

SOUTH AFRICA / JUDGMENT

Sogoni v Member of the Executive Council for Health, Eastern Cape Province (828/2017) [2020] ZAECBHC 35 (29 April 2020)

[2020] ZAECBHC 35

COURT

Eastern Cape High Court, Bhisho

BEFORE

Laing

CASE / FILE NUMBER

828/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, BHISHO)

CASE NO. 828/2017

Date heard: 30

January 2020

Date delivered: 29

April 2020*

In

the matter between:

MNCEDISI

WYCLIFF

SOGONI

Applicant

and

THE

MEMBER OF THE EXECUTIVE COUNCIL

FOR

HEALTH, EASTERN CAPE

PROVINCE

Respondent

JUDGMENT

LAING AJ

- [1] This is an application for condonation of the applicant's failure to have complied with the requirements of sub-section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ('the Act').

Background

to the matter

- [2] On 16 October 2015, the applicant's wife, Nolulamo Sogoni, was admitted to St Elizabeth Hospital in Lusikisiki, suffering from severe abdominal pain. She gave birth to twins on the following day but passed away that evening.
- [3] A relative of the applicant later informed him that he may have a claim against the respondent. The applicant consulted with attorneys for such purposes in mid-2016. His attorneys requested medical records from the hospital, but to no avail. It was only on 4 October 2017 that the hospital provided the attorneys with a copy of the post-mortem report, enabling the attorneys to form a prima facie view on the matter. The attorneys sent a letter of demand in terms of the Act on the same day, claiming payment of R 5 million for damages. This, in turn, led to the institution of action proceedings against the respondent.
- [4] The respondent has raised a special plea, arguing that the proceedings are premature for want of compliance with the Act. This has prompted the present application.

Issues

to be determined and legal framework

- [5] The relevant portion of the Act is sub-section 3(4), which provides as follows:
- '(4)
- (a) If an organ of state relies on a creditor's failure to serve a notice in terms of sub-section (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 organs of state as the court may deem appropriate.’

[6] The three requirements contained in sub-section 3(4)(b) are the issues that must be decided in this matter. In the answering papers, the respondent concedes that the applicant’s minor children’s claims have not prescribed but avers that the applicant’s claim has indeed prescribed. This aspect was, however, not pursued further

in argument and the respondent placed reliance primarily on lack of good cause and unreasonable prejudice.

[7] The requirement of good cause was considered by the erstwhile Appellate Division in *Silber v Ozen Wholesalers (Pty) Ltd*

[1954] 2 All SA 296 (A), albeit within the context of an application for the rescission of a default judgment in terms of sub-rule 46(5) of the Magistrates’ Court Rules. Here, Schreiner JA held, at 301, that:

‘The meaning of “good cause” in the present sub-rule, like that of the practically synonymous expression “sufficient

cause” which was considered by this court in *Cairn’s Executors v Gaarn* 1912 AD 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.’

[8] The above approach was applied in *Madinda v Minister of Safety and Security* [2008] ZASCA 34; [2008] 3 All SA 143 (SCA), to which both counsel in the present matter referred. In this case, the SCA dealt with an application for condonation of non-compliance with the Act for purposes of claiming damages arising from unlawful arrest, detention and assault. Heher JA held, at, [8], that:

‘The phrase “if [the court] is satisfied” in section 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...’

[9] Specifically addressing the three requirements contained in sub-section 3(4)(b), Heher JA went on to state, at [10] to [12], that:

‘The second requirement is a variant of one well-known in cases of procedural non-compliance... “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.

[10] The concept of good cause was addressed in *Mzizi v S* [2009] 3 All SA 246 (SCA), to which counsel for the respondent referred, where the SCA was concerned with the question of granting condonation for the late filing of an application for leave to appeal. Jafta JA held, at [9], that:

‘Good cause is a well-known test applicable to condonation applications. It has two requirements. First, the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that there are reasonable prospects of success on the merits of the appeal. If there are no prospects of success the court may refuse leave even if the explanation given is satisfactory,

for it would be futile for the court to grant condonation where it is clear that, on the merits, the case would fail.’

[11] This was followed shortly afterwards by *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] 3 All SA 537 (SCA). Majiedt JA remarked, at [35], that:

‘In general terms, the interests of justice play an important role in condonation applications. An application for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.’[1]

[12] The court applied the interpretation given to ‘good cause’ in *Silber* before Majiedt JA continued, at [37] and [38]:

‘The prospects of success of the intended claim play a significant role- “strong merits may mitigate fault; no merits may render

litigation pointless”. The court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of an intended action, e.g. where an expert report central to an applicant’s envisaged claim is omitted from the condonation papers.

...Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant. Whereas good cause primarily concerns the applicant’s conduct and its motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the

protection of its interests by receiving timeous notice. The DLA serves as a good example in the present case as to why this requirement must be met. It has a large staff component dealing with many matters relating to the vast tracts of land it administers on behalf of the State. It plainly requires adequate time to sift, analyse, prioritise and decide on matters before entering into litigation.’

[13] The above case law constitutes the framework within which this court must decide whether the applicant has met the requirements of sub-section 3(4)(b) of the Act.

Merits of the application

[14] Turning to the facts of the matter, the applicant in the present case explains that he was simply unaware of either the principles of prescription or the provisions of the Act. It was only when a relative drew his attention to the possibility of a claim, sometime in 2016, that he approached his attorneys. The applicant does not mention the precise dates but merely indicates that he consulted with his attorneys in mid-2016, which would have been several months after the date of his wife’s death and presumably after the expiry of the six-month period prescribed in the Act.

[15] The respondent does not dispute the applicant’s explanation, save to point out that the applicant does not state precisely what steps he took, arguing that the applicant has failed to furnish a full explanation for the delay, covering the entire period. Moreover, the respondent argues that the cause of action was established as early as 16 October 2015 inasmuch as the applicant knew that his wife had died as a result of excessive bleeding after the birth of their twins and while she was under the care of the medical staff at St Elizabeth Hospital.

[16] It is a recognised principle of the law of damages that a litigant is entitled to damages where he or she can prove the existence of a cause of action. The litigant is required to demonstrate that the cause of action arose by operation of some underlying set of principles, established in terms of the law of delict, contract, unjust enrichment or other area of law. A cause of action exists where all the requirements or elements for that cause of action are present, i.e. the *facta probanda*. If all the requirements or elements exist then a cause of action accrues as soon as damages are suffered and prescription begins to run from that point in time. [2] In the law of delict, such as concerns us in the present matter, the necessary requirements or elements would comprise an act,

wrongfulness, fault, causation and harm.[3] A litigant would be well advised to ensure that he or she can prove the existence thereof, on a balance of probabilities, before instituting a claim.

[17] Sub-section 3(2)(a) of the Act requires notice of intended legal proceedings to be served on an organ of state within six months of the date when the debt became due. The term, ‘debt’, is defined in section 1 as follows:

“debt” means any debt arising from any cause of action–

- (a) which arises from delictual, contractual or any other cause of liability, including a cause of action which relates to or arises from any–
 - (i) act performed under or in terms of any law; or
 - (ii) omission to do anything which should have been done under or in terms of any law; and
- (b) for which an organ of state is liable for payment of damages,

whether such debt became due before or after the fixed date...’

[18] If the respondent’s argument is to be accepted, then the respondent must be deemed to have been aware of each and every element or requirement for a cause of action based on delictual principles as at the date of his wife’s death on 16 October

2015. These would have consisted of an act, wrongfulness, fault, causation and harm. From the applicant’s affidavit, it is evident this was simply not the case. Whereas he avers that his wife died from excessive bleeding, it is by no means clear that this is what the medical staff told him at the time. Indeed, he goes on to aver that ‘[u]pon [the] death of my late wife the said Hospital never told me the circumstances around the death of my wife’.[4] Even if he was aware at the time that his wife had died from excessive bleeding, as the respondent asserts, then in the absence of further information he could not have been aware of whether or not the nature and extent of the conduct of the medical staff gave rise to a claim. If the respondent’s assertion is correct then the applicant had merely been informed that his wife had died from ‘excessive bleeding’, whatever that may have entailed. There could have been any number of reasons for his wife’s loss of blood, some of which having no relation at all to any possible lack of care or attention on the part of the respondent’s employees. Consequently, his attorneys’ request for copies of the medical records is perfectly understandable; the applicant did not know, at that stage, whether a cause of action in delict was present.

[19] Counsel for the applicant drew attention to *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 (5) BCLR 656 (CC), which dealt with a claim for damages brought by a cleaner in relation to the amputation of his thumb. Zondo J observed, at [42], that:

‘...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.’

[20] He went on to state, at [47], that:

‘The opinion given by Dr Reyneke was that the amputation of the applicant’s thumb and loss of function of the left hand “was

most probably due to the plaster of paris that was too tight, and not removed soon enough... when ischemia occurred”. That opinion was given years after the events in issue. Without advice at the time from a professional or expert in the medical profession, the applicant could not have known what had caused his condition. It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice.’

[21] The findings in *Links* have been applied in later cases[5] and are pertinent to this matter. The applicant asserts that the medical staff never told him about the circumstances of his wife’s

death, they never advised him further. He may well have known that her death was as a result of ‘excessive bleeding’ but it could hardly have been expected of him, as a layperson, to have deduced immediately that the medical staff could be held liable. It would have been necessary for him to have obtained further information. Such information was only provided on 4 October 2017, at least a year after his attorneys first made the request.

[22] Similarly, the respondent’s argument that the applicant has failed to furnish a full explanation for the delay is flawed. Quite simply, the applicant was not aware of his rights until his interaction with a relative sometime in 2016. No further explanation is necessary given the circumstances. The applicant is a rural and unsophisticated person who was dealing with the consequences of the birth of his twins, the immediate loss of their mother, and the burden of his depression. The explanation is sufficient on its own.

[23] Applicant’s counsel made reference to the case of *Member of the Executive Council for Education, KwaZulu-Natal v Shange*

[2013] JOL 30039 (SCA). Here, the applicant sought condonation in terms of sub-section 3(4) of the Act for purposes of a damages claim brought with regard to an injury inflicted on his eye by a teacher. In granting the application, the SCA took into account the fact that applicant had been a 15-year old learner at a rural school at the time that the incident occurred. There is no reason why the same approach should not be adopted in the present matter.

[24] The explanation for the applicant’s delay is one primary consideration in the determination of good cause. The other is the applicant’s prospects of success. In the post-mortem report attached to the applicant’s founding affidavit, the chief findings of the medico-legal officer are that the deceased displayed severe pallor and retroperitoneal haematoma, and that the cause of death was hypovolaemic shock. At the most basic of levels, the court understands from the above that the deceased’s condition was as a result of insufficient volumes of blood

or fluid circulating in her body.[6] The post-mortem report gives rise to the obvious question of causation. It is certainly not for this court to make any preliminary

findings on the merits of the applicant's claim and for immediate purposes it suffices merely to observe that the report

supports the applicant's contention that his wife died from excessive bleeding.

[25] A claim for damages for medical negligence is often a notoriously complex matter that can only be determined in trial proceedings. It is the respectful view of this court that the case law should not be interpreted so as to impose an impossibly high standard upon a litigant such as the applicant in the present circumstances. He is not required to prove his case at this stage. Inasmuch as the post-mortem report attached to his founding affidavit does not demonstrate per se, without further evidence, including oral testimony, that he has reasonable prospects of success or place the court into a position where it can make an assessment of the merits, it is nevertheless adequate, in these circumstances, to indicate that the applicant has a prima facie cause of action. Where the death of the applicant's wife seems to have been as a result of hypovolaemic shock or excessive bleeding (in the language of a layperson), the inescapable inference is that the respondent's employees may well have a case to answer. That is all that is required of the applicant, at this stage, in relation to his prospects of success.

[26] The final requirement under sub-section 3(4)(b) of the Act pertains to whether the respondent has suffered unreasonable prejudice as a result of the applicant's failure to have served a notice in terms of sub-section 3(2)(a). Here, the respondent alleges that it has indeed suffered prejudice inasmuch as it has not been able to conduct a proper investigation of the incident so as to prepare detailed reports. This was because most of the medical staff involved in the treatment of the deceased had left St Elizabeth Hospital. [7]

[27] However, what has prevented the respondent from tracing the relevant medical staff is not disclosed. It is unlikely that not a single one of the medical staff who attended to the applicant's wife is still employed at the hospital in question and it is even more unlikely that the respondent cannot rely on its employment records to contact individuals who had moved away or who had been relocated to other health institutions. At best for the respondent, the applicant's delay has caused inconvenience. To allege that it has suffered unreasonable prejudice would be to stretch the limits of plausibility.

Relief to be granted

[28] At this point, the test in *Madinda* bears repeating. The overall impression made on the court is what decides whether a court is satisfied to grant an application for condonation. Central to such an impression is whether it would be in the interests of justice to do so.[8]

[29] The right of access to the courts is enshrined in terms of section 34 of the Constitution. It is respectfully submitted that the provisions of sub-section 3(4) of the Act should not be interpreted such that a litigant's right of access is limited to the extent that such limitation is unreasonable or unjustifiable in an open and democratic society based on human dignity, equality and freedom.[9] In circumstances such as the present, involving a rural and unsophisticated litigant who was dealing with the consequences of the

birth of his twins, the immediate loss of their mother, and the burden of his depression, it is the view of this court that the

provisions in question must be interpreted restrictively. To do otherwise would be to impose an unreasonable and unjustifiable limitation on the applicant's right of access to the courts.

[30] Accordingly, the court is satisfied that the applicant has met the requirements of sub-section 3(4)(b)(i) to (iii) and is prepared to grant the application for condonation. In relation to costs, there is no reason why the usual order should not follow where the result favours the applicant.

Order

[31] The following order is made:

(a.) the application is granted; and

(b.) the respondent is ordered to pay the costs of the application on a party-and-party scale.

JGA LAING

ACTING JUDGE OF THE HIGH COURT

*Judgment delivered by email to the parties on 29 April 2020, by reason of the COVID-19 restrictions imposed under the regulations made in terms of the Disaster Management Act 57 of 2002.

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- [1] In this context, the court referred to the decision in *Van Wyk v Unitas Hospital and Others* [2007] ZACC 24; 2008 (4) BCLR 442 (CC), where the Constitutional Court dealt with the late filing of an application for leave to appeal. In considering whether to grant condonation, the Constitutional Court held, at [20], that this depended on the facts of the case, including the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.
- [2] See Dendy M, 'Damages', in *LAWSA* (Vol 14(1), 3rd edition, 2018), at 1 and 28.
- [3] See Neethling J and Potgieter JM, *Law of Delict* (Seventh Edition, LexisNexis 2015), at 4. See, too, Nienaber JA's definition of delict in *HL & H Timber Products (Pty) Ltd v SAPPI Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA), at [13]
- [4] Paragraph 14 of the applicant's founding affidavit.

- [5] For example, see *Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bhisho* 2018 (6) BCLR 659 (CC), at [34], within the context of sub-section 12(3) of the Prescription Act 68 of 1969.
- [6] A layperson's explanation can be found on the Wikipedia website. See https://en.wikipedia.org/wiki/Hypovolemic_shock#Diagnosis (accessed on 3 April 2020).
- [7] Paragraph 19 of the respondent's answering affidavit.
- [8] See CJ Rance, at [35].
- [9] In relation to the right of access to the courts, enshrined under section 34 of the Constitution, see the limitation provisions contained in section 36.
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