

SOUTH AFRICA / JUDGMENT

Dickson v MEC: Department of Health Free State Province (2132/2021) [2025] ZAFSHC 124 (7 May 2025)

[2025] ZAFSHC 124

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

2132/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable

/ Not reportable

Case

no: 2132/2021

In

re: 2100/2021

In

the matter between

ROSE

VERONICA DICKSON

APPLICANT

and

THE

MEC: DEPARTMENT OF HEALTH

FREE

STATE PROVINCE

RESPONDENT

Coram:

Opperman J

Heard:

28 November 2024

Delivered:	7 May 2025. This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 7 May 2025 at 15h00
Summary:	Application for condonation – s 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. ORDER 1. The applicant complied with the requirements of s 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, having regard to the provisions of s 3(3)(a); 2. In the alternative is condonation granted to the applicant in terms of section 3(4)(b) of the Legal Proceedings Against Certain Organs of the State Act 40 of 2002 for failure to serve a notice in terms of s 3(2)(a). 3. No order is made as to costs.

JUDGMENT

Opperman J

Background

and the law

- [1] This is an application concerning compliance with the requirements of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act).[1] The applicant instituted action proceedings against the respondent for the payment of damages allegedly suffered by her pursuant to medical services provided by the respondent.
- [2] Section 3(1)(a) of the Act provides that no legal proceedings for the recovery of debt may be instituted against an organ of the state unless the creditor has given said organ of the state notice in writing of the intention to institute the legal proceedings. Section 3(2)(a) of the Act prescribes that the notice must be served within six months from the date on which the debt became due.
- [3] The subject of ss 3(1)(a) and 3(2)(a) is sue generis and specific to the legislation, namely the Act. Non-compliance is not fatal nor final. Section 3(4) provides that if an organ of state relies on a creditor's failure to serve a notice in terms of subsec (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure. 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.

If an application is granted in terms of para (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

[4] The primary purpose of the Act is that the organ of state be given notice at an early stage to enable it to investigate the basis of the proposed claim. It is true that the quality of the adjudication of cases is central to the rule of law. I noted in *Edgar v MEC For Health, Free State (Provincial Department Of Health)*:^[2]

‘[5] The aim of the legislation is to “harmonise and create uniformity in respect of the provisions of existing laws... with a uniform notice period which will apply in respect of the institution of legal proceedings against certain organs of state for the recovery of a debt...” It is not to curtail access to courts when litigation is properly due. (Accentuation added)

[6] The history in cases of this nature has shown that ignorance of the law itself, the process and apprehension to enter the arena and litigate in courts, have a severe impact on real access to justice. It is not just for the mere walking through the doors of court; it is to summon the courage to litigate within the realm of dread for the justice system that ignorance, unfamiliarity and inexperience cause. Much consideration often goes into the decision to initiate action. It might take one person a month to ponder the issue; it might take another longer. The reality of funds and the procurement of evidence also lurk.

[7] Justice must however be effective and possible for both parties and the State may not be burdened with claims that are ancient to the extent that evidence had been compromised and the veracity of the administration of justice derided. It is not the case here.’

[5] In *Madinda v Minister of Safety and Security*,^[3] the Supreme Court of Appeal ruled that:

‘[8] The phrase “if [the court] is satisfied” in s 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties... I see no reason to place a stricter construction on it in the present context.’ (Accentuation added)

[6] 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 or it from acquiring such knowledge; and a debt referred to in s 2(2)(a), must be regarded as having become due on the fixed date.^[4] It does, however, not end here. Medical negligence cases are distinctive in nature.

[7] The Constitutional Court ruled in *Links v Member of the Executive Council, Department of Health, Northern Cape Province*[5] (Links) that:

‘[42] There is a further problem with the submission in that it presupposes that any explanation given to the applicant by the medical staff would have identified medical error as the actual or even a potential cause of his injuries. It is not necessary for a party relying on prescription to accept liability. To require knowledge of causative negligence for the test in section 12(3) to be satisfied would set the bar too high. However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises.’ (Accentuation added)

The above also applies to s 3(3)(a) of the Act here.

Disputes

[8] The issues in dispute are:

- (i) The date when the debt became due;
- (ii) prescription;
- (iii) whether good cause exists for the alleged failure by the creditor;
- (iv) whether the respondent was unreasonably prejudiced as result of the failure alleged by the respondent; and
- (v) costs.

The common cause chronology of material events and facts

[9] The chronology of the events[6] that are undisputed is significant and depicts the factual context of the case. It resolves the issues and are:

7 August 2017: The applicant was referred by Dr Claassens to Boitumelo Hospital since she had a lump in her throat.

24 August 2017: The applicant had an appointment at Boitumelo Hospital where she was examined by a Dr Shange, and a date was set for the 27th of October 2017 on which the lump would be removed.

27 October 2017: The applicant was admitted at Boitumelo Hospital.

30 October 2017: The operation was performed by Dr Brink to remove the lump.

1 November 2017: The complainant was discharged from hospital.

15 November 2017: On or about this date the applicant returned to Boitumelo Hospital and informed Dr Shange that her throat was constantly sore and her voice 'was gone'. She was informed that her thyroid was removed and samples were referred to the laboratory for analyses.

30 November 2017: The applicant was informed that she had parathyroid cancer. Dr Shange informed her so and also provided her with a letter addressed to her employer, informing them of the diagnosis and suggesting early retirement due to her condition.

20 December 2017: Dr Shange provided the applicant with a second letter for her employer, informing them that she must be 'medically boarded'

due to the fact that she had to attend oncology treatment and it may worsen her current situation.

21 February 2018: The applicant attended an appointment with an oncologist, Dr Rothman, at Boitumelo Hospital, which was arranged by Dr Shange. Dr Rothman took blood-samples from her as he did not believe that she had cancer.

May 2018: The applicant was informed by Dr Rothman that her blood results confirmed that she did not have cancer.

29 June 2018: The applicant was examined by another medical practitioner who provided her with a letter to present to her employer, informing them that applicant should not be medically boarded since it was a non-cancerous growth that had been removed. She was then referred to an endocrinologist specialist physician.

5 September 2018: The applicant was admitted to Waterfall City Private Hospital for three days for another cancer examination. She was informed that her thyroid had been removed unnecessarily and that she did not have cancer.

5 February 2019: Applicant returned to Dr Shange, who in turn provided her 'with forms to complete in order to return to work'.

8 October 2019: The applicant was informed by another medical practitioner that her 'voice box' had been damaged. As soon as she was informed of this, she arranged to consult with attorneys.

18 October 2019: The applicant met with her attorneys in order to discuss the merits of the case. She was informed that they would be providing

instructions to another attorney to assist with this case.

28 November 2019: The attorney advised that it would be necessary to obtain copies of her hospital records in order to consider the treatment provided by the respondent. A proper analysis of the incident and the respondent's liability could not be undertaken without the medical

records. The attorney further advised that it would be necessary, once the hospital records had been obtained, to instruct an expert in order to consider whether the respondent had been negligent in their treatment.

10 February 2020: The attorney formally requested the hospital records from the respondent by submitting a request for access to a record of a public

body in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA).

June 2020: The respondent requested payment for the records, and payment was made on or about 25 June 2020. The records were however only provided in September 2020. Upon receipt of the medical records the attorney forwarded the records to an internal consultant for the purposes of the consultant considering the records and establishing whether the respondent was indeed negligent in their treatment.

9 March 2021: The internal consultant provided the report wherein the opinion was expressed that substandard care was rendered by the respondent and it was advised that the matter be referred to an expert general surgeon for further comment.

12 March 2021: The statutory notice was sent.

12 May 2021: Summons was issued on the main claim which was duly served upon the respondent on 12 May 2021.

6 October 2021: Respondent served their plea wherein they denied compliance with Section 3(2) the Act as proper.

12 July 2022: The application for condonation was filed and served.

The date when the debt became due and prescription

[10] It is crucial in terms of the Act to establish the date when the debt became due; the ‘fixed date’. The respondent maintains

that it is on the date when the medical procedure was performed. This was on 30 October 2017.[7] The date was adapted by the respondent to ‘15 November 2017 and 08 October 2019 respectively’.[8]

[11] The applicant, on the other hand, maintains that the debt became due when she became aware that a cause of action existed, which was on 9 March 2021. She was provided with a report on this date wherein the

opinion was expressed that substandard care was rendered by the respondent.

[12] Notice in terms of the Act was immediately issued and served on 12 March 2021 and not out of the time prescribed. Summons was issued on the main claim, which was duly served upon the respondent on 12 May 2021.

[13] It was proven beyond any doubt that the cause of action was not established on either 30 October 2017 or 15 November 2017. The applicant did her due diligence to prevent burdening the respondent with unsubstantiated litigation. In compliance with Links and s 3 of the Act, she legally so, ascertained the veracity of her claim and only received word of it on 9 March 2021. I am convinced that the date when the debt became due, ex lege, is 9 March 2021. The claim has not prescribed and the notice was not late.

[14] If I am mistaken and, in the alternative, the respondent turned on their original plea and expressly stated that the applicant failed to satisfy the second and third requirements of s 3(4)(b) of the Act.[9]

[15] The applicant was informed by a medical practitioner on 8 October 2019 that she suffered damage as result of the medical procedure and she immediately, on 18 October 2019, consulted her attorneys. If the

court regards the date that the debt became due as 8 October 2019, condonation in terms of the Act must be considered.

[16] The respondent denies liability for medical negligence. Relevant here is the special plea of the respondent, which was filed and served on 6 October 2021. However, the core of the case for the respondent came to light in paras 13.2, 14, 16 and 17 of the answering affidavit in casu.

[17] It is not the case for the respondent in the answering affidavit, contrary to the plea of 6 October 2021, that the claim for damages has prescribed. What can be ascertained from the papers is that there lies a complaint that the applicant dragged her feet in bringing the current condonation application.[10] The special plea was filed on 6 October 2021 and the condonation application only came to the fore on 12 July 2022; approximately nine months later.[11]

[18] The argument does not assist the respondent. The reasonableness of the delay must be measured in light of the circumstances of this case. The notice was served on 12 March 2021 and summons issued on 12 May

2021. The special plea by the respondent was delayed by five months: 6 October 2021. The application for condonation came on 12

July 2022, about nine months later. The pot is calling the kettle black; both parties could have litigated faster and might have just cause for the delay. This brings issues of good cause and prejudice to the fore.

Whether good cause exists for the alleged failure by the creditor and the alleged unreasonable prejudice suffered by the organ of state

[19] The gripe of the respondent is prejudice in that almost five years have lapsed since the applicant's operation on 30 October 2017[12] before this application was lodged. According to the respondent several officials and employees of them who were employed at the

hospital are no longer within the Department: 'The respondent cannot state with certainty that it will, after all this time, be able to produce all relevant witnesses.'[13] The respondent does not state who the witnesses in question are why it will not be possible to trace them. The prejudice is thus vague. The fact remains that the veracity of the adjudication of cases must be protected and time limits in civil litigation serves a real purpose.

[20] The applicant wants for the court to order that:

'1. The Applicant complied with the requirements of Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, having regard to the provisions of Section 3(3)(a);

2. Alternatively, the Applicants' non-compliance with Section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002, is hereby condoned;

3. The Respondent pay the costs of this application on an attorney and client scale.'[14]

[21] Crucial is the proven case for the applicant in the founding affidavit that:

'7.8.3 As I have already dealt with above, I only became aware of any possible negligence once I was advised of my possible medical negligence claim in the alternative when my attorney satisfied himself as to same having canvassed.

7.8.3.1 The delay was caused mainly due to the fact that I attended to numerous medical treatments after my initial operation and only in October 2019 was, I informed that my voice box has been damaged. A further delay was caused due to the fact that the Respondent did not provide the requested records timeously. The further delay from date of receipt of plea was due to the necessity and difficulty of arranging a consult between myself and my attorneys at an earlier time.' (Accentuation added)

[22] Factually, the reality is that the applicant only established the veracity of the cause of action on 9 March 2021 and the notice was filed on 12 March 2021. The notice was thus not late.

[23] She was however advised of the damage on 8 October 2019. On this scenario, the filing of the notice was late. The application for condonation was filed on 22 July 2022 subsequent to the plea of the respondent on 6 October 2021. The nine months in the delay to bring the condonation application is not unreasonable in the context of the facts in casu. The respondent waited from May 2021 to October 2021 to file the special plea against the alleged late filing of the notice; this was a period of five months.

[24] The cause of action was not known to the applicant on the date of the operation on 30 October 2017. This might be why the respondent did not rely on prescription in the answering affidavit. Counsel for both the parties did deal with the issue of prescription, but it seems to have been *ex abundanti cautela*. It was pleaded but is not part and parcel of the case of the respondent in the answering affidavit.

[25] The respondent has not referred the court to real prejudice and the facts show that a prospect of success exists in light of the careful manner in which the applicant considered her case. The chronology of the events dictates that the delay to file the notice was *bona fide*. The opinions of experts were obtained and the decision to institute

action was not taken without due consideration. Good cause does exist for the failure to file the notice within six months after the 8th of October 2021.

[26] In conclusion, the claim is not prescribed, good cause exists for the delay and the organ of state was not prejudiced.

Costs

[27] The issue of costs remains. Condonation is an indulgence by the court and has been described as follows:

‘Where a litigant applies to court for condonation of non-compliance with the provisions of statutes or the rules of court and for

consequential relief, the general rule is that the applicant should pay the costs of the application. . . . On occasion the court will make no order as to costs where there is an application for condonation which is opposed. . . .’[15]

[28] Failure of the parties to negotiate the condonation is also important. In *Willemse v Minister for Health, Free State Province*[16] the court made no order as to costs and noted that:

‘[34] Both parties are blameworthy for being embroiled in these proceedings including the condonation application in the court *quo*. The applicant failed to take the liberty of seeking the respondent’s consent to condonation prior to launching the condonation

application. Similarly, the respondent vigorously opposed the condonation application and the appeal merely on the basis of cost

whereas it could have consented to the condonation and only opposed the cost issue. The opposition was unreasonable and unnecessary.’

[29] Having regard to the above-mentioned factors, the following order is made:

1. The applicant complied with the requirements of s 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, having regard to the provisions of s 3(3)(a);

2. In the alternative is condonation granted to the applicant in terms of section 3(4)(b) of the Legal Proceedings Against Certain Organs of the State Act 40 of 2002 for failure to serve a notice in terms of s 3(2)(a).
3. No order is made as to costs.

OPPERMAN J

Appearances For the applicant: I Sander Instructed by: VZLR Inc. Pretoria c/o Du Plooy Attorneys Bloemfontein For the respondent T L Manye Instructed by: State Attorney, Bloemfontein: Free State

- [1] Section 3 reads as follows: ‘3. Notice of intended legal proceedings to be given to organ of state.— (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; or (b) the organ of state in question has consented in writing to the institution of that legal proceedings— (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 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 or it from acquiring such knowledge; and (b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date. (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.’

[1] Section 3 reads as follows:

‘3. Notice of intended legal proceedings to be given to organ of state.—

- (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; or
- (b) the organ of state in question has consented in writing to the institution of that legal proceedings—
 - (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 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 or it from acquiring such knowledge; and
 - (b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.
- (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.'

- [2] Edgar v MEC For Health, Free State (Provincial Department of Health) (6087/2022) [2023] ZAFSHC 120 (19 April 2023).
- [3] Madinda v Minister of Safety and Security (153/2007) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA) (28 March 2008).
- [4] Section 3(3)(a) of the Act.
- [5] Links v Member of the Executive Council, Department of Health, Northern Cape Province (CCT 29/15) [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) (30 March 2016).
- [6] Founding affidavit paras 5 and 6 on pp 6 to 12. Also see para 7.8.2 (7.8.2.1 to 7.8.2.7)
- [7] The date of the operation. See heads of argument for the respondent para 4.1 and the plea of 6 October 2021 at para 1.6.
- [8] Para 16 of the answering affidavit.
- [9] Paragraph 14 of the answering affidavit.
- [10] Paragraph 19.1 of the answering affidavit: 'The applicant failed to deal with her failure to apply for condonation after the plea was filed. The applicant therefor simply fails to deal with the undue delay.' Also, see para 14.1 of the answering affidavit.
- [11] Paragraph 17.1 of the answering affidavit.
- [12] The date of 27 October 2017 averred is wrong since the medical procedure is trite to have been performed on 30 October 2017.
- [13] Para 21.1 of the answering affidavit.
- [14] Notice of motion filed on 12 July 2022.
- [15] AC Cilliers Law of Costs Service Issue 48 at 2-67-2-68.
- [16] Willemse v Minister for Health, Free State Province (A17/2020) [2021] ZAFSHC 8 8 (21 January 2021).

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