IN THE HIGH COURT OF SOUTH AFRICA

(FREE STATE DIVISION, BLOEMFONTEIN)

Case Number: 4016/2014

In the matter between:

L. H. A. Applicant

and

THE MEC FOR HEALTH OF THE FREE STATE PROVINCIAL GOVERNMENT Respondent/Defendant

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JUDGMENT BY: MURRAY, AJ

HEARD ON: 13 OCTOBER 2017

DELIVERED ON: 19 OCTOBER 2017

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[1] This is an application in terms of s 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act"). The Applicant seeks condonation for the late serving of her s 3(2) Notice of Intention to Institute Legal Proceedings ("the Notice") against the Respondent.

[2] The Applicant (the Plaintiff in the main action) instituted action against the Respondent (the Defendant in the main action) in her representative capacity as the mother and natural guardian of M. M. L., ("the minor"). The 12-year old boy was born in the Thebe District Hospital, Harrismith, on […] 2005 and suffers from cerebral palsy. The Applicant alleges that he suffered a hypoxic-ischemic insult during birth which resulted in permanent severe brain damage, *inter alia* because of her alleged prolonged labour, and as a result of the alleged negligence of the Respondent's employees, and claims R21 million in damages from the Respondent.

[3] The main trial, on the merits only, was set down for ten (10) consecutive court days from 9 to 20 October 2017. But, despite the requirement for condonation to be sought as soon as one becomes aware of the need for it, this application was filed on 7 September 2017, more than two years after the Respondent had denied compliance with the Act in its Plea. The application was therefore launched only a month before the trial was due to start. That did not leave enough time to allow for the ordinary time limits within which to file opposing and replying papers and to allow the issue of

condonation to be resolved before the matter came to trial. The belated filing of this application has therefore inevitably caused a considerable delay and a waste of allocated trial days in a matter which had been declared trial-ready in 2016 already.

[4] Although the Respondent had by then already filed a Notice of Intention to Oppose, the Applicant on 5 October 2017 set the application down for 9 October 2017 in the trial court, purportedly on "the unopposed roll". The Respondent filed its opposing papers on that first morning of "trial-time", with the Applicant insisting on time to consider the said papers in order to file a reply, which it did on the 11th. The Respondent's legal team then needed an opportunity to consider and discuss its options with the Respondent and the application was only argued on the 13th.

[5] The application resulted in two issues having to be resolved before the trial could proceed, namely: 1) whether an agreement was reached that the Respondent would not oppose the condonation application, and if so, whether the Respondent was entitled to resile therefrom, and accordingly whether the condonation application should be heard on an unopposed basis; and 2) if the court finds that the Respondent is entitled to oppose the application, whether the Applicant has made out a case for condonation. I agree with Mr Claassen's submission that the first issue should be dealt with as a point *in limine.*

***In Limine*: The "Agreement":**

[6] The Applicant's Particulars of Claim of 2 September 2014 alleged compliance with s 3(2)(a) of the Act. The Respondent raised no Special Pleas but took issue with the Applicant's alleged compliance in its Plea of 9 March 2015.

[7] It is common cause that on 7 September 2017 the application was served on the State Attorney who acts in this matter on behalf of her client, the Respondent.

[8] The Legal Administration Officer ("the Legal Officer") who handles the case for the Respondent, deposed to the opposing affidavit in which he claimed to be the only person who had the authority to instruct the State Attorney on behalf of the Respondent to settle or to reach agreements with other parties, which in this instance he insists that he did not do.

[9] He stated that the State Attorney forwarded the application to him for instructions on 8 September 2017, and on 20 September forwarded to him an advice from the relevant Senior Counsel not to oppose the application. When he failed to respond to either document because he was 'still investigating the claim and trying to establish the whereabouts of medical records and all the witnesses', the State Attorney sent the Applicant's attorney a letter on 21 September 2017, in which she *inter alia* confirmed that the Respondent would not be opposing the application.

[10] On 26 September 2017 the Legal Officer, upon learning of the 21 September letter, immediately instructed the State Attorney to withdraw its contents and to notify the Applicant's attorney that the Respondent would indeed be opposing the application. She immediately dispatched a letter to that effect and on that same morning also served and filed a Notice to Oppose.

[11] On 27 September 2017 the Applicant's attorneys alleged that the 21 September letter had amounted to an agreement and warned the State Attorney that she could not renege thereon. On 4 October they notified her that they did not consider the condonation application to be opposed and on 5 October 2017 set the application down for hearing 'on an unopposed basis' on the first day of trial. On 9 October 2017, however, the Respondent filed opposing papers, to which the Applicant replied on Wednesday 11 October 2017.

[12] The Respondent denied any agreement not to oppose and averred that the State Attorney's letter of 21 September had been written erroneously and without the Respondent's instruction or mandate. The Legal Officer stated that the State Attorney's only authority was to defend the matter, not to waive or abandon any of the Respondent's rights, and averred that, since neither she nor the Senior Counsel at the relevant time had knowledge of the new facts which had emerged from his investigation into the claim or, in view of those, of the

consequences of waiving the Respondent's right to oppose, neither of them could have waived or abandoned such rights.

[13] The Applicant remained adamant, however, that the 21 September letter had either created an agreement from which the Respondent could not resile, or constituted an admission which it cannot withdraw, or abandoned rights which the Respondent cannot reinstate.

[14] Counsel for the Applicant, Mr Strydom SC, argued that, in the absence of instructions from the Respondent, the latter's attorney and Counsel had been entitled to take control of the matter and had accordingly acted within their mandate on 21 September 2017 to agree not to oppose the application. With reference to **George v Fairmead (Pty) Ltd**[1]**,** he contended that the Respondent should therefore be bound by its attorney's 'assent to the agreement'.

[15] He argued, furthermore, that the Respondent had abandoned its right to oppose by way of the said letter because an agreement was reached when the Respondent communicated to the Applicant that it would not oppose the application.

[16] His third submission was that with the 21 September 2017 letter it became common cause that the application was to proceed on an unopposed basis and that, accordingly, the Respondent with its 26 September letter was attempting to withdraw an admission. For this

[1] 1958 (2) SA 465 AD at 471

argument he relied on **Bellairs v Hodnett and Another**[2] to state that any party who seeks to withdraw an admission needs to give a satisfactory explanation for its withdrawal, which requirement the Respondent's explanation did not meet, and pointed out that the withdrawal of an admission normally happened by way of a substantive application.

[17] Mr Claassen SC, Counsel for the Respondent, denied that the 21 September 2017 letter had created an agreement which had disentitled the Respondent to oppose the condonation application. He pointed out that in the absence of any request from the Applicant to allow the institution of legal proceedings without a valid Notice, or to undertake not to oppose an application for condonation, whether by way of a request in terms of s 3(1)(b) of the Act or otherwise, there had been neither an offer from the Applicant nor acceptance of an offer, and therefore no agreement.

[18] He contended, furthermore, that, in so far as the 21 September letter might have been construed as an 'offer', the Applicant only responded and alleged a so-called 'agreement' after the 26 September letter had already informed him that the Respondent had withdrawn the contents of its previous letter and after the Notice to Oppose had already been filed. Which, according to Mr Claassen, meant that the 'offer' had not been 'accepted' and that the Respondent had acted within its rights to withdraw it before acceptance.

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[2] 1978 (1) 1109 (AD) at 1150

[19] Support for Mr Claassens' submission is to be found in the Supreme Court of Appeal's confirmation in **Wissekerke and Another v Wissekerke**[3] and in **Phillips v Aida Real Estate (Pty) Ltd**[4] that an open offer can be withdrawn at any time before acceptance without amounting to breach of an undertaking or an agreement. **Cristie**[5] confirms that "the general rule is that the offeror may withdraw or revoke or 'repudiate' his offer at any time before it has been accepted. This corresponds, furthermore, with the principle set out in **Kerr**[6] that:

> "if at any time before acceptance an offeree receives a notification that the offer is withdrawn, or, as is often said, revoked, he loses the opportunity to accept".

In this regard it has even been said that 'it would amount to dolus on the part of an offeree to claim to have an agreement when he knows full well that the offeror no longer intends to enter into an agreement with him".[7]

[20] Despite Mr Strydom's submission that the word *"confirm"* in the 21 September letter suggests communication between the Applicant's attorneys and the State Attorney, there is no indication in the affidavits or the annexures that the Applicant did request an undertaking from the Respondent not to oppose its application for condonation and that

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[3] 1970 (2) 550 (A) at 557 E
[4] 1975 (3) SA 198 (A) at 207 H.
[5] Christie's The Law of Contract in South Africa, 6th Edition, at 54
[6] The Principles of the Law of Contract, Sixth Edition, at 73
[7] Christie, *supra,* at 54.

the 21 September letter therefore constituted the communication of an agreement to that effect between the parties.

[21] In the absence of such a request by the Applicant, I find persuasive the analogy of the 21 September letter being an 'offer' which the Applicant was no longer at liberty to accept on 27 September because by then the Respondent had already withdrawn or revoked the offer not to oppose and had communicated this revocation to the Applicant in its 26 September letter and its 26 September Notice of Intention to Oppose.

[22] Mr Claassen also denied any alleged waiver of the Respondent's rights to oppose, contending that when the State Attorney dispatched the 21 September letter neither she nor Counsel had the required full knowledge of all the new facts uncovered during the Deponent's investigation, namely the demise of one key witness and the disappearance of another key witness, but also the mysterious disappearance of the relevant hospital and clinic files in this and five other CP matters. He averred that they could therefore not have been aware of the legal consequences for the Respondent of any decision not to oppose, and could therefore not have had the necessary intention to surrender such rights.[8] He submitted that, in addition, neither of them had been authorised[9] or specially mandated[10] to waive such rights, and pointed out that the Respondent's original instruction

[8] Christie's Law of Contract in South Africa, 7th Edition, at 512; Ex parte Sussens 1941 (TPD) 15.
[9] Pretorius v Greyling 1947 (1) SA 171 (W) at 177.
[10] Christie, *supra,* at 512, ftn 81, and Bikitsha v Eastern Cape Development Board 1988 (3) SA 522 (E) at 527 J –
528 A.

to deny compliance with the Act had never been varied, amended or waived.

[23] Mr Strydom contended that, because of their original instruction to represent the Respondent, the State Attorney and Counsel needed no special mandate to conclude the alleged agreement and that, consequently, the Respondent had to be bound by their concession. But, the party who alleges waiver, must clearly prove that the person who is alleged to have waived his rights, or, in the case of an agent, his client's rights, had full knowledge both of the facts and of the legal consequences thereof and had intended to surrender those.[11] This the Applicant did not do.

[24] In view of a lack of any evidence that the Respondent's original instruction to deny compliance was ever retracted, I have to agree with Mr Claassen that the State Attorney's and the Counsel's general mandate to act on behalf of the Respondent does not authorise them to act to the Respondent's detriment and directly against its instructions[12] and so to infringe upon the rights of a State Department which, after all, is the custodian of public funds.

[25] It is an accepted principle in our law that a legal representative who is appointed to sue or is clad with only a general authority, such as that conferred on the State Attorney by s 3 of the State Attorneys' Act, cannot compromise or settle to his client's detriment without a specific

[11] Christie, *supra,* at 548 and Pretorius v Greyling, 1947 (1) SA 171 (W) at 177.
[12] Goosen v Van Zyl 1980 (1) SA 707 (O); Xatula v Min of Police, Transkei 1993(4) SA 244 (Tk GD).

mandate or authorisation to do so.[13],[14] See in this regard also **Bikitsha v Eastern Cape Development Board[15].**

[26] I agree with the principle set out in **Ras v Liquor Licensing Board Area 11, Kimberley[16]** that a client is not bound by his attorney's or counsel's action where he or she has exceeded his or her mandate. I accept, furthermore, in the absence of any evidence to the contrary, that the State Attorney and Counsel in the present application had no special mandate to settle or to compromise and that they had therefore not been authorised to agree to do away with, waive or abandon the Respondent's right to oppose the application[17].

[27] In the premises I find that the letter of 21 September 2017 did not create an agreement from which the Respondent could not resile and that, accordingly, Respondent had the right to oppose the application and such opposition was not unreasonable.

[28] The Respondent was substantially successful on this issue and there is no reason to deviate from the normal practice regarding costs, wherefore the Applicant is to be ordered to pay the costs occasioned by the adjudication of the point *in limine,* such costs to include the costs of two counsel, one of whom a Senior Counsel.

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[13] Ras v Liquor Licensing Board, *supra,* at 237 G – H.
[14] Ras v Liquor Licensing Board, *supra,* at 527 I – 528 C.
[15] 1988 (3) SA 522 (E) at 527 J – 528 C.
[16] 1966 (2) SA 232 (CPD) at 237 E - F.
[17] The facts in the present case differ from those in Dhlamini v Minister of Law and Order and Another 1986 (4) SA 342 (D) and (CLD) in which the court found that counsel who had been properly instructed by the State Attorney would have the implied authority to bind the Respondent to the settlement concluded in that here there was only an advice by counsel to the attorney for the Respondent to consider and there was no instruction or agreement or settlement not to oppose.

The Condonation Application:

[29] Act 40 of 2002 determines that, before a creditor can institute an action to recover a debt from an organ of State, s 3(2)(a) of the Act requires such creditor to serve on such organ of State a notice of its intention to do so "within six months from the date on which the debt became due".

[30] It is not in dispute that the Applicant's attorneys, Mokoduo Incorporated ("M.E.D. Attorneys'), on 30 June 2014, more than 9 years after the minor's birth on 5 May 2005, sent the Applicant's Section 3(2) Notice by registered mail to the Free State Department of Health and thereafter, on 2 September 2014, issued summons against the Respondent. The Applicant averred that it had merely brought the application for condonation out of an abundance of caution. That, of course, is not correct since its alleged compliance remained in issue.

[31] In her particulars of claim, the Applicant made three averments regarding compliance with the Act, namely (1) that she has been "pardoned" from compliance with any statutory time limitation by the minor's minority; alternatively (2) that she gave due and written notice in terms of s 3(2)(a) of the Act on 30 June 2014; further alternatively, (3) that she shall seek condonation for any non-compliance with any statutory time limitation.

[32] The Respondent disputes compliance, wherefore this application is essential.

[33] The Applicant's first averment is untenable. In **Premier, Western Cape Provincial Government v BL**[18] the court held that the term "creditor" in the Act is defined to include a person who acts on behalf of a minor, and that someone such as the Applicant who brings the action in her capacity as mother and natural guardian fell within such definition and accordingly had to give notice in accordance with the provisions of that Act, not in accordance with the extended time periods provided for in the Prescription Act 68 of 1969 regarding debts pertaining to minors. She therefore has to adhere to the requirement in s 3(2)(a) of the Act to notify the relevant organ of State of her intention to institute action "within six months from the date on which the debt becomes due".

[34] The date on which the six months' period commences will be determined by the facts which establish the date on which the debt becomes due.

[35] S 3(2)(a) read with s 3(3)(a) of the Act determines, respectively, that

> "(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 s 4(1)"

[18] [2012] 1 All SA 465 SCA

and

"(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 the facts giving rise to the debt, but a creditor must be regarded as having required 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."

[36] S 3(4)(a) of the Act gives a creditor the right to apply to court to have its non-compliance with s 3(2)(a) condoned where a Respondent relies on such non-compliance. The court's discretion to grant condonation is not unfettered, though, as is clear from **Madinda v Minister of Safety and Security**[19]. S 3(4)(b) permits the court to do so only once it is satisfied[20] that the Applicant had established all three of what Majiedt AJA, as he then was, referred to in **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd**[21] as 'conjunctive requirements', namely 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."[22]

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[19] 2008 (4) SA 312 (SCA) at par [6] at 315.

[20] In Madinda v Minister of Safety and Security, *supra,* at par [8] at 316 the Supreme Court of Appeal held that *"the standard of proof is not on a balance of probabilities but rather an overall impression made on the court which brings a fair mind to the facts set up by the parties".*

[21] 2010 (4) SA 109 (SCA) at 113.

[22] See also Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA) at para [5], [11] and [13] at 460 D – F; 462 B – C and 462 F.

[37] This application for condonation of the late filing of the s 3(2)(a) notice was only filed more than three years later, on 7 September 2017, despite the requirement, as confirmed in **Madinda v Minister of Safety and Security**[23], that condonation in terms of the Act be applied for as soon as the party concerned realises that it is required and despite the Respondent having denied the Applicant's compliance with the Act in its Plea three years earlier already. No explanation for that delay is given in the application.

[38] For his argument regarding the Applicant's alleged compliance with the provisions of s 3(2) of the Act, Mr Strydom relied mostly on the Constitutional Court case **Links v Department of Health, Northern Province**[24] which, as Mr Claassen pointed out, focused on the interpretation of s 12(3) of the Prescription Act 68. But his reliance on this case for the interpretation of the concept *"debt is due"* which determines the date on which the six month period for the filing of the S 3(2)(a) Notice starts to run, is, in my view, justified.

[39] As Mr Strydom pointed out, the wording of s 3(2)(a) of the Act "from the date on which the debt became due" corresponds with that of s 12(1) of the Prescription Act 68 of 1969 ("the Prescription Act") which determines that prescription shall commence to run "as soon as the debt is due"*;* and the condition in s 3(3)(a) in the Act that debt may only be regarded as being due when "the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt" corresponds with

[23] *Supra,* at para [14].
[24] 2016 (4) SA 414 (CC)

that of s 12(3) of the Prescription Act. There is no indication that the concept "debt due" has a different meaning in the Act for purposes of determining the date of commencement of the 6 months period.

[40] In the **Links**-case Zondo J with reference to **Truter and Another v Deysel**[25] interpreted the meaning of *"debt due"*, including a delictual debt which is owing and payable, to mean:[26]

> "A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place, or, in other word, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

[41] He continued, still with reference to **Truter**[27] that

> "In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts."

[42] The Court also quoted with approval[28] a statement in **Loubser**[29]

> "A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding

[25] 2006 (4) SA 168 (SCA) n7 at para [16]
[26] *Supra,* at para [31] at 425.
[27] *Id* para [17]
[28] *Id.*
[29] Loubser *Extinctive Prescription* 1996 at 80 – 81, para 4.6.2

> unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault."

[43] It is common cause that the Applicant's claim has not prescribed, and that the first requirement for condonation has therefore been met. In issue in this application is the Applicant's compliance with the second and third s (3)4(b) requirements, namely those of s 3(4)(b)(ii) 'good cause' for the delay and of s 3(4)(b)(iii) no unreasonable prejudice to the Respondent.

[44] One needs to keep in mind that, as stated in **Madinda**[30]**,** there are two competing elements at play in s 3(4)(b), namely the Applicant's right to have the merits of the case tried by a court of law, but also the right of the Respondent as an organ of State not to be unduly prejudiced by delay beyond the statutorily prescribed limit for giving notice. The Act fetters the Applicant's right to have the merits of its case tried in court by prescribing the three requirements to be met before its case may be heard.

"Good cause":

[45] To determine whether 'good cause' was proved, one needs to examine those factors which pertain to the fairness of granting the relief and the proper administration of justice, such as, for instance, the reasons for the delay, the sufficiency of the explanation offered,

[30] *Supra,* at par [12] at 317.

the Applicant's *bona fides,* any contribution by other persons or parties to the delay, the Applicant's responsibility for the delay, and the prospects of success in the proposed action.[31]

[46] The minimum requirement for 'good cause' for the Applicant's failure to give timeous notice is set out in[32] **Silber v Ozen Wholesalers (Pty) Ltd[33]**, namely that:

> "the respondent 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."

[47] The court, according to Heher JA[34], has accepted that this principle is also applicable to the interpretation of s 3(4)(b)(ii) of the Act. He stressed that "good cause for the delay" was not simply a mechanical matter of cause and effect but that the court needs to decide whether the Applicant has proffered "acceptable reasons for nullifying, in whole or at least substantially, any culpability on his part pertaining to the delay in serving the notice timeously".

[48] In **MEC for Education, Kwazulu-Natal v Shange[35]** Snyders JA cautioned, however, that the court is to exercise a wide discretion in this regard; "that 'good cause' may include a number of factors that are entirely dependent on the facts of each case and that the prospects of success of the intended claim play a significant role".

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[31] Madinda v Minister of Safety and Security, *supra,* at par [10] at 316
[32] Premier Western Cape, *supra,* at para [17]at 475.
[33] 1954 (2) SA 345 (A) at 352 H – 353 A.
[34] Madinda v Minister of Safety and Security, *supra,* at par [11] at 316
[35] 2012 (5) SA 313 (SCA) at para [15] at 320

Socio-economic circumstances:

[49] The Applicant requested this Court in evaluating 'good cause' for the delay in filing her s 3(2) Notice to have regard to her socio-economic circumstances. These she listed as: that she completed Grade 12 at Lerato Thando Secondary School in Harrismith, but has no other formal education or work experience; that she is currently 32 years old, has never been married, live in a basic 2-bedroom house in Indabezwe, Harrismith, with her parents, her five siblings, and her two children, and is able to read, write, and speak Isizulu and English.

[50] Although none of these factors individually are highly significant in explaining why it took the Applicant nine years to get to a point where she realised that she might have someone to hold liable for her child's condition, they are indicative of certain socio-economic factors which would potentially have hampered or prevented a very pro-active investigation into the real reason for and cause of her child's condition, such as an unsophisticated environment, basic and overcrowded living conditions, a lack of means, access - and probably transport problems, which meant her being totally dependent on public medical services and facilities.

Medical grounds:

[51] Regarding the medical grounds for her claim the Applicant avers that during 1 and [….] 2005 she endured prolonged periods of labour; that the minor was born by natural vaginal delivery; that he was immediately separated from her and placed in another ward and that a few minutes after birth the nurse brought him to her and told her they would be discharged that afternoon.

[52] Although she has passed matric, one has to keep in mind that there is no evidence that she had the medical knowledge to notice or realise the significance of or to evaluate any unexplained events or symptoms, or even to know what was normal or not.

[53] Zondo J cautioned that without advice at the time from a professional or expert in the medical profession, the applicant in the *Links*-case[36] where an ischemic incident caused that applicant's condition, could not have known what had caused his condition. He added that it seemed to him 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 be in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice.[37]

[36] Links, *supra*, at para [47].
[37] Links, *supra,* at para [48] at 429.

[54] In *Links* Counsel for the Applicant submitted that, even if the applicant knew by 5 August 2006 that he had lost his thumb, he did not and could not know what had caused it and the eventual loss of function of the left hand (namely that it was "most probably due to the plaster of Paris that was too tight… and not removed soon enough… when ischemia occurred"). The Court stated that the reason why the applicant lost his thumb and what caused such loss are factual questions and not a legal conclusion. They are therefore part of the facts which the applicant had to establish before it could be said that he had knowledge of the facts.[38] The same principle would in my view apply to the Applicant in the present case.

The Applicant's role in the Delay:

[55] The Applicant averred that the minor was approximately 6 months old when she noticed that he was unable to sit and attended the Intabezwe Clinic to consult with a doctor; that the doctor examined the child and told her that there was no cause for concern and that the minor would reach his normal milestones in his own time.

[56] The next pro-active step at her initiative apparently only happened eighteen months later. She avers that when the minor was approximately 2 years old, she realised that his condition was not improving and decided to return to the Clinic where the nurse on duty wrote her a referral letter to attend the Mofumahadi Mopeli Manapo

[38] At para [36] at 426.

Regional Hospital. There the duty doctor examined the minor and informed her that he was brain-damaged because of a lack of oxygen to the brain at the time of birth, as a result of which he would not develop normally and wrote her a referral letter for the minor to attend physiotherapy at the Thebe Hospital.

Unexplained Six-year Gap:

[57] On the Applicant's own version the above two steps appear to be the only pro-active ones that she took to discover the facts pertaining to her child's condition. She mentions no dates. Thereafter there is simply a complete blank, with no information whatsoever about the next five years until she allegedly met the unidentified woman on some unspecified date in 2014 and was directed to MED attorneys.

[58] It can therefore not be said that she diligently tried to obtain the information necessary to institute action. There is no 'full explanation' covering the entire period of delay which enables the Court to assess how the delay really come about, either, as emphasised in **Minister of Agriculture and Land Affairs v CJ Rance**[39] and as held to be a minimum requirement to enable a Court to assess the motives and conduct of Applicant, as specified in **Premier, Western Cape v Lakay**[40]**.** One therefore needs to look at other factors to determine if they compensate for such lack.

[39] *Supra,* at para [35] at 117.
[40] *Supra,* at para [17] at 12.

[59] That being confined to public medical facilities was an impediment in her acquisition of knowledge of the required facts is clear from the Applicant's averment that nobody suggested or intimated to her that the minor's condition was in any way preventable or related to a mistake made by anyone at the Hospital even though she had seen at least the two doctors referred to in her affidavit.

[60] It does seem questionable, though, that she would never in twelve years have asked why the oxygen-deprivation and resulting CP happened, especially in view of her subsequent pregnancy and concerns that she must have had of having another brain damaged child. That is where the socio-economic factors come into play again. As Prof Solomons stated in his report, for instance, he could not come to a certain conclusion because an early MRI had not been done. Had the Applicant had access to private medical facilities and specialists this problem might not have occurred and early intervention might have been possible.

Other People's role in the Delay:

[61] The Applicant avers that no-one ever intimated or suggested to her that the minor's condition was in any way preventable or related to a mistake made by anyone at the Hospital, so she never suspected that the Hospital might have been negligent or that facts which could support a claim against the Hospital existed.

[62] She stated, furthermore, that she was never shown any records pertaining to her maternity, labour, the minor's treatment at the Hospital, so she never realised that the Hospital might have been negligent in their monitoring and/or delivery of the minor or that facts existed which supported a possible claim against the said Hospital.

[63] In *Links* the applicant was given an explanation with regard to the nature, extent and possible consequences of the medical procedure to amputate his thumb, but he was not told what had caused his problem (namely the too tight plaster of paris).

[64] *In casu* it was submitted that the Applicant was informed by a doctor in 2007 already that the minor's medical condition stemmed from a lack of oxygen to the brain at the time of birth and implied that that was therefore the date on which the Applicant would have had knowledge of all the necessary facts to establish a cause of action, or would at least have had knowledge of sufficient facts to start searching for the cause of the lack of oxygen and for someone to hold liable for it.

[65] But, as Zondo J cautioned,[41] one should not make the mistake of presupposing that any explanation given to the applicant by the medical staff would have identified medical error as the actual or even potential cause of her injuries. (My emphasis)

[41] In *Links* at para [42] at 428

[66] Zondo J made it clear that to require knowledge of causative negligence for the test in s 12(3) to be satisfied, would set the bar too high. He warned, however, that in cases involving professional negligence, the party relying on prescription, as, in my view, the Applicant in the present case relies on non-compliance with s 3 of the Act, 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.[42]

[67] The question then is whether in the present case the Applicant can be said to have had reasonable grounds before 2014 for suspecting that the minor's injuries could be attributed to negligence of the Respondent's employees and when she could be said to have had knowledge of all the material facts from which the debt arose or which she needed to know in order to institute action.

[68] The Supreme Court of Appeal said through Cameron JA and Brand JA that it has in a series of decisions, been emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action.[43] In a claim for delictual liability based on the Acquilian action negligence and causation are essential elements

[42] Id
[43] Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA).

of the cause of action. Both have factual and legal elements.[44] Until the applicant had knowledge of facts that would have led her to think that possibly there had been negligence and that this had caused the minor's condition, she would have lacked knowledge of the necessary facts contemplated in ss 3(2)(a) and 3(3)(a).[45]

[69] Spilg J in **Makwelo v Minister of Safety and Security[46]** quoted from para [20] *Truter* where the Court held that the type of knowledge required is only of the material facts from which the debt arises – "it does not require knowledge of the relevant legal conclusions (i.e. that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions".

[70] On the facts at my disposal, it seems highly improbable that the Applicant before 2014 would have had the type of knowledge that is required to trigger the running of prescriptive time, and which has been defined as: "Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true is also insufficient. For there to be knowledge, the belief must be justified."[47] Furthermore, "belief without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, vehemently controverted allegation or subjective conviction".

Prospects of Success:

[44] Lee, *supra,* at n39 para 39.
[45] *Links*, *supra,* at para [45] at 429.
[46] 2017 (1) SA 274 (GJ) at para [51] at 286
[47] *Id* para [18].

[71] The Applicant alleges that during early 2014 she met a woman at the Hospital who indicated to her that she had instituted action for damages against the Government due to negligence on the part of the Hospital when she gave birth to her child; that that woman suggested that she contact her attorneys (MED Attorneys) with whom she then consulted during May 2014 after receiving their details from this woman.

[72] According to her affidavit, upon hearing of the circumstances surrounding the minor's birth the attorney indicated that he believed her to potentially have a claim against the Government due to the negligence of its employees at the Hospital. He informed her that further investigations needed to be conducted to establish whether the relevant medical institutions could be held liable but advised that they gave notice to the relevant Government Department in the meantime that she intended to institute action. On her instructions the attorney then sent the s 3(2) notice to the FS Department of Health on 30 June 2014.

[73] She avers, furthermore, that in August 2014 she attended a consultation with a Radiologist, Prof S Andronikau who performed an MRI on the minor and delivered a report in which he concluded that

> "Features are those of chronic evolution of a global insult to the brain, due to hypoxic ischaemic injury, of the partial prolonged variety, most likely occurring at term".

Based on those findings her attorneys advised that a claim against the Government based on the negligence of its employees would be potentially successful and she instructed them to proceed with this action.

Prospects of Success:

[74] The Applicant does not deal with the prospects of success on the merits in her founding affidavit. But, for a determination of the prospects of success on the merits, the Court's attention was directed to the findings in the Medico-legal report of a radiologist, Prof Andronikau, and those recorded in the three sets of joint minutes between the Paediatric Neurologists, between the Nursing Specialists, and between the Obstetrician and Gynaecologists.

[75] Prof Andronikau's finding that

> "Features are those of chronic evolution of a global insult to the brain, due to hypoxic ischaemic injury, of the partial prolonged variety, most likely occurring at term".

is based on an MRI scan of the minor's brain at the age of 9.

[76] The joint minute between the specialist paediatricians, Prof Solomon and Dr Griessel, recorded the following important findings:

1. "M.'s brain MRI changes are indicative of partial prolonged hypoxic ischemic injury at term";

2. “In the setting of absent medical records and maternal history of sucking and swallowing abnormality, timing of the partial prolonged hypoxic ischemic injury [in] the intrapartum period cannot be excluded”, and

3. “There is no evidence for hypoxic ischemic injury in the antepartum or postpartum periods.”

[77] But, significantly, Dr Griessel cautioned that due to the lack of documentation there is also no evidence for peripartum injury. And the report of Prof Solomon itself contains many concerning observations, such as, for instance, that due to the absence of antenatal, obstetric and resuscitation records, “complicated by the absence of early MRI neuroimaging” M.s fulfils one the three “Volpe’s features of intrapartum asphyxia, and none of the essential 2014 criteria of the Task Force of the American College of Obstetrics and Gynaecology” “to define an acute intrapartum hypoxic event as sufficient to cause cerebral palsy.”

[78] The joint minute between the nursing specialists, Prof AGW Nolte and Mrs EE Bekker reflects that they agreed that there was insufficient information to come to a conclusion about maternal and fetal condition during pregnancy and **disagreed** about the following regarding labour:

Mrs Bekker reported that:

“1. The quality of care during the intra-partum cannot be evaluated due to the unavailability of components of the maternity case record
2. The existence of a discharge summary indicates that documents were completed

3. There was a good Apgar score (7/10 and 8/10) recorded, and
4. No clinical signs of Hypoxic Ischemic Encephalopathy were recorded on discharge."

Prof Nolte reported that:

"The nurses who cared for the Applicant delivered sub-standard care in that they did not:

1. Do or record observations of the fetal or maternal condition according to the Maternity Guidelines (2000)
2. Refer the Applicant to a doctor when there was prolonged labour
3. Keep accurate records of the case."

[79] The joint minute between the Obstetrician/Gynaecologists, Dr Schoon and Dr Hofmeyr merely agreed that the radiology reports by Dr Otto and Prof Andronikou "confirm MRI findings supportive of the diagnosis of Hypoxic Ischaemic Encephalopathy".

[80] The common thread throughout the expert reports is the absence of the medical records to support or eliminate many other potential causes of the minor's condition. That leads to many unanswerable discrepancies, such as the observation in Dr Hofmeyr's report that "the maternity register notes that both mom and baby were stable and discharged for further home care on Tuesday 3 May 2005 at 14:30" (discharge on day one after an uncomplicated normal delivery is standard practice".

[81] A further cause for concern is that to a large extent the information on which the experts' observations and conclusions is based originates

from the history obtained from the Applicant herself. Her recollection of specific detail and of exactly what did or did not happen in and during her stay in the hospital and during the labour process in 2005 must inevitably be dimmed by the passage of nine to twelve years, especially in view thereof that she has since had another pregnancy and gone through another birth process five years ago, in 2012, and especially in view thereof that the documentation to confirm or refute her version is absent.

[82] My further problem is that while the expert reports appear to confirm a diagnosis of Hypoxic Ischaemic Encephalopathy, they still cannot conclusively pinpoint the time of the event, do not identify a specific hypoxic event or confirm the reason for its occurrence, or reveal what role, if any, negligence by the Respondent's employees played in the process. Unfortunately, therefore, I cannot conclude that the Applicant has more than a slim prospect of success on the merits.

[83] The question then is whether, if all of the above factors are considered together, the Applicant can be said to have established 'good cause' for the delay.

[84] In my view all of the above factors do tie in with the socio-economic background and circumstances set out above. Although the Applicant certainly did not play a very pro-active role in trying to obtain the facts necessary to establish a cause of action, there is no indication either that she was the direct cause of the delay, except indirectly through

inaction. One has to keep in mind, furthermore, that the real subject of this action is a minor child M. who has severe brain damage and is totally dependent on others to conduct the matter on his behalf.

[85] That the Applicant's acquisition of the required knowledge to establish a cause of action had been seriously affected by the lack of records pertaining to her maternity and labour, and to the minor's treatment at the Hospital cannot be denied. For, as Zondo JA stated in **Links v Department of Health, Northern Province**[48]

> "the first sentence of the passage is the important one. In it the applicant said that he did not know and could not know, without the hospital records and notes in the file, what the cause of the problem was and who or what was responsible for it."

[86] The problem regarding the lack of record appears to persist to this day. The Applicant lists the discovery requests by her attorney: a Rule 35(1), (8) and (10) Notice on 18 August 2015, a Rule 35(6) notice on 12 April 2016; and a Rule 35(5) request. During argument it transpired that, despite the Respondent's Discovery on 8 March 2015, its provision of the Delivery Register in the form of a disk on 28 April 2016, and its reply to the Rule 35(5) request on 29 August 2016, the only other medical document available to the Applicant was the Road to Health Chart which had been in the Applicant's own possession anyway. During argument it emerged that, despite averments to the contrary, the Duty Roster and the Admission and Discharge Records

[48] 2016 (4) SA 414 (CC) at par [19] at 421

had not been provided to the Applicant. This seems to be confirmed by their absence in the expert reports submitted by the Applicant, while they do appear, for instance, in the report of Dr Schoon, one of the Respondent's experts.

[87] I therefore respectfully agree with the finding quoted with approval by Cloete JA in **Premier, Western Cape** [49] that "given the applicant's socio-economic background and the difficulties she faced in ascertaining the facts on which her cause of action is based, her explanation for her failure to give the notice to respondent within the requisite six month period, is in my view acceptable."

[88] In view of all of the factors evaluated above and based on the facts of this case, I believe that it would be in the interests of justice to find that "good cause" for the delay does exist, so that the second leg of the statutory requirement is satisfied.

The Third Requirement: Respondent's prejudice:

[89] But that still leaves the third requirement, namely that of 'no unreasonable prejudice to the Defendant'. The Applicant has to prove that there is no such prejudice. In this case, however, the Applicant merely avers that the Defendant has not been unreasonably prejudiced as a result of her failure to timeously provide it with a s 3(2)(a) Notice without giving any reasons or grounds for this submission whatsoever and avers, in the alternative, that the Court

[49] *Supra,* at para [19] at 476.

should be mindful of the minor's sacrosanct Constitutional rights which had 'clearly' been infringed by the Respondent. But as Heher JA stated in *Madinda*[50] although the onus was on the applicant to bring the application within the terms of the statute, it should be slow to assume prejudice for which the respondent itself did not lay a basis.

[90] The Respondent maintains that the Applicant's long delay in serving the Notice caused the serious prejudice that the Respondent now faces in that the majority of the medical records and documentation regarding this case have inexplicably disappeared; in that a material witness, Ms Maseko, the nurse who completed the minor's Road to Health Chart on which the first note of brain damage only appeared in 2008, passed away on 29 June 2010; in that Dr Matla, the doctor who attended to labour cases at Thebe Hospital on 1 and 2 May 2005, resigned from the Respondent's employ in 2010 and has since then disappeared without a trace; and in that memories fade with the passage of such a long time.

[91] The problem of the missing medical and hospital records does not affect only the Respondent's ability to defend itself, however. It also poses a serious challenge to the Applicant to prove causality, that is, a causal link between the minor's present medical condition (*inter alia* cerebral palsy and brain damage) and some hypoxic-ischemic incident or injury or event which can be identified as the cause thereof and

[50] *Supra,* at para 21 at 320 I - J

which can be ascribed to the negligence of the Respondent's employees.

[92] It is not evident, either, that the problem of the lost records can be ascribed to the delay in filing the s 3(2)(a) Notice, because there is no indication of when they were lost, especially in view thereof that the statutory duty and responsibility to safeguard records lie with the Respondent.

[93] In the circumstances of this case I cannot find that the prejudice suffered by the Respondent is unreasonable to such an extent that, in the absence of evidence to the contrary, the applicant and the minor child should be penalised for that by depriving them of the opportunity to state their case in court.

[94] Therefore, in the specific circumstances of this case I consider it to be fair and in the interest of justice to exercise my discretion to grant condonation for the Applicant's non-compliance with s 3 of the Act.

Costs:

[95] Regarding the costs of the application for condonation Snyders JA in **MEC for Education, KZN v Shange** referred with approval to Cloete JA's approach in **Premier, Western Cape v Lakay**[51] :

[51] 2012 (2) SA 1 (SCA) at para [25]

> "Ordinarily, in applications for condonation for non-obsevance of court procedure, a litigant is obliged to seek the indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter's costs if it does oppose, unless the opposition was unreasonable. I doubt that this is the correct approach in matters such as the present, as an application for condonation under the 2002 Act has nothing to do with non-observance of court procedure, but is for the permission to enforce a right, which permission may be granted within prescribed statutory parameters; and such an application is (in terms of s 3(4)) only necessary if the organ of State relies on a creditor's failure to serve a notice. In the circumstances there is much to be said for the view that where an application for condonation in a case such as the present is opposed, costs should follow the result"

[96] I see no reason to follow a different approach. The costs in this application should therefore follow the result.

[97] **THEREFORE THE FOLLOWING ORDER IS MADE:**

1. The Applicant's *point-in-limine* alleging an agreement not to oppose is dismissed with costs, which costs are to include the costs of two counsel, one of which a Senior Counsel.

2. The Applicant's application for condonation is granted with costs, which costs are to include the costs and fees of two counsel, one of which a Senior Counsel, but excluding the costs pertaining to the order in paragraph 1 above.

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H. MURRAY, AJ

On behalf of the Applicant/Plaintiff:	Adv. G.J. Strydom SC Adv A Viljoen Instructed by: McIntyre Van der Post Attorneys BLOEMFONTEIN
On behalf of the Respondent/Defendant:	Adv. J. Y. Claassen SC Adv T L Manye Instructed by: Ms B Maranyane State Attorney BLOEMFONTEIN