

SOUTH AFRICA / JUDGMENT

# Edgar v MEC For Health, Free State (Provincial Department Of Health) (6087/2022) [2023] ZAFSHC 120 (19 April 2023) [2023] ZAFSHC 120

## COURT

Free State High Court, Bloemfontein

## BEFORE

Opperman

## CASE / FILE NUMBER

6087/2022

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## FLYNOTES:

MEDICAL NEGLIGENCE AND NOTICE TO STATE  
CIVIL  
PROCEDURE – Organ of state – Notice –  
Condonation – Injury to foot – Alleged negligence  
in  
treatment causing compartment syndrome – Consultation with  
attorneys, time taken in obtaining medical records and  
then  
medico-legal report – Delay not unreasonable in the  
circumstances nor male fide – Fair administration of  
justice  
demands that condonation be granted – Opposition to  
application for condonation in face of the strong merits  
of the  
case and complete lack of any prejudice – MEC to pay costs  
of application – Institution of Legal Proceedings  
Against  
Certain Organs of the State Act 40 of 2002, s 3(4).  
IN  
THE HIGH COURT OF SOUTH AFRICA  
FREE  
STATE DIVISION, BLOEMFONTEIN  
Case  
no: 6087/2022

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

the matter between: KERRY  
LEE THERESA EDGAR Applicant  
and  
THE MEC FOR HEALTH,  
FREE STATE  
Respondent  
(PROVINCIAL  
DEPARTMENT OF HEALTH)

CORAM: OPPERMAN, J  
HEARD

ON: 13 APRIL 2023  
DELIVERED  
ON: 19  
APRIL 2023. The judgment was handed down electronically by  
circulation to the parties' legal representatives by email and  
release to SAFLII on 19 April 2023. The date and time for hand-down  
is deemed to be 19 April 2023 at 15h00

## JUDGMENT

BY: OPPERMAN, J

SUMMARY: Opposed application for condonation in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act, 40 of 2002

## JUDGMENT

- [1] The application that lies before court for adjudication evolved from the institution of legal proceedings for damages arising out of alleged negligent medical treatment administered to the applicant. The claim in the main case is now based on the conclusion of the experts of the parties that drafted a "JOINT MINUTE OF MEETING" dated 5 June 2022:[1]
1. We agree that Kerry Edgar sustained an injury to her right foot as a result of a fall while hiking on 1/09/2019.
  2. We agree that this injury was diagnosed an intraarticular comminuted calcaneal fracture.
  3. Dr Versfeld notes that this fracture may have been a compound fracture.
  4. We agree that this fracture could be treated in different ways, including a closed reduction and casting, or an open reduction and internal fixation.

5. We agree that, from the history and examination, she developed a compartment syndrome from her injuries, which was worsened by the application of a full cast.
6. We agree that appropriate treatment for the compartment syndrome would have prevented the effects of the compartment syndrome.
7. Dr Versfeld is of the opinion that failure to treat the early symptoms and signs of the compartment syndrome was negligent treatment.
8. Dr Versfeld is of the opinion that the compartment syndrome has resulted in serious symptoms and disabilities affecting her right foot (mostly the front part of her foot).
9. We agree that she suffers from symptoms and disabilities related to the compartment syndrome affecting her right foot, which was a preventable complication.
- [2] The parties in casu are at odds with each other about the condonation applied for by the applicant in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act, 40 of 2002 (the Act).
- [3] The Preamble of the Act, among others, acknowledges that South Africa has moved from a parliamentary sovereign state to a democratic constitutional sovereign state; the Bill of Rights is the cornerstone of democracy in South Africa and that the State must respect, protect, promote and fulfil the rights in the Bill of Rights.
- [4] It goes on to recognise that section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum; the right of access to courts may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution.
- [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.
- [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.
- [8] The peculiarity of this case is that the joint minutes of the experts supra have given clarity on the merits of the main claim on 5 June 2022. The respondent wants more detailed explanations for the delay in the sending of the required notice timeously, for the failure to launch the application for condonation as soon as she realised that the condonation is needed or, within a reasonable time and it is held that she did not prove that the respondent did not suffer

unreasonable prejudice due to the delay.[2]

- [9] The law applicable to the facts of this case is to be found in section 3 of the Act[3] and the dictum of Premier of the Western Cape Provincial Government NO v Lakay (184/11) [2011] ZASCA 224; 2012 (2) SA 1 (SCA); [2012] 1 All SA 465 (SCA) (30 November 2011).
- [10] The following in the Lakay-matter is relevant:
- [12] The next question is whether the court a quo was correct in its conclusion that condonation should be granted for the applicant's failure timeously to give notice of the action to the Premier. In terms of s 3(4), a court may grant an application for condonation for such failure if it is satisfied on three matters:
- (i) that the debt has not been extinguished by prescription;
  - (ii) that good cause exists for the failure by the creditor; and
  - (iii) that the organ of state was not unreasonably prejudiced by the failure.

[13] This court said in *Madinda v Minister of Safety and Security*

[2008] ZASCA 34; 2008 (4) SA 312 (SCA):

'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. See eg *Die Afrikaanse Pers Bpk v Nesor* 1948 (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context.' (Accentuation added)

- [17] The second question on which a court must be satisfied is that 'good cause' exists for the failure by the creditor to give the notice. The minimum requirement is that the applicant for condonation must furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess his/her conduct and motives: *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H-353A, quoted in the context of the 2002 Act in *Madinda's* case.<sup>11</sup> Beyond that, each case must depend on its own facts. As Innes CJ said in *Cohen Brothers v Samuels* 1906 TS 221 at 224 (in the context of an application for leave to prosecute a lapsed appeal, but the remarks are equally appropriate to s 3(4)(b)(ii) of

the 2002 Act):

'In the nature of things it is hardly possible, and certainly undesirable, for the Court to attempt to [define good cause]. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown.' (Accentuation added)

[11] The exposition of counsel for the applicant of the events in their Heads of Argument dated 15 March 2023 are correct and true; both in fact and as to the submissions on the application of the law thereto in the circumstances of the case. These are:

1. In and during September 2019 the Applicant was treated for injuries to her right lower limb sustained in a hiking accident.
2. On 14 September 2020 the Applicant consulted her attorneys of record concerning the treatment administered to her at the Hospital and the sequelae thereof.
3. The Applicant has no knowledge of legal matters.
4. The Applicant consulted with her attorneys of record regarding a possible claim against the Respondent and arrangements were made for the relevant medical records to be obtained.
5. It took a considerable period of time to obtain the relevant medical records.
6. Arrangements were also made for a medical legal report to be obtained from an expert orthopedic surgeon.
7. The medico-legal report was received on or about 12 August 2021.
8. The Applicant received advice regarding the claim against the Respondent and gave instructions to her attorneys of record to institute the action against the Respondent.
9. On 24 August 2021, written notice in terms of section 3 of the Act was dispatched to the Respondent.
10. The Applicant instituted action proceedings out of this Honorable Court against the Respondent under case number 4398/2021.
11. The summons was served on the Respondent on 27 September 2021.
12. On 5 June 2022 a meeting was held between the Applicant's expert orthopedic surgeon, Dr GA Versfeld, and Professor S Matshidza, an orthopedic surgeon, who has been employed as the expert witness for the Respondent.
13. The expert orthopedic surgeons recorded by agreement that the complication of compartment syndrome affecting the Applicant's right foot, from which she still suffers from symptoms and disabilities, could have been prevented, had appropriate treatment been administered by the Respondent.

14. The Respondent's Plea was served and filed on 14 September 2022 together with a Special Plea, in terms of which reliance was placed upon the Applicant's failure to comply with section 3 of the Act.
  15. On 23 November 2022 the Applicant served this application for condonation in terms of section 3 of the Act on the Respondent.
  16. The treatment of the Applicant at the Hospital is well documented.
  17. All employees acting under the Respondent's direction and control were at all material times aware of the nature and consequences of the treatment administered to the Applicant.
- [12] Reading of the above convinces that there is not much more to be said for the delay and the applicant has shown that she has complied with the factors set out in the Act. The respondent did not point the court to any prejudice or complications in the litigation of their case. The experts had all the evidence necessary to formulate their conclusions. The delay was not unreasonable in the circumstances nor male fide. Fair administration of justice demands that condonation be granted to the applicant.
- [13] As to costs: In the instance, costs should follow the result. The opposition to the application for condonation was made in the face of the strong merits of the case for the applicant, a complete lack of any prejudice or potential prejudice to the case of the respondents and a claim for detail that would not have taken the case further; but rather, caused added delays. The delay(s) was, conspicuously so, not extensive or unreasonable on the facts.
- [14] ORDER
1. Condonation is 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 and she is thus granted leave to institute the action brought under case number 4398/2021.
  2. The costs shall follow the result and the respondent is ordered to pay the costs of this application.

M OPPERMAN, J

#### APPEARANCES

On behalf of the Applicant/Plaintiff ADVOCATE P.A. CORBETT SC Mr. T Brivik Malcolm Lyons & Brivik Inc. CAPE TOWN c/o Matsepes Attorneys BLOEMFONTEIN On behalf of the Respondent/Defendant ADVOCATE D.R. THOMPSON Ms. R.E. Greyling State Attorney, BLOEMFONTEIN

[1] Dr. G.A. Versfeld & Prof. S Matshidza: Annexure TB2 as attached to the supplementary affidavit of T Brivik dated 12 April 2023.

[2] Respondent's Heads of Argument dated 4 April 2023 at paragraph 9 on pages 4 to 5.

[3]

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.

[3]

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.

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