

SOUTH AFRICA / JUDGMENT

Mokoena v Member of the Executive Council for Health, Free State Province (453/2019) [2021] ZAFSHC 108 (6 April 2021)

[2021] ZAFSHC 108

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

453/2019

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 453/2019

In

the matter between:

MOKOENA
EE
Applicant
and
THE
MEMBER OF THE EXECUTIVE
COUNCIL
FOR HEALTH,
FREE
STATE PROVINCE
Respondent

CORAM:

NAIDOO, J
HEARD

ON:

15 October 2020

JUDGMENT

BY: NAIDOO, J

DELIVERED ON: 6 April 2021

- [1] This is an application in which the applicant seeks condonation for the late service, on the respondent, of the notice of her intention to institute legal proceedings in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). Adv MC Louw appeared for the applicant and Adv L Mtukushe for the respondent.
- [2] The applicant went into labour on 19 April 2017 and was admitted to the Fezi Ngubentombi Provincial Eye Hospital/Metsimaholo District Hospital to have her baby. On 21 April 2017 she was admitted to theatre to have her baby delivered by Caesarean Section, under spinal epidural anaesthetic. After the epidural anaesthetic was administered, and on her return to the ward, she informed the theatre staff that she was cold. They filled bottles with very hot water and placed them alongside her. Later, when the sensation returned to her lower body, she experienced sharp pain in her legs and alerted the nursing staff. She was examined by one of the nurses who summoned a doctor. She was diagnosed with severe burns to the lower body. The burns were treated and dressed. The applicant was discharged from the hospital on 24 April 2017 and asked to return every second day for dressing of her burns. She did so, but was not attended to. Her burns turned septic, and she was re-admitted to hospital on 16 May 2017,
- and remained there until 23 May 2017, when she was discharged.
- [3] The applicant consulted her attorney, Mr Gary Lourens (Mr Lourens), of the firm Lourens Bezuidenhout Inc (LB Attorneys), on 6 September
2017. The attorney then sent a series of letters to the hospital, from 15 November 2017 to 19 March 2018, requesting the applicant's hospital records, in order to properly assess her case. The attorney also sought the assistance of colleagues in another firm of attorneys (Adams and Adams), who specialise in medical negligence litigation. When no response was received from the hospital, Adams and Adams served a notice in terms of section 3 of the Act on the respondent.

The applicant's attorney continued his efforts to obtain the hospital records, and addressed a letter on 29 August 2018 to the hospital. For the first time, a response was received from the hospital on 13 September 2018, requesting payment for the copies of the hospital records, requested by the applicant. This was done the next day and the hospital records were received shortly thereafter. Summons was issued in January 2019 and served shortly thereafter. A special plea of non-compliance with section 3(2) of the Act was raised, which gave rise to this application.

[4] The respondent, in its Answering Affidavit, took issue with Mr Lourens deposing to the Founding Affidavit, claiming that he is the applicant seeking condonation and not the plaintiff cited in the summons. The attorney was also criticised for not specifically stating that Adams and Adams was also representing the plaintiff. The respondent concluded that Adams and Adams was representing Mr Lourens and not the plaintiff. Much was made of the fact that Mr Lourens allowed the time prescribed in the Act for serving the notice in terms of section 3 of the Act to lapse. The respondent also referred to the letters requesting the plaintiff's hospital records as letters of demand, addressed to the wrong entity, and concluded that the applicant has not shown good cause for the granting of the relief she seeks. With regard to the issue of prejudice, the respondent alleges that there is a high turnover of staff at hospitals and when such an application is brought out of time, it suffers prejudice, as "factual witnesses" may no longer be available.

[5] The relevant provisions of section 3(2) and (3) of the Act read as follows:

"(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."

Section 3 (4) (a) and (b) permit a creditor to apply for condonation, where the notice is not served timeously. It provides

"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.”

- [6] I mention that the tone and language of the Answering Affidavit, regrettably, falls far short of being collegial or courteous. Mr Lourens is accused of being ignorant of the law, of being inefficient, of being opportunistic and self-serving, and the deponent to the Answering Affidavit boldly asserts that if condonation is granted, Mr Lourens should be ordered to pay the costs out of his own pocket. All this, without factual substantiation. It appears that the respondent failed to take into account the applicant’s explanation that it was the respondent who in fact delayed the matter by neglecting to respond to numerous requests to furnish her with her hospital records. It offered no response in respect of this aspect. The respondent also does not deal pertinently with the issue of prejudice suffered by it or why the explanation tendered by the applicant does not show good cause. Instead the respondent embarks on a diatribe of sarcasm and insults regarding the conduct of Mr Lourens, and that it is not the plaintiff but Mr Lourens who should be the applicant. This argument is not founded either in law or logic, is unmeritorious and cannot be sustained.
- [7] The respondent alleges, in general terms, that there is a high staff turn-over at hospitals, and that the witnesses may not be available. No allegation is made that this situation pertains to the present matter. The respondent also fails to tender any explanation for its lack of response to the applicant’s numerous requests for her hospital records. As correctly pointed out by the applicant, the respondent’s response ought to have been to immediately investigate the matter and obtain the necessary incident reports from relevant nursing staff. It failed to do that, and cannot now complain that it suffers prejudice because witnesses may not be available. In any event, the respondent did not raise the issue of prescription in its plea. Its only complaint was the non-compliance with section 3 of the Act.
- [8] I should mention that another point which occupied much of the respondent’s attention and elicited further negative comments in respect of Mr Lourens, was the lack of clarity of the role of Adams and Adams in this matter. This was also the basis for the assertion that it ought to have been Mr Lourens who applied for condonation. In the Founding Affidavit, Mr Lourens asserts that he instructed Adams and Adams to assist with the litigation, as they have specialist knowledge in claims of this matter. This was confirmed by Ms Koch of Adams and Adams. It is so that no specific mention was made in the Founding Affidavit that Adams and Adams were co-mandated, with LB Attorneys, by the plaintiff to represent her. When challenged on this in the Answering Affidavit, the plaintiff attached the power of attorney to her Replying Affidavit, clarifying the reason for instructing Adams and Adams.
- [9] The respondent then argued that this was impermissible as the Respondent was making out its case in Reply. I do not agree. It was clear that Adams and Adams were instructed and became involved in this matter. Perhaps the omission on the part of Mr Lourens to make specific mention of the co-mandate did create doubt and/or confusion about whether the involvement of Adams and Adams was regular or permissible. It is clear that he was acting

on the instructions of the applicant from the outset when he engaged Adams and Adams. In my view he sought to clarify the challenge by the respondent, by attaching the power of attorney to the Replying Affidavit. The reaction of the respondent and especially the attack upon Mr Lourens is unwarranted and difficult to understand.

- [10] The applicant's case is that she only became aware of the potential claim and identity of the debtor on 6 September 2017, during her first consultation with her legal representative. This was some five months after the incident had occurred. At that stage the legal representatives were unaware that the plaintiff was re-admitted to hospital in May 2017. However, for the purposes of this application and, particularly, compliance with section 3 (3)(a), I am satisfied that the date when the applicant became aware of the debt and identity of the debtor was 6 September 2017. Due to the respondent's delay in furnishing the plaintiff's hospital records, summons was only issued and served in January 2019. That was wholly within the stipulated three year period, before prescription would extinguish the claim.
- [11] The plaintiff's legal representatives were justified in attempting to obtain the hospital records, in order to assess whether there was a claim or not, before addressing the statutory notice to the respondent. However, the respondent's non-response frustrated their efforts to obtain the hospital records, and thus prevented them from serving the notice within the stipulated six months. The notice was ultimately served on the scant information provided by the plaintiff. The details contained in the summons are an indication that there was a claim against the respondent, which emerged from the hospital records. The respondent's comments in respect of the plaintiff's version and its insistence that the deponent to the Founding Affidavit should bring the application, do not interfere with the fact that the applicant has shown, satisfactorily, the reasons for the delay in serving the section 3 notice timeously. If criticism is to be levelled against the plaintiff's attorney, it is that the delay of two months before the first request was sent to respondent in November 2017, is unexplained. This in any event, would not have impacted negatively on the service of the notice, had the respondent reacted with the promptness expected of it in these circumstances. The plaintiff has also demonstrated that her prospects of success on the merits are good.
- [12] With regard to the aspect of unreasonable prejudice, the respondent did not plead prejudice in its special plea. As I alluded to earlier, it set forth a general situation that there is a high turnover of staff at hospitals, and that a notice served late can have the consequence that relevant witnesses may not be available. I have also alluded to the fact that no allegation is made, in respect of this case, that relevant witnesses are no longer available. The respondent has failed to indicate that upon receipt of the plaintiff's written requests for her hospital records, which also contain an indication of the impending legal action, it attempted to locate the medical and nursing staff involved in this matter, to ascertain the details surrounding the plaintiff's complaints. The requirements of fairness and equity dictate that to deny the applicant condonation at this stage will visit undue harshness upon her. The doors of the court will effectively be closed to her, in the face of a case which has

good prospects of success on the merits.

[13] With regard to costs, the applicant sought costs of the application only in the event that the application was opposed. The nature of the opposition in this matter does not pass muster as having been justified. The respondent did not deal at all with its own failures in this matter, but sought instead to malign the plaintiff's legal representatives, and cast aspersions on their bona fides in bringing this application. It seems that this was a strategy to deflect attention away from, and minimize its own part in the plaintiff's delay in serving the notice herein. An application for condonation is one where an indulgence is sought, and the party seeking such indulgence ought, ordinarily, to bear such costs. However where the opposition to such application is unmeritorious, there is reason to depart from the ordinary position. In the light of what I have set out above, my view, is that there is no reason why costs should not follow the result in this matter.

[14] In the circumstances, the following order is made:

14.1 The late service by the applicant of the notice of her intention to institute legal proceedings in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, is condoned

14.2 The respondent is directed to pay the costs of this application.

S NAIDOO J

On behalf of the Applicant: Adv MC Louw

Instructed by:

Adams & Adams

c/o Hill McHardy & Herbst

7 Collins Road

Arboretum

Bloemfontein

(Ref: P Schuurman/rs/G25490)

On behalf of the Defendant: Adv L Mtukushe

Instructed by:

State Attorney

11th Floor Fedsure Building

49 Charlotte Maxeke Street

(Ref: 596/201900157/P16M)

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