THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 24 DECEMBER 2021

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

NMZ obo SFZ v MEC for Health and Social Development of the Mpumalanga Provincial Government (1149/2020) [2021] ZASCA 184 (24 December 2021)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with no order as to costs, an appeal against a decision of the Mpumalanga Division of the High Court, Mbombela (High Court).

The issue before the SCA was whether the High Court was correct in dismissing the appellant's condonation application for failing to give timeous notice under s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Act).

On 3 October 2012, the appellant (NMZ), gave birth to SFZ at Piet Retief Hospital, Piet Retief. SFZ was born following prolonged labour and was subsequently diagnosed with cerebral palsy due to asphyxia during delivery. NMZ instituted an action in the High Court on behalf of SFZ for damages arising from the alleged negligent conduct of the employees of the respondent, the MEC for Health and Social Development of the Mpumalanga Provincial Government (the MEC), during her birth. On 24 October 2019, NMZ applied to the High Court for an order in terms of s 3(4) of the Act. She sought condonation for her failure to serve a notice of intention to bring legal proceedings against the MEC within the period specified in s 3(2)*(a)* of the Act (s 3 notice). The MEC opposed the application. The High Court dismissed her application on the ground that the delay was unreasonable and the claim lacked any prospect of success. The High Court granted leave to appeal to the SCA.

In terms of s 3 of the Act, legal proceedings against an organ of state to recover a debt must be instituted by written notice within six months from the date that the debt became due. Such notice should briefly set out the facts giving rise to the debt and such particulars that are within the knowledge of the creditor. If a creditor serves the notice out of time, a state organ may refute the claim, leaving the creditor with no option but to seek condonation in terms of s 3(4) of the Act.

The SCA held that it was common cause that the claim of the appellant was against the MEC of the Department of Health and Social Development, an organ of State, for damages. This amounted to a 'debt' as envisaged by s 3. It was further common cause that the summons was only served on 7 November 2017 to which the MEC raised a special plea, citing non-compliance with s 3. According to the MEC, the s 3 notice ought to have been given 'on or before April 2013'. The MEC's contention was based on the allegation that the cause of action arose in October 2012 when the appellant was admitted to the hospital. In addition, the respondent contended that, at the latest, the appellant consulted an attorney and signed a 'Mandate and Fee Agreement' on 30 October 2013, thus by then the appellant and her attorneys were both aware of the debt. Consequently, so it was contended, by 30 April 2014 the s 3 notice ought to have been transmitted.

In response to the special plea, the appellant applied for condonation in terms of s 3(4)*(b)* for the late delivery of the s 3 notice. Section 3(4)*(b)* sets out the three requirements which must be satisfied for a court to grant condonation for the failure to service a notice in accordance with the prescript of s 3(2)*(a)*.

The SCA held that it is instructive to bear in mind that the standard of proof to establish the s 3(4)*(b)* requirements is not on a balance of probabilities but rather, the 'overall impression made on a court which brings a fair mind to the facts set up by the parties'.

The SCA further held that in this case the cause of the delay needs to be weighed against the assessment of the merits of the case to ascertain whether the merits mitigate fault, thus advance prospects of success on the merits.

The High Court summed up the case of the appellant alluding to the merits thereof as follows: '[a]s far as prospects of success is concerned, the legal representative of the applicant submitted in this regard that it is clear from the facts given by the applicant that since she was admitted and complaining of lower abdominal pain on 2 October, a period of 8 hours passed by without being checked. The last time she was checked was the previous day at 22h30 and then again on the 3rd at 6h30, and she delivered the baby three hours thereafter. She indicated that every time when she requested for help, she was not attended to except to be told that it was not yet her time for delivery.'

The SCA found that the High Court committed a misdirection when the learned judge ignored the fact that the hospital staff failed to adhere to the mandatory 4-hourly monitoring and concluded that the appellant had failed to establish a prospect of success and that her explanation on 'good cause' was found wanting. In addition, the SCA held that it was apparent that there was no feto-maternal monitoring at 4-hourly intervals as recommended on admission. Hence, a prima facie case of negligence had been established.

After looking into the expert reports at hand, the SCA held that it was persuaded that this was a matter that ought to proceed to trial as there are conflicting expert opinions and inconsistent views which require ventilation with the aid of oral evidence. Therefore, it appeared on the conspectus of the evidence before it, the High Court misdirected itself by concluding that based on the medical and expert reports, there was nothing to demonstrate that the appellant had reasonable prospects to succeed with her daughter's claim.

As a result, the SCA concluded that for the reasons alluded to above, it was satisfied that the appellant established the requirements as set out in s 3(4) for the granting of condonation. Consequently, the High Court erred when it refused the application for condonation in terms of s 3(4) and the appeal must succeed.

~~~~ends~~~~
~~~~