IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: BISHO

Case no. 718/17

In the matter between:

MOIRA RADEMEYER **Applicant**

and

THE MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE **First Respondent**

THE HEAD OF DEPARTMENT,

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE **Second Respondent**

JUDGMENT

STRETCH J.:

1. The applicant has instituted action for special damages against the respondents in respect of medical and related expenses incurred over a period which she avers came to an end in July 2017. She sent notice of her claim to the respondents on 13 September 2017 and receipt thereof was acknowledged on 6 October 2017.

2. In response to her claim, the respondents have raised a special plea of failure to comply with the provisions of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Act"), alleging that the applicant failed to notify the respondents of her claim within the period prescribed by the Act. The respondents further allege that the applicant has not established good cause for this failure and claim that they have been prejudiced by the alleged non-compliance.

3. Before me then is, what purports to be, the applicant's application for condonation for her failure to comply with the Act, insofar as this application may be necessary. The application is opposed.

4. According to the relevant portions of s 3 of the Act, the applicant may not institute legal proceedings against the MEC for Education (being an organ of state) without having given the MEC notice of her intention to institute legal proceedings within six months from the time when the debt in question became due.[1] For purposes of the Act the debt would have been regarded as having been due at the time when the creditor (ie the applicant) had knowledge of the identity of the organ of state (it is not in issue that the applicant knew from the outset that the organ of state was the Department), and of the facts giving rise to the debt. In terms of s 3(3)(a) of the Act the applicant would have been expected to have acquired this knowledge as soon as she could have done so, with the exercise of what is termed "reasonable care". Should an organ of state rely on the creditor's failure to serve the notice in compliance with the terms of the Act (as in the case before me), the creditor may apply to court for condonation of the failure. The court may grant the application if it is satisfied that:

   a. the debt has not been extinguished by prescription;
   b. good cause exists for the failure to serve the notice; and

[1] Section 3(3)(a) of the Act. See *Sibiya v Premier of the Province of KwaZulu-Natal* [2008] 1 All SA 295 (N)

c. the organ of state is not unreasonably prejudiced by the failure.[2]

5. The applicant's founding affidavit is brief. She alleges that her claim is one for special damages consisting of medical expenses incurred over an extended period of time, which period started in November 2014 and ended on an arbitrarily selected date in July 2017.[3] The applicant contends that she instituted her claim just over two months after all the facts upon which her claim was based were available to her (being on the aforesaid arbitrary date) and is accordingly not out of time in terms of the Act; alternatively, if she is deemed not to have complied with the Act, that such non-compliance be condoned. In short, it is not an application for condonation. It is a document purporting to lay the basis for the issuing of a declarator.

6. According to her particulars of claim[4] the applicant is employed as an assistant director with the Department of Education, based at Zwelitsha. During November 2014 the chief financial officer, Mr Isaacs, instructed her and others to move offices to an unsuitable venue. When she complained that this was an irregularity, Isaacs publicly accused her of insubordination, and instructed her and others to move into a passage, locking them out of their former offices. He also allegedly performed various other irregular and unlawful actions affecting the applicant, including suspending her and others without giving reasons. As a consequence of this conduct, the applicant alleges that she was subjected to and suffered psychological trauma, stress, defamatory insult and financial pressure. She was constrained to consult "one or more" medical practitioners for treatment. She submitted a grievance which was ignored by the Department. She was deprived of her quarterly

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[2] Section 3(4) of the Act. See in this regard *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA); *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA); *Premier v the Western Cape Provincial Government NO v BL* 2012 (2) SA 1 (SCA).

[3] According to the applicant's replying affidavit she continues to suffer from reactive depression and post-traumatic stress disorder "arising out of the events which gave rise to this action". She states that she received individual psychotherapy until 12 October 2016 when her medical aid benefits were exhausted and she was no longer able to attend. She further states that the numerous medical aid claims which she discovered reflect claims which she had submitted up until July 2017 whereafter she was obliged to do without medication for the aforementioned reason.

[4] None of the averments made in the pleadings have been repeated on oath in her founding affidavit supporting her application for condonation.

performance assessment and annual performance bonus. About three months later, she was reinstated to her former position without any explanation, inter alia depriving her of fair and just public administration. The plaintiff accordingly claims from the defendants damages in the form of loss of income, medical expenses and general damages for anxiety, humiliation, psychological trauma, stress, depression and so forth.

7. The Department's opposing affidavit has been deposed to by its director of legal services, Mr Edward Scheun. It seems that the Department's principle reasons for opposing the application are that the applicant has failed to show good cause for not giving notice to the Department within the requisite time period, and that the Department has been unreasonably prejudiced by this delay, in that its main witness is no longer in the Department's employment.

8. In terms of s 3 of the Act, the applicant was required to give notice to the respondents of her intended litigation within six months from the date on which the debt became due, briefly setting out the facts that gave rise to the debt, and any particulars about the debt that lay within her knowledge. A debt may not be regarded as being due until the creditor (ie the applicant) has knowledge of the identity of the organ of state (ie the Department of Education), and of the facts which gave rise to the debt.[5]

9. As I have said, the applicant's two-page affidavit does not support an application for condonation at all. It does not even state when the events took place which caused the applicant the distress, anxiety and indignation she seeks to be compensated for. This court has had to search for this information in her particulars of claim, which are, in any event, pleadings and not evidence on oath which is required in an application of this nature. Be that as it may, it seems to be common cause that the trigger-event which the applicant complains of occurred on 24 November 2014 and that the applicant's notice was received on 6 October 2017, just short of three years

[5] Section 3(3)(a) of the Act. See *Sibiya v Premier of the Province of KwaZulu-Natal* [2008] 1 All SA 295 (N)

after the trigger-event. In my view the applicant's failure to refer to this date in her founding affidavit in the condonation application, is because it is of particular significance. I say so because the applicant just happened to issue summons one week before a period of three years would have come and gone, calculated from 24 November 2014. This also just happens to be the time limit that sets forth the maximum period after an event that legal proceedings based on that event may be initiated to avoid prescription.[6]

10. The applicant in her replying affidavit says this:

'The assertion that the cause of action occurred on 24 November 2014 is erroneous. Upon a proper reading of my Particulars of Claim, it was clear that the cause of action occurred over a period of time, commencing on 24 November 2014 running through 2015, 2016 and up to 7 July 2017, when the last of my medical expenses were incurred. This has been admitted by the Defendants in paragraph 1 of the Defendants' Plea Over. In paragraph 4 of my Founding Affidavit I stated that *"…prescription would only have commenced running on that date"* (i.e. 7 July 2017). In paragraph 1 of the Plea Over this is admitted. I submit that the Special Plea of Prescription should fail on this account alone and that in reality, my application would not ordinarily be required.'

11. Attention to nonsensical averments such as those I have just referred to, should also not ordinarily be required. However, because of the costs order I intend making, I am forced to deal with them. This is why. It should not be necessary for this court to explain to the legal practitioner who settled the applicant's papers, that the defendant's "plea over" (dated 9 February 2018) is a response to the applicant's particulars of claim (dated 20 October 2017). The "plea over" is not a response to what is reflected in the applicant's founding affidavit (dated 1 March 2018) in the application for condonation. It is on account of this guff that the applicant was no doubt advised to aver that

[6] In terms of section 11(d) of the Prescription Act 68 of 1969

her application for condonation was not really required and that the opposition thereto ought to fail on that ground alone.

12. The only reason which comes to mind why this application for condonation would be a waste of time is because it has no prospects of success whatsoever on the issue of good cause. Insofar as it may be necessary to explain this in layman's terms to the applicant's attorney, it means that a debt does not become due once all the maths in respect of the quantum of the claim has been done. Such an approach would result in the ridiculous situation that claimants such as children who have been compromised at birth and require ongoing treatment and facilities (often until they die) would be non-suited from instituting damages claims against organs of state. In the matter before me, such an approach would mean that the applicant would have been entitled to select any arbitrary and irrational date from whence to measure the six month period, which date could, for argument's sake have been determined following the lapse of a considerable period of time following the trigger event.

13. It is clear that in the matter before me the applicant's claim became due at the earliest on 24 November 2014 (when there was a fallout between her and the chief financial officer) and (allowing for generous leeway in the applicant's favour) at the latest on 12 December 2014, on which date the applicant had started consulting a psychologist after having consulted her first general practitioner in relation to the event and its sequelae.[7] Her notice is accordingly at least two years out of time, with no explanation for this delay or even an admission that there was a delay.

14. Having knowledge of the facts which give rise to the debt, and the final quantum of the claim are not the same thing at all. This is a basic legal principle which ought to have come across in the contents of the affidavits filed on the applicant's behalf by her legal representative/s. That being the

[7] This information has been gleaned from the applicant's discovered documents. I am assuming in the applicant's favour that they purport to be a correct reflection of the facts. Then again I have some difficulty in understanding how, for example, a doctor's note dated 10 December 2014 can reflect the reasons for a visit some two weeks later.

case, the applicant should not be mulcted in costs with respect to these application papers.

15. It goes without saying then, that the applicant has failed to show good cause and that the application serves to be dismissed with costs.

ORDER:

1. The application is dismissed with costs.
2. The applicant is absolved from liability for any legal practitioners' fees with respect to the drafting and settling of her founding and replying affidavits.

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I.T. STRETCH

JUDGE OF THE HIGH COURT

Counsel for the applicant:
C.B. Wood
Instructed by Randell & Associates
Care of Hutton & Cook
KING WILLIAMS TOWN
(Ref. G.C. Webb)

Counsel for the respondents:
M. Mayekiso
Instructed by the State Attorney
Care of Shared Legal Services
KING WILLIAMS TOWN
Ref. 831/17-P16 (Mrs Yako)
Email noyako@justice.gov.za

Date heard on the papers: 7 May 2020

Date handed down by email: 29 May 2020