IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 823/2019

In the matter between:

MAGDALENA ADRIANA ROODT	**1ST APPLICANT**
JEANETTE FAUCHE	**2ND APPLICANT**
GEORGE ALBERT ROODT	**3RD APPLICANT**
LEA ROODT	**4TH APPLICANT**

and

MEMBER OF EXECUTIVE COUNCIL FOR HEALTH **RESPONDENT**

CORAM: C NEKOSIE AJ

JUDGMENT BY: C NEKOSIE AJ

HEARD ON: 27 JANUARY 2021

DELIVERED ON: 10 FEBRUARY 2021

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[1] This is an application for condonation for the late serving of a notice in accordance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act"). The applicants are the plaintiffs in the main action under the same case number. I shall refer to the parties as cited in the application.

[2] On 22 February 2017 GA Roodt, the deceased, husband of first applicant and father to the remainder of the applicants, fell off the roof of his house. At the time he was sixty-six years old. He was taken to Tokollo Hospital Heilbron. After X-rays were taken he was discharged on the same day. On 23 February 2017 he returned to the hospital where he passed on.

[3] Initially the cause of death was noted as natural causes. The first applicant insisted that a post-mortem examination be held. The cause of death was recorded as “unnatural cause: chest and abdominal injuries due to blunt force”. Consequently an inquest was held and on 13 March 2018 the magistrate found that the death of the deceased was not brought about by any act or omission of any person.

[4] The applicants gave notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 contemporaneously with the issuing of summons on 20 February 2019. They claimed the following:

(a) general and constitutional damages for loss suffering, loss of amenities of life , emotional shock and psychological trauma and

(b) past and future medical and related expenses for medical psychological and/or psychiatric treatment to cope with the emotional shock, mental and psychological suffering.

[5] The respondent, in a special plea, alerted the plaintiff to the lateness of the notice on 19 February 2020. At that juncture the applicants knew they had to apply for condonation. The application for condonation was brought on 31 May 2021.

[6] Section 4 prescribes as follows:

"(a) If the organ of state relies on a creditor`s failure to serve 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."

In **Minister of Agriculture and Land Affairs v CJ Rance**[1] it was held that the requirements are conjunctive and must be established by the applicant for condonation.

[7] It is common cause that the claim has not prescribed as it was brought within 3 years three years from the passing of the deceased on 23 February 2017. The remaining considerations are thus good cause and unreasonable prejudice.

[8] I consider the aspect unreasonable prejudice first. The respondent submits that its unreasonable prejudice lies in the fact that huge legal costs will be incurred and the applicants, by their own admission will not be able to pay the costs in the event they are unsuccessful. The submission is correct to the extent that the inability to recoup legal cost from an unsuccessful party constitute prejudice. The question is however whether said prejudice is unreasonable. In **Madinda v Minister of Safety and Security**[2] the Appeal court held:

[1] 2010 (4) SA 109 (SCA) para 10
[2] 2008 (4) SA 312 (SCA) para 21

"The approach to the existence of unreasonable prejudice (not simply any prejudice, an aspect which the judgement of the court a quo blurs) requires a common sense analysis of the fact of the facts, bearing in mind that whether the ground of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus is on the applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which for which the respondent itself does not lay a basis"

[9] Other than costs, the respondent did not put forward any other prejudice that may be suffered. No indication is given on the extent to which the respondent`s case has been hampered by the delay. The submission that it is better to save costs now before because the applicants, by their own admission will not be able to pay the costs later does not hold water. Costs is an inevitable consequence of litigation with mechanism in place for recouping costs from any unsuccessful party. There may well be instances where costs is a more prominent consideration but in these particular circumstance it is certainly not such that the court can, on the strength thereof alone, be moved to conclude that it constitutes unreasonable prejudice.

[10] In considering whether the applicant has shown good cause I am cognisant of the fact the standard of proof is the overall impression made on the court which brings a fair mind to the facts set up by the parties[3]. In **Madinda *supra*[4]** it is stated:

"The second requirement is a variant of one well known in cases of procedural non-compliance. See *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 227I - 228F and the cases there cited. '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."

[3] p316 para 8
[4] P316 para 10

[11] In accounting for their non-compliance prior to giving late notice, the applicants aver that they were not aware that notice must be given within 6 months. Thus claiming ignorance of the law. The first applicant`s conduct immediately after the death of her husband attests to a person that is more informed than she would have the court believe. When she was informed that her husband died of natural causes, she insisted that a post mortem be held which revealed an unnatural cause of death leading to an inquest being held. This conduct, at the very least, points to the fact that she suspected fowl play and knew what was required for it to be investigated.

[12] The façade of ignorance is further belied by the fact that the first applicant confirms her conscious decision not to initiate the civil proceeding until the outcome of the inquest is known. This is also indicative of her hope that the inquest will strengthen their claim. Ironically, when the finding of the inquest was that no action or omission by any person caused the death of the deceased, she none the less instituted action. Begging the question why she waited in the first place if the outcome of the inquest was inconsequential.

[13] The applicant asserts that she and the other applicants were unfamiliar with the intricacies of the law and believed that the outcome of the inquest meant that they were precluded from launching civil action. They nonetheless made enquiries and found that a number of legal representatives were unwilling to assist on contingency. She does not take the court into confidence in respect of how many legal representatives were consulted nor whether they advised on the prerequisites for instituting action. The court is left to speculate what transpired between her and the legal representatives that she consulted.

[14] Neither first applicant nor the other applicants takes the court into their confidence in regards their alleged lack of funds. No attempt is made to set forth their respective financial position to enlighten the court on their circumstance that

resulted in their inability to procure legal representation. In **Bayat v MEC, Department of Health - Kwazulu-Natal Public Health and Social Development and Others**[5] the court reiterated the need for detailed disclosure of financial position by an applicant when relying on the lack of funds.

[15] The fifteen month delay between being advised that condonation would be required and the actual bringing of the application is superficially attributed to the Covid-19 pandemic. The applicants submit that it was difficult for all of them to sign the necessary document. While the pandemic had a retarding effect on litigation, courts should be circumspect to simply accept, what has become an almost rudimentary excuse for the tardiness by litigants, blaming the pandemic for delay. The explanation given by the applicants do not account for the whole period of delay. In fact no explanation is given for what was done after the level 5 lockdown was lifted when court were back I full operation.

[16] Adv Groenewald referred me to **Sogoni v The Member of the Executive Council for Health, Eastern Cape Province**[6] and **Shannon v Masilonyana Local Municipality**[7] in support of his contention that the applicant`s explanation for failing to give notice was sufficient. Indeed **Sogoni** provides a thorough exposition of the law pertaining to condonation which I do not deem necessary to repeat herein. In particular I was directed to the fact that in **Sogoni** the plaintiff was an unsophisticated rural person who was informed by the medical staff that his wife passed on because of excessive bleeding after delivery of their twin babies. The court found that he could not have realised that he had a claim at that point and therefore accepted that he only came to know of the existence of the claim when he was informed of the possibility thereof by a relative a year later.

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[5] Bayat v MEC, Department of Health - Kwazulu-Natal Public Health and Social Development and Others (D 2278/18) [2021] ZALCD 54 (4 August 2021) at para 19

[6] 2021 JDR 0730 (ECD)
[7] 2018 JDR 1131 (FB)

[17] The matter at hand is distinguishable as the applicants asserted their right to have a post-mortem performed on the deceased from the outset. Thus, they were aware that they may have a claim even then. Furthermore the applicants elected to wait more than a year for the outcome of the inquest to presumably assess their prospects before seeking assistance to institute their action.

[18] **Shannon *supra*** is distinguishable from the present matter. There the plaintiff was hampered by the failure of the SAPS to provide information to his attorneys. The attorney attempted to obtain the information shortly after cause of action arose, within six months. The court found that the overall impression made by the undisputed facts before it, was such that it was satisfied that the applicants were entitled to have their case tried in a court of law.

[19] It was argued on the strength of this judgment that delays caused by the legal representatives in bringing the application for condonation is inconsequential and cannot be held against the plaintiff. On proper reading of the judgment it is clear that the court based its finding on the undisputed facts pertaining to the processing of the application and did not intend it to be of general application where condonation is concerned. The interest of justice dictated that the application be granted in **Shannon.**

[20] The prospects of success is fleetingly touched upon by the applicants. There is a scant reference to a medical practitioner who opined that the deceased death was due to the negligence on the part of the staff of the hospital. This opinion was obtained at the eleventh hour more than a year after summons was issued. Converse to this opinion are the opinions of several medical practitioner and the outcome of judicial proceedings absenting any negligence on the part of the hospital staff.

[21] I am mindful that it is not for this court to make a determination on the merits of the claim. However, when the prospects of success are as glaringly dismal as in

this matter, the pendulum of the interest of justice swings in favour of the respondent.

[22] On consideration of all the aforementioned the overall impression gained from the circumstances of this matter is such that the applicants failed to show good cause for giving notice out of time and their delay to bring the application for condonation. In the premise the application stands to be dismissed.

ORDERS

1. The application for condonation is dismissed.
2. The applicant to pay the cost of the application on a party and party scale.

CNEKOSIE, AJ

For the Plaintiff:	Adv WJ GROENEWALD Instructed by Collins Attorneys PRETORIA c/o Wynand Jansen Attorneys BLOEMFONTEIN
For the Defendant:	Adv BS MENE SC Instructed by: THE STATE ATTORNEY FEDSURE BUILDING BLOEMFONTEIN