant has shown no good cause for the delay thus falling short of meeting the second requirement for condonation. In **Madinda v Minister of Safety & Security [2008] 3 All SA 143 (SCA)** at para 12, the Supreme Court of Appeal analysed the meaning and effect of the concept of 'good cause' and found it to be more about considering of all factors which bear on the fairness of granting the relief. These factors may include prospects of success, reasons for delay, sufficiency of the explanation offered and the *bona fides* of the applicant. It is not for this court to decide on the merits of the case. I however have considered the applicant's allegations that the respondent failed to employ suitably qualified and experienced medical practitioners who would be able to examine, manager and give

appropriate advice in respect of the procedure to perform a caesarean section, as a result thereof, a broad pedicle ligament was raptured, causing arterial bleeding and damaging her womb. In the event that these allegations are proven to be true, I am of the view that the prospects of success favour the applicant.

[15] In respect of the causes of the delay, the applicant has submitted that the medical records, received after a long delay through no fault of the applicant, had to be sent to experts for an opinion on whether or not the applicant would have a claim. It was only after such an opinion was received that the notice was served. I cannot find reasons to reject this explanation as unreasonable and unacceptable as 'good cause'.

Prejudice

[16] With regards to prejudice, the applicant submits that there would be no prejudice. The respondent pleaded no prejudice in its plea and in its answering affidavit, it submitted that she *"will be prejudiced if she was to defend a claim that has not merits…"*. It is not for this court to decide whether or not the applicant's claim against the respondent has merits or not. For this reason, I must reject the respondent's averment in this regard. In the **Madinda** case, the Supreme Court of Appeal cautioned the courts to "*be slow to assume prejudice for which the respondent itself does not lay a basis".* I am not persuaded that the respondent has been unreasonably prejudiced by the applicant's failure to comply with the timelines stipulated in section 3 of the Legal Proceedings Act, neither will it be by this court granting this condonation application.

Consequently, I make the following Order:

Order

1. The application for condonation is granted.
2. Costs shall be costs in the cause.

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D. P. MTHIMUNYE, AJ

Appearances:

For the Applicant/Plaintiff:	Adv. N Van Der Sandt
Instructed by	Jerry Nkeli & Associates Inc c/o Webbers Attorneys Bloemfontein
For the Respondent/Defendant:	Adv. R.K. Ramdass
Instructed by:	State Attorney Bloemfontein