

SOUTH AFRICA / JUDGMENT

Moroeroe obo T.T.M v Member of the Executive Council for Health, Free State Province (6218/2018) [2021] ZAFSHC 361 (21 July 2021)

[2021] ZAFSHC 361

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

6218/2018

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN**

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/ NO

Case

number: 6218/2018

In

the matter between: NTHABISENG
MOROEROE obo
T[...]
T[....] M[....]
Applicant
and
THE
MEMBER OF THE EXECUTIVE
COUNCIL
FOR HEALTH,
FREE
STATE PROVINCE
Respondent
CORAM: NAIDOO,
J
HEARD
ON: 2
MARCH 2023

JUDGMENT

BY: NAIDOO, J

DELIVERED ON: 21 JULY 2021

- [1] This is an application in which the applicant (plaintiff in the main action), acting on behalf of her minor son, T[....] T[....] M[....] (T[....]), seeks a declaratory order that her Notice of 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), alternatively condonation for the late service, on the respondent (defendant in the main action), of the notice of her intention to institute legal proceedings in terms of section 3 of the Act. The order sought by the applicant was couched as follows:

“1. That the Applicant complied with the requirements of Section 3 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);

0.5cm; margin-bottom: 0cm; line-height: 150%”> 2. Alternatively, that the applicant’s non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, is condoned;

3. That the applicant be granted leave to proceed with the action instituted out of the above Honourable Court under case number 6218/2018 against the respondent;

4. The costs of this application be costs in the cause, save in the event of opposition.” Adv A Sander, appeared for the applicant and Adv R Magagabe SC, with Adv PT Masihleho for the respondent. The respondent denies that the section 3 notice in respect of the plaintiff’s personal claim was received by it at all. I will deal further with this aspect later.
- [2] The applicant was admitted to the Bongani Hospital in Thabong, Free State Province on 5 January 2016, at approximately 7h00. The respondent’s staff advised her at about 14h00 that there was a drop in T[....]’s heart rate and administered oxygen, but she was not attended to by a doctor. She was admitted to the labour ward at approximately 19h00 and it was only at approximately 22h55 on 5 January 2016 that the plaintiff delivered T[....], who was in respiratory distress and required resuscitation. He was assessed as suffering from birth asphyxia as well as meconium aspiration syndrome. A subsequent brain scan showed T[....] to be suffering from hypoxic ischemic encephalopathy. The applicant alleges that as a result of the respondent’s negligence, T[....] suffers from cerebral palsy, with cortical blindness, which has caused the damages to her and T[....] that she claims in the summons.
- [3] The applicant set out a detailed history of events from the time she was admitted to the hospital to the time after T[....]’s birth, describing the negligent conduct of the nursing staff and the fact neither she nor T[....] were attended to by a doctor. After their discharge from hospital, she took T[....] regularly to the clinic for his vaccinations and follow-up visits. She noticed a problem when he was two months old and took him to the clinic who referred her to a hospital for a CT scan and sonogram. It was only in November 2016, upon receipt of the CT scan results that she was informed that T[....] suffered brain damage. She also detailed all T[....]’s symptoms and the disabilities he suffers.
- [4] The applicant avers in her Founding Affidavit in this application for condonation, that the statutory notice in terms of section 3 of the Act was sent on 8 August 2017, by email and registered post to the respondent approximately two weeks after the applicant first consulted with an attorney and a firm of consultants called Christopher Consulting. The first consultation took place 25 July
2017. She was advised by Christopher Consulting that it was necessary to first obtain the hospital records in order to confirm the applicant’s version, to obtain additional information and to assess whether she had a claim in this matter. The section 3 notice was therefore despatched some nine months after she became aware of T[....]’s condition and two months prior to receipt of the hospital records. It was only on the latter date that she became aware of the facts giving rise to the claim, namely about October
2017. She was then referred by the initial attorney she consulted with to another firm of attorneys, namely Wihann Joubert (Joubert) of VZLR Inc during December 2018. Joubert issued summons and served same on the respondent on 18 December 2018.
- [5] It was only upon service of the respondent’s plea and special plea that the applicant became aware of the respondent’s contention that it did not receive the section 3 notice, which the applicant contends is not true, as such notice was sent on 8 August 2017, some seventeen

months prior to service of the special plea. The applicant alleges that the respondent has not suffered any prejudice, as the delay was caused by the employees of the defendant preventing her from becoming aware of the facts giving rise to the claim. She has, in any event, tendered a full and reasonable explanation in respect of such delay. The applicant also alleges that she and T[...] have excellent prospects of success in their claims.

[6] The respondent opposed the application for condonation and specified that such opposition was only in relation to the applicant's claim in her personal capacity, and not in respect of the claim on behalf of the minor child. The respondent asserts that the condonation application in respect of the minor child's claim should, in the court's discretion be granted. The respondent contends that the alternative prayer for condonation was triggered by the service of its special plea on 7 March 2019, and means that the applicant waited more than three years to launch the application for condonation on 25 March 2022. This delay is fatal to the applicant's claim in her personal capacity because the delay is "inordinate, excessive, protracted and flagrant". This is compounded by her failure to give any explanation for such delay, which is also fatal to her claim in her personal capacity, and requires that her claim falls to be dismissed.

[7] The respondent contends that the issues for determination before this court are:

7.1 Whether the applicant has complied with the provisions of section 3 of the Act;

7.2 Whether the failure by the applicant to comply with the provisions of section 3 of the Act should be condoned, on account of her making out a case for condonation for the late filing/ service of the Section 3 notice, in respect of her claim in her personal capacity. The respondent also correctly characterised the application as consisting of two parts, namely the first part being for declaratory relief and the alternative prayer being for condonation.

[8] With regard to the declaratory relief in respect of the applicant's personal claim, the respondent avers that this prayer should be dismissed for the same reasons as the condonation application, which I will detail shortly. With regard to the condonation application, the respondent pointed out that this part of the application was triggered by service of its special plea on the applicant on 7 March

2019. The current application was launched on 25 March 2022, being three years after the service of the special plea. The applicant has given no reasons at all for this 3 -year delay. She has failed to provide an explanation, as required in law, why there was no prior opportunity since the receipt of the plea to bring the condonation application. She has likewise failed to give a full and satisfactory explanation which covers the entire period of the delay. This is an important factor for the court to consider in order to exercise the discretion it has with regard to whether condonation should be granted or not.

[9] Another reason raised by the respondent for the condonation application in respect of the applicant's personal claim to be dismissed, is that the application pertains to the section 3 notice dated 8 August 2017, sent by Christopher Consulting, to the respondent. The

respondent avers that the notice reflects and relates only to an intention to institute action in the applicant's representative capacity on behalf of the minor child for the damages he has suffered as a result of the negligent conduct of the respondent's employees, and makes no mention at all of an action to be instituted in her personal capacity.

- [10] For convenience and completeness, I repeat the contents of the section 3 Notice sent on 8 August 2017. The notice was sent under the hand of a functionary at Christopher Consulting and reads thus:

"NOTICE OF INTENTION TO INSTITUTE LEGAL PROCEEDINGS IN TERMS OF ACT 40 OF 2002 NTHABISENG MOROEROE (ID. 9[....]0) in her capacity as mother and natural guardian od T[....] T[....] M[....] (ID 1[....]9)

1. We refer to the above matter and confirm that we act herein as Consultants for Ms N Moroeroe ("our client").
2. You are hereby notified of our client's intention to institute legal proceedings fo damages suffered by her son, Mr TT Moroeroe ("the baby") on 5 January 2016.
3. At approximately 7:00 on 5 January 2016 our client was admitted to the Bongani Regional Hospital due to labour pains.
4. At approximately 22:00 on 5 January 2016 our client was requested to push her own bed to the Labour Ward. She subsequently fell on her way to the Labour Ward.
5. At approximately 22:50 on 5 January 2016 the baby was delivered."
6. The baby sustained brain damage.
7. Our client is of the opinion that this was as a result of the negligence of the employees of the Bongani Regional Hospital in that,

had they acted with due care and diligence, the injuries could and should have been prevented.

8. We have a mandate to instruct an attorney to institute legal proceedings on behalf of our client against the MEC for Health, Free

State, for the inefficient and sub-standard care that was provided to our client and her baby at the Bongani Hospital.

9. We also request that you condone non-compliance (if any) with section 3 of Act 40 of 2002, reasons therefore (sic) being:

9.1 Our client mandated us on 25 July 2017;

9.2 We are in the process of obtaining reords to verify the facts herein;

9.3 Our client (being a layman) was unaware of her obligations in terms of the Act and only became aware thereof after consulting with

our offices.

10. Should you require any further information to assist in your investigation of this matter, please do not hesitate to contact the

writer hereof.

11. Please acknowledge receipt and reply to our request for condonation in writing.

[11] The respondent contends that the letter gives only notice of the applicant's intention to institute legal proceedings against the respondent in her representative capacity, as mother and natural guardian, on behalf of her minor son for brain damage that he suffered as a result of the negligence of the employees of Bongani Hospital. The letter makes no reference or mention of any intention on the part of the applicant to sue the respondent for damages she sustained in her personal capacity, as a result of T[...] suffering brain damage and resultant cerebral palsy. The respondent further contends that to construe the or interpret the contents of the letter in any other way would strain the language and import thereof, and would result in reading - in claims not contained in such notice, or crafting a claim on the applicant's behalf.

[12] Section 3 of the Act contains a peremptory provision that a notice "must" be given. 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."

- [13] It was contended on behalf of the applicant that although the letter containing the section 3 notice is not eloquent, it identifies the creditor, albeit in a different capacity. The respondent knew what the claim was going to be, and the applicant's claim is based on the same facts. The same evidence will be led to prove her claim. The only thing that differs will be the sequelae. The applicant's claim in her personal capacity is so intertwined with the facts of the minor's claim that they cannot be separated. The crux of her case will be dealt with when the minor's claim is dealt with. With regard to the delay, Mr Sander argued that they could only properly consider merits after receipt of the hospital records. Thereafter the applicant had to obtain medical reports in order to proceed. He contended that, in respect of prospects of success, the applicant has shown that she has a prima facie case. The respondent will be doing the same investigation in respect of the minor's claim and the applicant's personal claim so they will not suffer any prejudice. It will be fair and equitable to grant condonation.
- [14] Mr Sander's argument acknowledges that there will be a difference in the applicant's claim in respect of the sequelae. She has claimed damages, inter alia, for past and future loss of earnings, as a result of the brain damage that T[...] has suffered. The medical reports that the applicant has appended to her application are only in relation to T[...] 's injuries, and hence his damages. No mention is made of her damages in those reports. The expert reports from an industrial psychologist and other experts that she mentions, have not materialized.
- [15] The fact remains that the applicant did not give any notification of her intention to institute proceedings in her personal capacity, in compliance with section 3 of the Act, against the respondent. She has not explained why, at least since the service of summons and particularly after receipt of the special plea, the application for condonation was not brought, alternatively why a notice in respect of her personal claim was not served. The delay of three years prior to the launch of this application has not been explained at all. The applicant was legally represented at the time summons was issued, and ought to have been advised on the legal requirements relevant to her claim. She ought to have also been properly advised with regard to the substantiation and proof of her claim. Such proof is glaringly absent. The respondent in my view will not properly be able to meet the case she puts forward in the absence of notice and substantiation of her claim. Her biggest challenge, however, remains that notice of her intention to institute proceedings for damages in her personal capacity was not served in compliance with the Act. I am in agreement with the respondent's argument that to interpret the section 3 notice dated 8 August 2017, to include her personal claim, would amount to reading-in her claim, which is not mentioned in the notice, or crafting a claim on her behalf, both of which are impermissible.
- [16] It is a matter of logic and common sense that a declaratory order or condonation cannot be granted where a notice does not exist. The applicant has not sought leave to file a section 3 notice, but insists that the notice dated 8 August 2017 is a notice relevant to her personal claim as well as the claim in her representative capacity on behalf of the minor child. That argument has no merit and cannot be sustained. The application for condonation in respect

of the minor's claim is not opposed and the respondent concedes that the application in respect of the minor child can be granted.

[17] With regard to costs, the applicant, in the Notice of Motion, sought costs in the cause, except in the event of opposition. The respondent seeks costs against the applicant and her attorney. It has not been argued that the opposition of this application is frivolous. In my view, the applicant in an application for condonation seeks an indulgence and should bear the costs. In this case condonation was sought in respect of a notice which was not given. The attorney should be given an opportunity to explain why the applicant was not properly advised in this respect and why he should not bear the costs of this application. The trial court, ultimately hearing the trial will be much better placed to make an appropriate costs order, after hearing relevant evidence and/or arguments

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

18.1 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, on behalf of the minor child T[....] T[....] Moroeroe, is condoned;

18.2 The application by the applicant, in respect of her claim in her personal capacity, for an order declaring that she has complied with the provisions of the Legal Proceedings Against Certain Organs of State Act 40 of 2002, alternatively condonation for late service of the notice in terms of the said Act, is dismissed

18.3 Costs are to be costs in the cause.

S NAIDOO J

On behalf of the Applicant: Adv

A Sander

Instructed by: VZLR

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R Magagabe SC with

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(Ms S Maila)

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