

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BISHO**

Case no. 67/15

In the matter between:

ANDISWA VALANTIYA on behalf of

SIMVUYELE VALANTIYA

Applicant/Plaintiff

and

THE MEC FOR HEALTH:

PROVINCE OF THE EASTERN CAPE

Respondent/Defendant

JUDGMENT

STRETCH J:

1. This is an interlocutory application in which the applicant (the plaintiff in the action) seeks an order in the following terms:
 - a. condoning the plaintiff's 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 Organs of State Act");
 - b. declaring the proceedings instituted by the plaintiff valid *ab initio*;
 - c. directing the defendant to pay the costs of the application in the event of opposition.
2. The application is opposed.

3. The applicant gave birth to her son, Simvuyele, at Dora Nginza Hospital on 7 March 2013, after having been transferred there from Motherwell Health Centre. The child presently suffers from cerebral palsy. The applicant alleges that the child's medical condition is attributable to intrapartum sub-standard obstetric treatment.
4. During November 2014 the applicant approached her erstwhile attorneys. They served a notice in terms of section 3 of the Organs of State Act (addressed to the Eastern Cape MEC for the Department of Health) on the Office of the Premier on 12 November 2014, on the State Attorney on 13 November 2014 and on the Senior Manager for Legal Services at the Department of Health on 19 November 2014.
5. During February 2015 the applicant issued summons against the respondent for damages arising from the intrapartum treatment referred to. The respondent denied liability and pleaded that the requisite section 3 notice had not been issued; alternatively, that the notice failed to substantially comply with the provisions of the Organs of State Act.¹

¹ The relevant portions of section 3 of the Organs of State Act reads as follows:

- (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; ...
- (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 he or she or it could have acquired by exercising reasonable care ...; and
 - (b) a debt referred to in section 2(2)(a) must be regarded as having become due on the fixed date.
- (4) (a) If an organ of state relies on the 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. The respondent no longer pursues the point that the notice was not issued. Nor is it suggested that the debt has prescribed or that the respondent has been unreasonably prejudiced by the applicant's failure to give notice in compliance with the terms of the Organs of State Act. The only issue before me is whether good cause existed for the applicant's failure to give notice in compliance with the aforesaid provisions.

7. In this respect the applicant has stated the following in her affidavit:

'During 2013 I attended Motherwell Health Centre and Dora Nginza Hospital to prepare the delivery of my son, Simvuyele. However Simvuyele and I received sub-standard obstetric treatment at Dora Nginza Hospital to an extent that Simvuyele is now having a cerebral palsy. Details of my cause of action are contained in the summons I instituted in the abovementioned Honourable Court during 2015. ... Throughout I was not aware about the peremptory provisions of section 3 of Act 40 of 2002. During November 2014 I approached my erstwhile attorneys Wim Krynauw Incorporated who issued a letter of demand to the Defendant.'

8. That in a nutshell, is the plaintiff's sole contribution on the issue of good cause. It is simply not enough. The applicant has not taken this court into her confidence.² The affidavit is silent on relevant aspects which I would have liked to hear her on (such as when she discovered that her son was not well, what steps she took thereafter, whether she attended a clinic for the child's post-natal care and what she was told there about his condition and whether she has any recourse, and what it was that eventually prompted her to seek

(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 the notice to the organ of state as the court may deem appropriate.

² See in this regard *MEC for Health: Eastern Cape v Mbodla* (449/2013)[2014] ZASCA 60 (unreported judgment dated 6 May 2014) at paras 3 - 4

legal advice when her child was almost two years old). Differently put, the applicant has circumvented the only period which is of relevance to this court in an application of this nature, in particular because the Organs of State Act mandates the plaintiff to acquire knowledge regarding the identity of the debtor by exercising reasonable care.

9. I am not satisfied with the paucity of information which the plaintiff has tendered in this regard.³ By the same token, and particularly because the other two prerequisites for a successful application are not in issue, I do not intend depriving either party of the opportunity to explore the issue of good cause at trial stage, by way of oral evidence. The respondent, in any event, did not raise the issue of failure to comply with the Organs of State Act as a special plea or as a point *in limine*. Being a particularly narrow and defined issue, it seems to have been in the contemplation of the parties that it would be traversed at trial stage in any event.

10. Rule 6(5)(g) deals with this situation as is apparent from its opening words, which are:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision.’

I intend making an order with the provisions of the sub-rule in mind.

ORDER:

1. The respondent is granted absolution from the instance.
2. Costs are reserved.

³ See *Mbodla* above para 5 - 6

I.T. STRETCH
JUDGE OF THE HIGH COURT

Counsel for the applicant:

N. Dukada SC with Z. Madlanga

Instructed by Z.Y.M. Ndzabela Inc

Locally represented by Sigabi Attorneys

KING WILLIAMS TOWN

Counsel for the respondent:

T.M. Ntsaluba SC with N.P. Mnqandi

Instructed by the State Attorney

Care of Shared Legal Services

KING WILLIAMS TOWN

Ref. 100/15-P11 (Mr Addae)

Date heard on the papers: 7 May 2020

Date handed down by email: 28 May 2020