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**

Appeal: A43/2020

In the matter between:

JEAN WILLEMSE Appellant

And

THE MINISTER FOR HEALTH, Respondent

FREE STATE PROVINCE

CORAM:	MUSI, JP *et* DANISO, J *et* NEKOSIE, AJ
HEARD ON:	02 NOVEMBER 2020
JUDGMENT BY:	DANISO, J
DELIVERED ON:	21 JANUARY 2021

[1] This is an appeal against the judgment and order of Morobane J delivered on 20 June 2019 in which he dismissed the appellant's application in terms

of s 3(4) of the Institution of Legal Proceedings against certain Organs of State Act[1] with costs. The appeal is with the leave of the court *a quo*.

[2] On 03 August 2018 the appellant instituted a claim against the respondent for damages arising out of negligent medical treatment by the respondent's servants (nurses and/or medical doctors) at Metsimaholo, Boitumelo and/or Pelonomi hospitals where he was admitted after he sustained severe lacerations to his right arm caused by a slip. The incident occurred on 24 October 2016 and due to the severity of the injury he was admitted at Metsimaholo hospital. On the next day he was transferred to Boitumelo hospital. The ambulance that was transporting him to Boitumelo hospital ran out of petrol along the way. The appellant lay in the stranded ambulance for three hours before it was refuelled.

[3] On arrival at Boitumelo hospital he was left unattended for a considerable time. He was later admitted for the night. The next day, he was transferred to Pelonomi hospital where his arm was amputated below the elbow. The appellant was informed by the attending doctor that the amputation was occasioned by the two-day delay in receiving the appropriate medical treatment. He was discharged, from Pelonomi hospital, on 28 October 2016.

[4] The respondent defended the action. In its belated plea,[2] the respondent raised a special plea objecting to the appellant's failure to serve it with a written notice of its intention to institute legal proceedings within the time period prescribed by s 3(2).

[5] Section 3(1)(a), (b) and 3(2)(a) of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question a written notice of his/her intention to sue it within six months from the date the debt became due, unless the organ of state has consented in writing to the institution of the legal proceeding(s) without such notice.

[1] Act 40 of 2002.
[2] The respondent's plea was filed ten days after Bar. The late delivery of the plea was condoned by the appellant.

[6] It was common cause that the respondent is an organ of state as envisaged in s 1 of the Act. The appellant was accordingly subject to the provisions of s 3(1) and 3(2). The debt which forms the basis of the appellant's claim became due on 26 October 2016. The appellant's notice was only served on the respondent on 15 May 2018,[3] approximately eighteen months after the date on which the debt became due.

[7] Pursuant to the respondent's objection, the appellant launched an application before Morobane J seeking condonation for his failure to serve the notice within the prescribed time. The application was opposed by the respondent on the basis that the appellant had failed to show that good cause existed for the delay. The respondent further averred that the delay was not sufficiently explained and that the appellant did not make any allegation to the effect that new information was provided to him other than the information he had received from the doctor at the hospital. Lastly, the respondent alleged that the prospects of success in the proposed action were not good. The court *a quo* agreed with the respondent and refused condonation.

[8] The appellant is aggrieved by the whole judgment and order of the court *a quo*.

[9] The appellant's seven grounds of his appeal are embodied in his notice of appeal, I therefore deem it unnecessary to rehash them verbatim except to refer to the relevant parts thereof for the purpose of this judgment.

[10] It is trite law that if condonation, for lack of compliance with the provisions of a statute, is refused by a court, the appeal court is entitled to decide the same question according to its own view as to whether the statutory requirements have been fulfilled, and to substitute its decision for the decision of the court of first instance simply because it considers its decision preferable. (Premier, Western Cape v Lakay **2012 (2) SA 1 (SCA)**) at paragraph 14.

[3] Annexure "WIL2" of the appellant's founding affidavit.

[11] In terms of section 3(4)(b) of the Act the court may condone the failure to serve a section 3 notice if it is satisfied that:

11.1. The debt which forms the basis of the creditor's claim has not prescribed;

11.2. Good cause exists for the failure to serve the notice timeously; and

11.3. The organ of state was not unreasonably prejudiced by the failure to serve the notice timeously.

[12] The discretion to grant or refuse condonation is exercised judicially by having regard to various factors such as the degree of lateness, the explanation of the delay, the prospects of success in the proposed action, the appellant's interest in progressing the matter and the avoidance of unnecessary delay in the administration of justice. These factors are not individually decisive but are interrelated. They must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong or, strong merits may mitigate fault. See United Plant Hire (Pty) Ltd v Hills and others **1976 (1) SA 717 (A)** page 720 para E-G quoted with approval in Madinda v Minister of Safety and Security **[2008] 3 All SA 143 (SCA)** at paras 12 and 16.

[13] It is trite law that the phrase "*if the court is satisfied*" does not require proof on a balance of probabilities "*rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties.*"[4]

[14] In this matter the appellant's claim had not prescribed, accordingly, what remained to be determined by the court *a quo* was whether the appellant had shown that good cause existed for his failure to serve the notice within the stipulated time and that the respondent was not unreasonably prejudiced by the late notice.

[4] Madinda at paragraph 8.

[15] Heher JA held that good cause involves "*all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. These factors 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*."[5]

[16] The appellant's reasons for the delay in serving the notice were set out in his founding affidavit and replication.[6] He averred that after he was discharged from hospital he was traumatized by the loss of his arm which, in turn, adversely affected his work as he could no longer do his work as a boiler maker efficiently with one arm. The inability to work as before the incident caused him financial strain as a result he could not instruct an attorney to assist with his claim. He was unaware that he could obtain legal assistance on a contingency fee agreement until he consulted with his attorneys of record on 26 February 2018.

[17] He is a layperson thus he only became aware of the statutory requirement of giving a six-month notice before legal proceedings could be instituted against an organ of state when he consulted his attorney. The delay was further exacerbated by the struggle encountered by his attorneys when they set about to obtain the hospitals' medical records in order investigate the veracity of the claim. The hospitals' names had changed.

[18] It was the appellant's contention that the respondent was not prejudiced by the late notice as the claim had not prescribed. The medical records were still available and furnished to the respondent to enable it to acquaint itself with the merits of the claim.

[19] It was argued by counsel for the appellant that the Metsimaholo hospital had determined that the appellant's injury was so severe it required specialist care. It was on that basis that he was transferred to Boitumelo hospital. The

[5]Ibid para 10.
[6] Paragraph 7.5 to 7.7. of the appellant's founding affidavit and 3.1 to 3.4 of the replication.

appellant was instead left stranded in the ambulance for three hours without receiving the required medical attention. Upon reaching Boitumelo, he was left unattended for some hours. On the next day, he was transferred to Pelonomi hospital where he was ultimately informed by the attending doctor that the arm had to be amputated due to the lack of appropriate medical treatment. All these factors are indicative of prima facie negligence on the part of the respondent's employees.

[20] It was submitted by appellant's counsel that the appellant's explanation that the delay in serving the notice was occasioned by a lack of knowledge of the law and the financial means to appoint an attorney is a valid explanation. The appellant was honest in his explanation he did not manufacture a version in order to obtain the order he sought. No unreasonable prejudice was proffered by the respondent.

[21] Counsel for the respondent was adamant that the court a quo was correct in its conclusion that no good cause was shown by the appellant. With regard to the merits of the matter, it was contended that the appellant injured himself when he smashed his arm against a windowpane in a fit of rage. It is therefore incomprehensible how a person who engaged in such a reckless conduct can expect compensation from the respondent.

[22] The appellant failed to explain fully and reasonably the delay in order to enable the court a quo to interrogate the cogency of his ineptitude. By October 2016 the appellant was aware or ought to have been aware that he had a claim against the respondent but failed to seek legal advice immediately or shortly after he was discharged from the hospital.

[23] The appellant only consulted an attorney on 28 February 2018 approximately 18 months after he was informed by the doctor that the amputation of his arm was as a result of lack of appropriate medical care. There is also an unexplained delay of over a month after the appellant had sought legal advice till the date on which the notice was ultimately delivered. There is also no allegation that new information came to light other than what was relayed to him by the doctor in 2016. Being a lay person is of no

consequence as ignorance of the law is no excuse for failing to serve the notice.

[24] The failure to comply with the statutory requirements is prejudicial to the respondent as it is responsible for the administration of all the hospitals in the Province. Medical records do get misplaced. Hospital employees leave their posts or move to the private sector in other provinces or even abroad. The longer it takes to institute a claim chances are greater that the employees who were primarily involved would have left the institution. It is generally difficult to trace former employees. The specific doctor the appellant has referred to might have moved on.[7]

[25] On the facts germane to this matter, I'm satisfied that the merits are in favour of the appellant. Except for the bare denial of negligence and to merely aver that the injury sustained by the appellant was self- inflicted the respondent's plea is silent over the appellant's allegations that he missed out on appropriate treatment for at least 3 hours when the ambulance stalled on the way to Boitumelo hospital and that when he ultimately reached Boitumelo hospital he was left unattended for a considerable period of time. It is also not gainsaid that on the next morning after having bled profusely the doctor informed him that the only option was for the arm to be amputated. How the injury occurred or the cause therefore is irrelevant under these circumstances. All these factors viewed conjunctively impute negligence on the respondent's servants.

[26] The delay is indeed extreme. *In casu* there is nothing peculiar about the appellant's reasons for the delay before consulting an attorney. It was not in dispute that as a result of the incident he lost a limb which affected how he performed his work. Understandably that would have an adverse impact on his finances which in turn resulted in lack of funds to appoint an attorney.

[27] With regard to the delay after consulting an attorney it was also undisputed that the litigation materialized as a result of a contingency fee agreement that the appellant concluded with his attorney. In contingency fee

[7] Paragraph 5 to 24 of the respondent's answering affidavit.

agreements the attorney only earns his /her fee from the award upon the successful conclusion of the matter "no win no pay." It therefore makes sense for the attorney to first investigate the veracity of the claim and satisfy him/herself that there are reasonable prospects that the claim may be successful[8] before embarking on a costly litigation which largely includes costs for experts, medical consultations and of obtaining medical reports.

[28] Having regard to these factors, I find that the delay occasioned by the lack of financial means and of the knowledge of the law does not constitute ineptitude behaviour. The reasons are valid and satisfactory.

[29] The court a quo took issue with the fact that no affidavit was filed by the appellant's attorney to explain the delay after the consultation on 28 February 2018 to the date the notice was ultimately served on 15 May 2020. The subsequent delay in bringing the condonation application has no bearing on the determination of good cause. It is the delay in serving the notice that is relevant. See Madinda at paragraph 14. The appellant is the litigant in this matter. His affidavit filed in support of the condonation application gave a full, detailed and accurate explanation for the period of the delay. His affidavit was sufficient.

[30] With regard to the last requirement, it was accepted that the duty was on the appellant to show that respondent was not unreasonably prejudiced by the late notice. On the available facts, despite the late notice the respondent was able to gather the facts giving rise to the debt. The respondent was able to carry out its own investigation with regard to when and under what circumstances the appellant was treated. The respondent is also seized with the knowledge of the chronology of the events from the time the appellant was admitted, transferred to other hospitals and later discharged. The respondent has also been able to plead to the appellant's summons.

[31] All that the respondent had to do, was to lay a basis for unreasonable prejudice but instead the respondent made generic averments namely that: medical records do get lost; the hospital employees do not stay long at the

[8] See section 2(1) of the Contingency Fees Act 66 of 1997.

hospitals; and it's generally quite difficult to trace them as they often emigrate or move to other provinces and the attending doctor might have moved. These are not facts pertinent to this matter but speculation. It can therefore not be said that the respondent was unreasonably prejudiced by the late notice.

[32] Section 3 is premised on the tenets of fairness and equity. The appellant is a bona fide litigant with good merits which he clearly intends on having them tried by a court of law hence he even consented to the late filing of the respondent's plea. No unreasonable prejudice has been proven on the part of the respondent.

[33] I am persuaded that the appellant succeeded in establishing the requirements set in relation to s 3(4)(b). Condonation should have been granted.

[34] Both parties are blameworthy for being embroiled in these proceedings including the condonation application in the court a quo. The applicant failed to take the liberty of seeking the respondent's consent to condonation prior to launching the condonation application. Similarly, the respondent vigorously opposed the condonation application and the appeal merely on the basis of cost whereas it could have consented to the condonation and only opposed the cost issue. The opposition was unreasonable and unnecessary.

ORDER

[35] Having regard to the above-mentioned factors, the following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:
   (a) Condonation is granted for the applicant's failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 within the period laid down in section 3(2)(a) of the Act.

(b) No order as to costs is made.

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N.S. DANISO, J

I concur

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C.J. MUSI, JP

I concur

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C. NEKOSIE, AJ

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