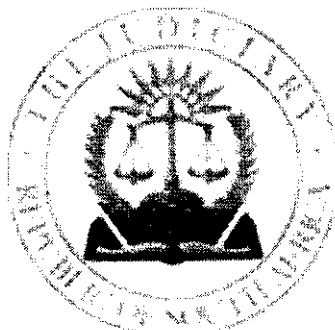


**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG SOUTH DIVISION, PRETORIA**

CASE NO: 3203/2015

28/3/2017

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: NO

(1) OF INTEREST TO OTHERS JUDGES: NO

(2) REVISED

28 March 2017

DATE

SIGNATURE

In the matter between:

**NOKWESABA NORAH HADEBE****APPLICANT**

And

**MEC OF HEALTH GAUTENG PROVINCE****RESPONDENT****Heard: 11 November 2016****Delivered: 28 March 2017.**

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## JUDGMENT

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Molahlehi J

### Introduction

- [1] This is an opposed application in terms of which the applicant seeks condonation concerning the issuing the notice in terms of s.3 of Institution of Legal Proceeding against Certain Organs of State (the Act),<sup>1</sup> on the respondent.

### Background facts

- [2] The claim against the respondent relates to the cause of the death of her daughter, Ms Nombulelo Gloria Gumbi (the deceased) who died on 2 February 2012. The deceased passed away soon after delivering a baby through caesarian section at Pholosang Hospital. The deceased is survived by her mother, the applicant and two of her children.
- [3] At the time of her death the deceased was employed at a petrol station and was earning R4000 00 per month.
- [4] On the 17 July 2013 the applicant addressed the letter of demand to the Minister of Health and the respondent, and on 16 July 2015 she issued summons against the respondent claiming damages arising from the death of the deceased. The proceedings were instituted on behalf of the minor children and the applicant.
- [5] During March 2015 the respondent raised a special plea contending that the applicant had failed to comply with the requirements of ss. 3 and 4 of the Act.

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<sup>1</sup> Act number 40 of 2002.

- [6] It is common cause that the respondent is an organ of state and is thus regulated by the Act and therefore the applicant was obliged to issue the notice in terms of s.3 (1) of the Act, once she had decided to institute proceedings against the respondent.
- [7] In terms of s. 3(1) of the Act the applicant had six weeks from the 2 February 2012, to serve the notice of intention to institute legal proceedings against the respondent. She instituted these proceedings on the 17 June 2015, a period of four months after the respondent raised a special plea.
- [8] In terms of section 3 of the Act no legal proceedings may be instituted against an organ of state unless:
- a) A notice in writing has been given of such intention or,
  - b) The organ of the state in question has consented to the institution of proceedings, against it with or without such notice.
- [9] Section 3 (4) (a) of the Act makes provision for condonation in the event of failure by the claimant to serve the notice within the prescribed six weeks period. A creditor is entitled to apply for condonation either because of failure to issue notice or where a defective notice was served on the respondent.<sup>2</sup> The court may grant condonation if the following requirements are satisfied:
- i. The debt has not been extinguished by prescription;
  - ii. Good cause exists for the failure to issue the notice by the claimant
  - iii. The failure does not unreasonable prejudice the organ of state.<sup>3</sup>

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<sup>2</sup> Minister of Safety and Security v De Witt (722/2007) 103 [2008] ZASA (10 September 2008).

<sup>3</sup> Minister of Agriculture and land affairs v CJ Rule (Pty) Ltd 2010 (4) SA 109 (SCA).

- [10] The applicant bears the onus of showing that all the requirements for condonation as required by the Act have been satisfied.<sup>4</sup>

Issues for determination

- [11] In the present matter the issue of prescription does not arise. It follows therefore that, for the purpose of this judgment, the issues that need consideration are, good cause and prejudice on the respondent.

Good cause

- [12] It is trite that in order to succeed in an application for condonation for non-compliance with the requirement of s. 3 of the Act, the applicant has to provide a reasonable and acceptable explanation. The explanation as stated in **Premier, Western Cape v Lucky**,<sup>5</sup> has to be sufficiently full to enable the court to understand, how the non-compliance with the provisions of the Act came about and assess the conduct and of the applicant.<sup>6</sup>
- [13] In essence the explanation proffered by the applicant in the present matter is that she was ignorant of her rights and that of the minor children of the deceased.
- [14] It was contended on behalf of the respondent that this explanation should be rejected because the applicant did not state the level of her educational background to assist the court in determining how it came about that she lacked

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<sup>4</sup> See *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at paragraph 16.

<sup>5</sup> 2012 (2) SA (SCA). See also *Minister of Safety and Security v Spalding* (CA 136/08) ZAECHC 209 (5 December 2008).

<sup>6</sup> see also *Minister of Safety and Security Republic of South Africa v Spalding* 2008 (4) SA 312 at par 11.

knowledge of the requirement. The applicant has in her replying affidavit stated that she only has Grade 6.

[15] It seems to me that the lack of knowledge averred by the applicant in her papers went beyond the narrow requirement of s 3 of the Act. The lack of knowledge included the broader knowledge about her right and those of the minor children to claim damages for the alleged negligent cause of the death of the deceased by the respondent's staff. This in my opinion does not seem unreasonable for a person with her educational level and work experience.

[16] In ***Morumo v Minister of Police***,<sup>7</sup> the court in dealing the issue of good cause in relation to non-compliance with s 3 of the Act, in the middle of paragraph [7] of the judgment held that:

"[7] In my view the plaintiff's ignorance accounted for her failure to file the section 3 notice timeously. As soon as she was aware of the requirement to file this notice, the notice was filed on her behalf by her attorneys. Counsel for the defendant contended that to show good cause the plaintiff should have gone further to explain why she waited 10 months before she consulted her attorneys regarding the alleged unlawful arrest, detention and assault. Counsel for the plaintiff submitted that she has made out a prima facie case of unlawful arrest, detention and assault and that she need not provide any explanation regarding her delay in bringing the

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<sup>7</sup> (37401/2011) (2014) ZAG par 640 (25 August 2014).

Condonation application. In the *Madinda* case, the court held that subsequent delays in bringing the application for Condonation does not contribute to good cause as they did not contribute to failure to file the notice (at para 14). I agree with this approach by Heher JA. I am of the view that the plaintiff has shown good cause for failing to file the section 3 notice within the prescribed time.”

[17] In *Minister of Safety and Security v De Witt*,<sup>8</sup> the court found that there are two instances where a creditor may apply for condonation in terms of Section 3 of the Act. A creditor who has failed to give the notice in terms of the Section may apply for condonation where the state opposes the proceedings on the basis of the failure. An application for condonation may also be applied for where the notice is sent out of time.

[18] The court in the above case further held that:

“[12] The very purpose of the provision allowing condonation is to give a court a discretion to determine whether the organ of state can rely on noncompliance, whatever form that may take. If this were not so, as was pointed out by Somyalo AJ in *Moise*, the requirement of written notice as above, para 13 10 precondition to the institution of legal proceedings would be in itself an absolute bar to such proceedings and would constitute a real impediment to the claimant’s access to court. Indeed, a blanket bar to the

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<sup>8</sup> 22/2007 103 [2008] ZASCA (19 September 2008)

amelioration by a court of the hardship worked by an inflexible precondition to the institution of proceedings could hardly survive constitutional scrutiny."

- [19] The other point raised by the respondent is that the explanation of the applicant should be rejected because she failed to take reasonable steps to enquire what her rights from the attorney who administered the estate of the deceased. There were no attorney appointed because there was, as the applicant explained in her replying affidavit, deceased left no estate to report.

Prospect of success


- [20] In considering the prospect of success account should be taken of the fact that the onus to prove liability for the alleged negligent death of the deceased rest with the applicant. The respondent has the evidentiary burden of showing that the death of the deceased was not caused by its negligence.
- [21] The applicant states in the founding affidavit that she has sought medical advice which support her averment that the cause of the death of the deceased was the negligent conduct o of the respondent.
- [22] It is trite that prospect of success entails showing a *prima facie* or triable case for the applicant. It is not required of the applicant to show that the balance of probabilities favours her. In this respect it has not been disputed that the applicant died soon after giving birth by caesarian at the respondent's hospital.
- [23] It is thus my view that the applicant has satisfied one of the elements of good cause in that she has shown that there are good prospect of succeeding when the matter is finally considered on the balance of probabilities.

Prejudice

- [24] The respondent contends that it is being prejudice by the applicant's failure to comply with the provision of the Act. Whilst I accept that the delay in serving the notice required by s. 3(1) of the Act may have caused prejudice to the respondent, I am not persuaded that it so unreasonable so as to bar the applicant from instituting her damages claim. The applicant states in her papers that she has a medical records of the deceased which she is willing to avail to the respondent.
- [25] In light of the above I am satisfied that the applicant has made out a case for the condonation of the non-compliance with the requirements of Section 3(1) of the Act.
- [26] In the circumstance of this case I see no reason why costs should not follow the results.

Order

- [27] In the premises condonation is granted with costs.



E Molahlehi

Judge of the South High Court,  
Johannesburg.



APPEARANCE:

APPLICANT: M Mjali

RESPONDENT: M Makhubela