



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – BHISHO)**

Reportable/Not Reportable

Case no.:634/2021

Matters heard on: 27 August 2024

Judgment delivered on: 03 September 2024

In the matter between:

G[...] T[...] obo G[...] N[...]

Applicant

and

MEC FOR HEALTH, EASTERN CAPE

Respondent

JUDGMENT

BRODY AJ

1. This is an application for condonation for the late service of a section 3(4)(a) notice in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act").

2. The applicant is Ms G[...] T[...] ("Ms G[...]") who has instituted an action in her and in her representative capacity as the biological mother and natural guardian of her minor daughter N[...] G[...] ("the minor child").
3. During June 2012 Ms G[...] was admitted to Frontier Hospital, East London, Province of the Eastern Cape. During her stay at the hospital and on the 16th of June 2012 the minor child was born and thereafter (the details of which are not given) it was discovered that the minor child suffered from brain damage, spastic cerebral palsy, mental retardation, uncontrolled epilepsy, foetal distress, and right hemiplegia due to a birth asphyxia.
4. Summons was issued against the Member of the Executive Council for Health, Eastern Cape Provincial Government, on the 18th of August 2021 after Ms G[...]’s attorneys had given notice in terms of section 3 of the Act on the 27th of May 2021.
5. In Ms G[...]’s particulars of claim she stated the following in regard to the section 3 notice:

"10. Prior to the institution of these proceedings, plaintiff duly complied with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002, and all relevant prescribed periods have lapsed, alternatively, by virtue of N[...]’s minority at the time of the accrual of the cause of action, the period of prescription is postponed or completion of prescription delayed, in terms of the provisions of the Prescription Act, No 68 of 1969, further alternatively, plaintiff will apply for condonation of the late notification of the claim."

6. In the defendant's plea, a special plea was raised, which related to the delay in serving the section 3 notice and based on the pleaded allegation that the **"cause of action arose on the 17th of June 2012"**.
7. This special plea was served and filed on the 2nd of March 2022.
8. The application for condonation was served and filed on the 21st of August 2024, two and a half years, after the issue of condonation being raised by the defendant in the plea.
9. Ms G[...] describes herself in her founding affidavit as **"an adult female police officer"** and states the following about her knowledge of legal affairs:

"12. I am a lay person in respect of legal matters and legal issues. I accepted that the staff at the hospital, where I was admitted at the time of labour, knew what they were doing and acted appropriately.

13. My mother who helped me take care of my baby suggested I take the matter up as she suspected foul play in the management of my child's birth.

14. She suggested that I contact Ndlebe Msuthu Incorporated Attorneys, a firm of attorneys, to get an opinion regarding my suspicions. She gave me her attorney's contact details. I contacted the number she gave me and I was able to make an appointment with the attorney.

15. On 25 May 2021, I then consulted with Mr Ndlebe of Ndlebe Msuthu Incorporated and gave him the history of my pregnancy, labour and delivery of my child as well as the fact that my child has symptoms of

underdevelopment or cerebral palsy. I was advised that the medical staff at the hospital were negligent in caring for my baby.”

10. And further at paragraph 20 she stated the following:

“20. I am a lay person with regard to legal matters and medical issues. As indicated above, I did not believe that the hospital staff had anything to do with the outcome of my baby. I accepted it as an unavoidable fact following a complicated labour.”

11. Unlike other matters of this nature, Ms NG[...] did not claim any sum of money in her personal capacity, and only claimed damages in respect of the minor child.

12. The application for condonation was not opposed by the defendant in this application.

13. In argument I requested Mr Mlalandle to furnish short heads of argument in regard to the reason why there was such an inordinate delay in bringing the condonation application before court. It is trite that applications for condonations should be brought immediately when it is apparent that condonation is required, without any further delay. If there is a delay, full reasons need to be given for the delay.

14. The day after the matter was argued, a supplementary affidavit was served and filed in which Mr Mfundiso Ndlebe, Ms G[...]’s attorney, explained the delays in the matter.

15. The following explanation was given:

“After having received the defendant’s plea, our offices immediately made discovery in terms of rule 35, the

respondents also filed their discovery affidavit. Following that a request for further documents in terms of rule 35(3)(6) was made to the respondents which led to an application to compel having been brought to this Honourable Court on 22 November 2022. I attach hereto such court order and I have marked same annexure "A".

11.

Following the non-compliance with the above court order the applicant thereafter moved an application to strike out the defence of the respondent. The respondent thereafter requested removal of the application and provided the documents which were crucial for our case. I attach hereto such court order and I have marked same as annexure "B".

12.

I must mention to this Honourable Court that we could not proceed with a further consultation with our client without having obtained clinical records which were in possession of the respondent. The documents were only brought to us on 23 January 2023.

13.

I submit that the delay was for purposes of gathering further information in order to establish whether we have a proper case against the respondent and thereafter file a reply to the respondent's special plea and/or apply for condonation for failure to comply with the provisions of section 3 of Act 40 of 2002.

14.

In the circumstances it is my respectful contention that the requirements for an application for condonation have been met and that the applicant has made out an appropriate case

on the papers and it will be appropriate for the above Honourable Court to grant an order in terms of the relief sought by the applicant in the notice of motion.”

16. I am grateful to Mr Mlalandle for his short heads of argument which deals with the issues of the delay.
17. Section 3(4)(b) of Act 40 of 2002 (“the Act”) sets out the requirements that the court may grant for an application of condonation:

“The court may grant an application for failure to serve notice 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.”**

18. I agree with Mr Mlalandle that the claim by Ms NG[...], on behalf of the minor child, has not prescribed.
19. The issues for consideration are fully set out in Madinda vs Minister of Safety & Security 2008(4) SA312 (SCA) where the principal is set out that a full explanation must be given for the delay.
20. I am further in agreement with Mr Mlalandle that the respondent will not suffer any unreasonable prejudice because:
 - 20.1 the application was not opposed by the respondent;

- 20.2 the statutory notice was dispatched as early as the applicant was aware of her claim;
- 20.3 after the issuing of summons, the respondent's special plea and plea-over dealt extensively with the relevant issues;
- 20.4 the respondent had in fact delayed the furnishing of the clinical records for the applicant to consider her prospects of success; and
- 20.5 on the face of the pleaded case, the applicant appears to have good prospects of success.
21. This court as upper guardian of minor children is also required to consider the best interests of the minor child and especially in circumstances where the minor child is unable to advance her own case, and submit her own claims.
22. I am satisfied with the reasons furnished by Ms G[...]’s attorneys for the delay in bringing the application for condonation and a decision to grant condonation by this court will not bind the trial Judge in due course.
23. In the result, the following order will issue:
1. Condonation is granted for the late filing of the notice in terms of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.
 2. That there is no order as to costs.

B.B. BRODY
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Adv. Mlalandle
Instructed by	:	Ndlebe Msuthu Inc. c/o S. Booie & Sons Attorneys 50 Stewart Drive Berea EAST LONDON (Ref.: S173/10/17)
Counsel for the Respondent	:	No Appearance
	:	The State Attorney c/o Shared Legal Services Office of the Premier 32 Alexander Road KING WILLIAM'S TOWN (Ref.: 779/21 – P3 (Mr Mgujulwa))