

SOUTH AFRICA / JUDGMENT

Hlatshwayo and Others v Member of the Executive Council for Health: Mpumalanga (890/2017) [2022] ZAMPMBHC 22 (30 March 2022) [2022] ZAMPMBHC 22

COURT

Mbombela High Court, Mpumalanga

BEFORE

Mashile

CASE / FILE NUMBER

890/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 890/2017

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:YES

REVISED: YES

30/03/2022

In the matter between:

WILLIAM FANA HLATSHWAYO

First Applicant

THEMBI ELIZABETH MNTOMBENI

Second Applicant

MARIA MTHOMBENI

Third Applicant

ZODWA MTHOMBENI

Fourth Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR

HEALTH: MPUMALANGA

Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

- [1] This is an application brought in terms of the Institution of Legal Proceedings against Certain Organs of State, Act 40 of 2002 (“the Act”). The Applicant seeks an order condoning his failure to serve a notice as contemplated in Section 3(2)(a) of the aforesaid Act timeously on the designated person, Head of Department of the Respondent, in terms of section 4(1)(a) of the Act read with the relevant Schedule of the Public Service Act of 1994.
- [2] The main action involves a claim for damages allegedly arising from emotional shock suffered by the Applicant following the death of his son, Thulani Mthombeni, (“the deceased”). The Applicant is said to have sustained the emotional shock as a result of witnessing the deceased receiving sub-standard medical treatment and care at hospitals under the control and management of the Respondent, which saw his health and physical body decline.
- [3] As will be seen later in this judgment, it is a requirement under the Act that if an applicant intends to claim damages from an organ of State such as the Respondent, a notice ought to be served on the Head of Department of the organ of State within six months from the date on which the cause of action arose failing which an application for condonation must be launched. The condonation application must satisfy three prerequisites described in Section 3(4)(b).

FACTUAL MATRIX

- [4] The background facts from which this application derives, is that on 20 April 2014 the deceased was assaulted and sustained a traumatic subdural haemorrhage following which he was conveyed to Mmametlhake Hospital. He was admitted and temporarily detained for treatment before he could be referred to Witbank Hospital. He was assessed and found to present with a scalp laceration of approximately 2cm. The examination conducted concluded that the injuries with which he presented were too severe for a rural hospital. In consequence, the Applicants were advised that he would be transferred to Witbank Hospital, which was considered a higher level hospital.

- [5] He was still capable of responding to messages on his arrival at the Mametlhake Hospital but his condition is said to have rapidly degenerated leading to his confusion and low level of consciousness. The first opportunity to convey him to the Witbank Hospital by ambulance only materialised on 21 April 2014. He arrived at the Witbank Hospital for investigation and further treatment at 10:47 on that day. The Applicants allege that the deceased was refused treatment and as a result of which he had to be returned to Mmametlhake Hospital later that evening.
- [6] He was again admitted back to Mametlhake Hospital at 20:00 on the evening of 21 April 2014. The Applicants claim that the deceased received no medical attention between the time of his readmission until he was transferred to Rob Ferreira Hospital on 22 April 2014 at 10:00. When he went back to Mametlhake Hospital, the deceased was not aware of his surroundings and his Glasgow Coma Scale had deteriorated to 7/15 indicating a severe head injury. Doctors at the Mametlhake Hospital contacted their colleagues at Rob Ferreira Hospital and arrangements for the deceased's transfer began.
- [7] The deceased was in a coma when he arrived at the Rob Ferreira Hospital. A CT brain scan performed at the Rob Ferreira Hospital revealed an acute subdural and subarachnoid bleeding. By this time his Glasgow Coma Scale score had dropped to 2 – 3/15 and this was regarded as life threatening. Following the CT brain scan, he was admitted to the Intensive Care Unit ("ICU") of the Rob Ferreira Hospital for brain injury management.
- [8] On 14 May 2014, the deceased was still comatose but was able to breathe independently subsequent to removal of a ventilator. At this stage, it had been accepted that Rob Ferreira Hospital could provide no further treatment for his recovery or rehabilitation. As such, he was transferred back to the Mametlhake Hospital for commencement of long-term nursing care. On 11 June 2014, it is recorded that the deceased had developed bedsores from which worms dropped onto the bed and floor. As a result of the bedsores his body also discharged a repugnant odor. Later on 24 June 2014, he was declared dead.
- [9] The Applicant states that in consequence of the conduct of the hospital personnel that he received at the Witbank Hospital, he lodged a complaint with Mr Dumisani Malamule ("Malamule") of the Respondent on 21 April 2014. He specifically drew Malamule's attention to the behaviour of Dr Vilakazi who was persistent that the deceased was to be transported back to Mametlhake Hospital without receiving treatment regardless of his deteriorating health condition.

Between that time and 24 June 2014, the date of death of the deceased, the Applicant alleges to have been in touch with Malamule

who sounded very concerned. When he reported the death of the deceased to him, he swore that he would require the medical personnel

at the Mametlhake Hospital to account to him.

[10] Subsequent to the death of the deceased in 2014, the Applicant and his wife went for counselling at Old Mutual in Meyerspark, Pretoria. Furthermore, he also had to see his pastor to help him deal with the pain. That said, the papers in the court file are silent on how long and often the counselling was nor is there an indication of this with regard to the prayers that the Applicant sought from his pastor. Believing that Malamule would still assist him, he continued to be in constant contact with him during 2014, 2015 and early 2016. Malamule, says the Applicant, never disappointed him with empty promises. The Applicant eventually stopped contacting Malamule in 2016 and resolved to consult with Attorney Ntuli, his former school mate, on 28 June 2016.

ASSERTIONS

- [11] The Applicant is entitled to condonation as long as he has met all the requirements described in Section 3(4)(b) of the Act. These requirements are firstly, that the debt must not have prescribed, secondly, there must be good cause for the delay in instituting the action and thirdly, there must exist no unreasonable prejudice. It is the Applicant's contention that he has met all these three prerequisites. As such, he concludes, is entitled to condonation.
- [12] The Applicant referred to the matter of *Mbhele v MEC for Health for the Gauteng Province*[1], which I will fully discuss later in this judgement. The essence of his argument is that the presence of psychological lesion is not a requirement for a court to award damages in these types of cases. The Applicant mentions several cases, which according to him fortifies his position that medical evidence of a psychological lesion is not strictly necessary.
- [13] Conversely, the Respondent is steadfast that evidence of experts or some form of strong evidence suggesting that the claimant experienced difficulties that could be elevated to some form of a psychological lesion is significant before an award can be made. Other than the claimant stating that he and his wife have attended counselling at Old Mutual at Meyer's Park in Pretoria and that he is still relying on prayers by his minister, no concrete evidence exists to support that contention.
- [14] The case of *Mbhele supra*, did not remove the requirement that where a claim is predicated on emotional shock, a claimant ought to lead evidence to demonstrate that he or she nonetheless suffered shock as a result. Absent this form of evidence, concludes the Respondent, a claim ought to fail.

ISSUES

- [15] On the basis of the above facts, this Court is required to consider whether or not the Applicant has made a case for the court to:

15.1 Condone his omission to serve the Notice upon the Respondent within 6 months of the date of incident from which the debt arose as contemplated in Section 3(4)(a) and (4)(b) of the Act;

15.2 Direct that the notice dated 13 July 2016 served by the Applicant upon the Respondent, the MEC for Health: Mpumalanga, by registered mail on 14 July 2016 is proper and sufficient as a notification to the Respondent indicating her intention to institute legal proceedings;

15.3 Declare that the action instituted by the Applicant against the Respondent on 16 May 2017 was validly and properly instituted;

15.4 Declare the service upon the MEC for Health: Mpumalanga and not the Head of Department to be adequate service;

15.5 Accept that the Mbhele case is authority for the proposition that mere allegation of suffering of emotional shock is sufficient for purposes of establishing a claim.

[16] These issues ought to be addressed by having due regard to the provisions of the three requirements prescribed in Section 3(4)(b) of the Act and case authority on the subject. Failure by the Applicant to demonstrate that he has observed all these requirements conjunctively will necessarily result in a dismissal of the condonation application.

LEGAL FRAMEWORK

[17] This application is founded exclusively on the provisions of Section 3 of the Act. It will therefore be instructive to refer to those provisions in the Act. Section 3 provides:

“(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).”

[18] Section 3(2) stipulates that 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 willfully 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.”

[19] The Applicant having failed to give notice of his intention to institute legal proceedings against the Respondent within the prescribed period of six months and the Respondent having not waived service of the notice in terms of Section 3(1)(b), he now applies to court in terms of Section 3(4) that his failure be condoned. Section 3(4) lays down that:

“(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.”

[20] In *Mohlomi v Minister of Defence*[2], the court described the universal purpose of clauses such as section 3 of the Act in the following terms:

“The conventional explanation for demanding prior notification of any intention to sue an organ of government is that, with its extensive

activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it to consider them

responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.”

[21] The advent of the Act has been followed by a significant rise of litigation on the time bar contained in Section 3(2)(a), on Section 3(4)(b), which concerns condonation and Section 3(4) (b)((i) to (iii) being the conditions that a court hearing the application must satisfy itself that they have been established prior to granting the condonation. Recognising the importance of the time bars in the Act, the Constitutional Court in *Mohlomi* case *supra* stated at Paragraph 11:

“Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Recognising the significance of ordinate 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 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.”

[22] A court needs to be satisfied that all the three prerequisite set out in Section 3(b)(i) to (iii) have been observed prior to granting

condonation. In this regard I can say no more than refer to paragraph 11 of Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd[3] where the court stated:

“[11] As can be seen, s 3(4)(b) circumscribes a court’s power by requiring that it be satisfied that: (i) the debt has not been extinguished by prescription; (ii) good cause exists for the failure by the creditor, i.e. to serve the statutory notice according to s 3(2)(a) or to serve a notice that complies with the prescripts of s 3(2)(b); and (iii) the organ of State was not unreasonably prejudiced by the failure. These requirements are conjunctive and must be established by the applicant for condonation.”[4]

[23] A court possesses an extensive discretion when deciding whether or not an applicant has shown good cause, which it must apply fully conscious of the merits of the matter seen in their entirety[5]. This approach was endorsed by the Constitutional Court in the matter of Ferris v FirstRand Bank Ltd[6] where it was stated that precision is not the only consideration in determining whether an application for condonation may be granted.

The test for condonation, said the Court, is whether it is in the interest of justice to grant it. Pertinent factors to determine the interest of justice are the Applicant’s prospects of success and importance of the issue to be decided.

[24] Of further significance on the issue of discretion on whether or not a litigant has shown good cause is the statement in Vlok NO v Sun International South Africa Ltd[7] that the broad discretion enjoyed by a court when considering whether or not a litigant has shown good cause does not extend to incorporate

ignorance of an Act of Parliament nor is it a free-floating power to condone non-compliance with statutory time periods. The power ought to be exercised circumspectly and judiciously.

[25] The above pronouncement was fortified in Mabaso v National Commissioner of Police and Another[8]. Where the following was said on the interpretation of Section 3 of the Act:

“Interpretive framework

[20] A resolution of the present dispute requires a consideration of a proper construction of s 3 of the Act, read contextually. The principles which should inform that exercise are trite. The starting point is the Constitution. It commands courts in s 39(2), when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Courts must also adopt a generous and purposive approach.”

ANALYSIS

COMPLIANCE WITH THE PROVISIONS OF SECTION 3(4)(B)(I) TO (III)

[26] The first of the three prerequisites is that the debt must not have been extinguished by prescription. The prescription period for this kind of debt is three years and a claimant may launch the condonation either before or after issue of summons. The debt having arisen on 24 June 2014, the date of death of the deceased, and summons having been issued on 16 May 2017, it is evident that the action had not been extinguished by prescription when the action was instituted.

[27] The second of the requirements is that good cause must be established why a court should exercise its discretion in favour of an applicant. whether or not an applicant has shown good cause will depend on the overall impression made on the court which brings a fair mind

to the facts described by the parties. This is the standard of proof that is required in the assessment of good cause. It was against that background that the court in *Madinda supra* said:

“The second requirement is a variant of one well known in cases of procedural non-compliance. See Torwood Properties (Pty) Ltd v South African Reserve Bank 1996

(1) SA 215 (W) at 227I - 228F and the cases there cited. 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex, it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.”

[28] Without detracting from the fact that ultimately the interest of justice will dictate whether or not it is appropriate to grant condonation, case authority suggests that a collective demonstration of the following factors should attract favourable consideration from a court when good cause is assessed:

28.1 Prospects of success in the action;

28.2 Reasons for the delay;

28.3 Sufficiency of the explanation offered;

28.4 Bona fides of the applicant; and or

28.5 Any contribution by other persons to the delay (and the applicant's responsibility therefor).

See, Madinda supra at Paragraph 10.

[29] I now consider these individual sub-topics under good cause below.

PROSPECTS OF SUCCESS IN THE ACTION

[30] Here the debate between the parties has centred around whether or not a claimant ought to prove psychological lesion before he can be said to have shown prospects of success. The Applicant has referred this court to the case of Road Accident Fund v Sauls [9] where a psychological lesion or psychiatric injury or psychological disturbance was described as any recognisable harmful infringement of the brain and nervous system of a person. Counsel also referred to the Australian High Court case of Jaensch v Coffey [10]. The terms in which psychological lesion is described are no different from the Sauls case.

[31] The first time a court in this country intimated that it may be possible to award damages caused by emotional shock was in Bester v Commercial Union Versekeringsmaatskappy [11]. The court stated that there is no reason in our law why somebody who, as the result of the negligent act of another, has suffered shock or psychiatric injury should not be entitled to compensation, provided the possible consequences of the negligent act should have been foreseen by the reasonable person who should find himself in the place of the wrongdoer.

[32] The question that arises here is how far should an applicant go to establish that good cause exists? The court in Ethekwini Municipality v Crimson Clover Trading 17 (Pty) Ltd [12] states that it is not enough for an applicant to merely allege that there is good cause for the granting of the condonation, the applicant must show that there is good cause.' What is clear from the statement of the court is that a mere allegation that there is good cause will not suffice. Accordingly, the question is, has the Applicant in this case made more than an allegation?

[33] The Applicant has alleged that he and his wife attended counselling at Old Mutual in Meyerspark, Pretoria. I did not see any proof of the type of counselling that the Applicant and his wife claim to have attended. Insofar as reliance on the prayers of the pastor are concerned, the Applicant has furnished, only in reply to the answering affidavit, some document allegedly emanating from the Applicant's pastor wherein it is indicated that he suffers from post-traumatic stress disorder.

[34] I agree with the Respondent that the document said to be coming from the pastor is inadmissible. First, the pastor does not furnish his credentials. Second, post-traumatic stress disorder is a condition ordinarily diagnosed by psychiatrists, not pastors. Third, its introduction amounts to trial by ambush as the Respondent could not deal with it. Thus, in the absence of evidence that the pastor is suitably qualified to make the diagnosis, the document must be rejected. I also note, with approval, the Respondent's observation that it is extraordinary that the Applicant claims to have been suffering emotional shock since the death of the deceased that happened approximately eight years ago but to date no proper

and detailed treatment of such has been produced.

- [35] Of course I am saying that the attendance of counselling and receiving prayers from the pastor is no proof that he is suffering from emotional shock. Emotional shock is as described by Sauls supra, which is radically different from what the Applicant would have this court believe. Even assuming that the test to be applied by the trial court is indeed whether the emotional trauma that he is suffering is associated with a detectable psychiatric lesion; not a diagnosed psychiatric lesion, the Applicant has not made a case for emotional trauma at all.
- [36] The Respondent has argued that from the demise of the deceased, there is no question that the Applicant suffered grief. However, a claimant is expected to demonstrate a noticeable psychiatric injury that requires medical treatment and not mere bereavement. In the Australian case of Tame v New South Wales[13], which is mentioned in the case of Komape v Minister of Basic Education[14] (“Komape”) it is stated that ‘save in exceptional circumstances, a person is not liable in negligence, for being a cause of distress, alarm, fear, anxiety, annoyance or despondency, without any resulting recognised psychiatric illness’.
- [37] Also significant is another overseas case of Alcock v Chief Constable of the South Yorkshire Police[15] where the following is stated:

“Grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without

compensation... but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point”.

- [38] Contrary to what the Applicant would have this Court believe and as was held in Sauls’ case supra at par 13, the Applicant is required to show, not only emotional trauma, but sustenance of a discernible psychiatric injury. Bringing this closer to the case in casu, it is evident that all the evidence that has been levied before court establishes nothing that could be said to amount to a ‘detectable psychiatric injury’. This must be distinguished from ordinary grief that most people would experience after incidents such as the current.
- [39] The Applicant has referred this Court to the matter of Mbhele supra where the court directed payment of damages for emotional shock and trauma against the background of non-existence of medical evidence of lasting trauma. Notwithstanding the aforesaid, the court still pronounced that ‘there can be no doubt that the Appellant

experienced severe shock, grief and depression’. While what happened in Mbhele might be perceived to be in support of the

Applicant’s assertion, it should be borne in mind that the court was requested to decide legal issues on a stated case that the claimant had sustained a recognisable psychiatric lesion.

- [40] Furthermore, in *Komape supra* which is a later decision of the same court, the court clarified that *Mbhele* is no authority for the proposition that our law has changed and that claims are recognised for grief where there is no psychiatric lesion. Accordingly, for clarity on the subject one ought to look to decisions prior and subsequent to *Mbhele* such as *Sauls* and *Komape* respectively.
- [41] The nature of emotional shock or psychiatric injury makes it difficult to identify because it is not tangible and patently observable. It is for this reason that claimants cannot simply make a bald and unsubstantiated allegations of emotional shock that has led to complicated mental illnesses without proper accompanying diagnosis. The Applicant's claim that courts have recently made awards in circumstances where no psychiatric injury was present must be rejected.
- [42] Virtually in all the cases referred to by the Applicant on this point reveal that experts were employed to testify and psychiatric injury established. To start with, *Bester* that I have mentioned earlier, a general practitioner testified that he had referred the claimant for psychiatric tests, had administered psychiatric therapy and that he would still require psychiatric therapy in the future. Not only was the evidence of the general practitioner not opposed but no expert was called to contradict it.
- [43] Equally, in *Sauls supra* the claimant was seen by a general practitioner, treated for shock following which she was diagnosed with post-traumatic stress disorder. What is significant here is that the parties agreed that the claimant had suffered shock and emotional trauma, which had resulted in the claimant suffering post-traumatic stress disorder. While the issue of emotional shock developing into a post-traumatic stress disorder became common cause, the court remarked that because proof of the actual harm suffered and its sequelae were required, the burden would be on the claimant.
- [44] In *Barnard v Santam*[16] the court thought it wise to state that the duty to prove a detectable psychiatric lesion remains with the claimant, which can be accomplished by leading supportive psychiatric evidence. The court decided as it did because of the agreement of the parties that it had to deal with legal issues on the assumption that the claimant suffered a shock leading to a recognised and serious psychiatric lesion. It would appear that even in *Mbhele supra* there was an acceptance of the facts in the stated case that the claimant had suffered from depression.
- [45] The Applicant's assertion concerning emotional shock represents no more than a mere allegation without proof. He was required to have expert reports confirming that indeed he has suffered emotional shock which in turn has led to an identifiable psychiatric lesion. Instead of this, the Applicant obtained reports of experts that seek to verify how the deceased was treated and ultimately his death. That evidence, on its own and whether it is true or not, cannot be adequate to find a claim based on a psychiatric injury. As such, The Applicant has failed to establish a *prima facie* case in this regard.

REASON FOR THE DELAY

- [46] Insofar as the account for the delay, the second requirement, is concerned, the Applicant explains that he complained to Malamule as early as 21 April 2014 about the behaviour of the Witbank Hospital personnel in particular, Dr Vilakazi towards the treatment of the deceased. Quite evidently, the complaint was directed at the correction of the behaviour of the hospital personnel and their administration of medical treatment to the deceased. The papers are silent on what the complaints were about after the deceased had died. Other than that, the Applicant continued to communicate with Malamule until early 2016, evidence on this is exceedingly flimsy and without any validating material.
- [47] The Applicant's complaints to the nursing personnel are not captured anywhere on record making it difficult to verify. Similarly, his complaints to Malamule is denied and all that the Applicant could do, and only in reply to the answering affidavit, is to cite a mobile telephone number allegedly belonging to Malamule and a message from Vodacom that it does not keep records of telephone calls that are so old. Insofar as counselling is concerned, no record of such treatment having occurred has been annexed to the papers. But even if this Court accepts that he complained to those parties and received assistance from counselling and prayers of the pastor, he will still fall far short of proving a psychiatric lesion.
- [48] With regard to the apparent unpleasant smell that could be picked up when walking into the deceased's room, that his body was unsightly, had bedsores from which worms dropped onto the bed and the floor, it is notable that not even a single medical report presented to court captured any of this. The Respondent's acknowledgment that the body of the deceased might have been unsightly and possibly produced stench does not assist the Applicant because, as the Respondent states, such was expected due to the deceased developing bedsores. Whatever the condition of the deceased might have been, the point is that the Applicant has not established a link between the sub-standard medical treatment and a recognisable psychiatric injury that he claims to have.
- [49] Whichever way one scrutinises the facts from the time of the demise of the deceased to the period when the notice was prepared and served (14 July 2016), the lapsed time is not only unexplained but it is also unconscionable. Every explanation that there is, has been validly challenged and criticized by the Respondent. Even if this Court were to accept that he complained to Malamule, would it take a Warrant Officer almost two years to realise that the source from which he was expecting aid was unlikely to deliver? The Applicant's reason for the delay is unacceptable and it is inadequate to constitute good cause.
- [50] It is not decipherable from the papers in the file when the plea was served but it is evident that having served the notice on 14 July 2016, the Applicant issued papers commencing the action proceedings on 16 May 2017 and only three years thereafter launched this application on 30 October 2020. I am at a complete loss why there is no explanation of the lapse of three years before the application was launched. For this reason, I must find that there is no sufficient explanation firstly, of the period between the death of the deceased and the

service of the notice, 14 July 2017, on the one hand and secondly, the date of issuing of summons and the bringing about of the application, on the other.

UNREASONABLE PREJUDICE

- [51] This is the third requirement as listed under Section 3(4)(b)(iii) and it is perhaps important to stress that it is only unreasonable prejudice that will be recognised and not any ordinary unqualified form. How a court ought to approach this is described at Paragraph 21 of the Madinda case supra:

“The third leg of Section 3(4)(b) required the appellant to satisfy the court that the respondent had not been unreasonably prejudiced by the failure to serve the notice timeously. This must inevitably depend on the most probable inference to be drawn from the facts.... The approach to the existence of unreasonable prejudice (not simply any level of prejudice ...) requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.”

- [52] The Respondent has contended in this regard that it has been unreasonably prejudice by the late service of the notice and that the application for condonation should be dismissed on that ground. The Respondent has further pointed out that while it is defending the claim, it does so under frustrating circumstances as some of its potential witnesses have left its employ and it does not know where to find them. It is probably right that the allegation that potential witnesses are not available anymore is prejudicial but understood against this Court’s findings on the other requirements, it is nonetheless unreasonably prejudicial.
- [53] Had this Court found that good cause was established, there would exist a reason to insist that the Respondent could enquire from its current employees to locate the whereabouts of its former employees. Other measures could include, amongst others, engagement of tracers and other methods of similar nature. However, to demand of the Respondents to do so in circumstances where prospects of success in the action are virtually non-existent would be unreasonable and will not serve any purpose.
- [54] I note the Applicant’s assertion that besides the unreasonable prejudice alleged by the Respondent brought about by the late service of the notice, it has nonetheless been able to serve and file all its opposing papers in the action. Both parties have consulted experts and are both legally represented before this Court and the main case. Given these facts, it is somewhat challenging to apprehend the unreasonable prejudice allegedly suffered by the Respondent. This might well be the case but the finding that prospects that the Applicant will be successful in the action do not exist far outweigh the Applicant’s argument.
- [55] Another related but different and discrete argument to the above raised by the Respondent is that the notice was not served upon the Head of Department of Health as contemplated in the relevant statute. This contention is raised in circumstances where the notice despite it

having been served incontestably late on the MEC for Health, it has nonetheless elicited the anticipated response, which has in turn rendered unreasonable prejudice inconspicuous. Like the argument in the preceding paragraph and to the extent that there is a finding by this Court that prospects of success are limited, any decision one way or the other will be vain.

APPLICATION TO STRIKE OUT

[56] I am mindful that the Respondent has brought application to strike out certain paragraphs in the replying affidavit of the Applicant and that the Applicant has responded thereto. I think that it will be gratuitous and will serve no purpose to consider the application to strike out as its utility has been superseded by this Court's decision on the condonation application.

THE CASE FOR THE SECOND TO FOURTH APPLICANTS

[57] I note that although this application involves four Applicants, the founding affidavit in the court file refers to the First Applicant alone. In fact, no evidence exists in the court file that the other three Applicants have put any evidence before court in the form of affidavits for consideration. Accordingly, I concluded that no such evidence was levied at all and have treated the matter as comprising only one applicant.

CONCLUSION

[58] Having considered the overall circumstances and without diminishing the sub-standard medical treatment that was offered to the deceased, it is not in the interest of justice to grant the application for condonation. The court should be understood to be saying that because there is lack of proof of a detectable psychiatric lesion, the Applicant has failed to present a prima facie case.

ORDER

[59] In the result, I make the following order:

The application for condonation is dismissed with costs.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 30 March 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant: Adv L Haskins

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[1] [2016] ZASCA 166

[2]

[1996] ZACC 20; 1997 (1) SA 124 (CC)

[3] 2010 (4) SA 109 (SCA)

[4] See also, *Madinda v Minister of Safety & Security* 2008 (4) SA 312 (SCA).

[5] See, *Gumede v Road Accident Fund* 2007 (6) SA 304 (C).

[6] 2014 (3) SA 39 (CC) at 43 G-44A

[7] 2014

(1) SA 487 (GSJ)

[8] (1222/2017) [2019] ZASCA 43; 2020 (2) SA 375 (SCA) (29 March 2019)

[9] 2002 (2) SA 55 (SCA)

[10]

[1984] HCA 52; (1984) 155 CLR 549 at 567 (referred to in 9 *Lawsa* 2 Ed at Para 545)

[11] 1973

(1) SA 769 (A) See at 779 d-g.

[12] 2021 JDR 1419 (SCA) at Para 11

[13]

[2002] HCA 35 par 7

[14] 2020 (2) SA 347 (A)

[15]

[1992] 1 AC 311 (HL) at 931a-b cited in Komape par 34, 361A-B

[16]

[1998] ZASCA 84; 1999 (1) SA 202 (A)

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