

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

APPEAL CASE NO : **A5044/09**

DATE: **18/08/2010**

In the matter between:

HENRY GEORGE DAVID COCHRANE

Appellant
(Respondent *a quo*)

and

THE CITY OF JOHANNESBURG

Respondent
(Applicant *a quo*)

JUDGMENT

BAVA AJ:

1]This is an appeal to the Full Bench of the South Gauteng High Court in terms of Section 20(4)(b) of the Supreme Court Act, Act No. 59 of 1959, as amended, against the whole of the judgment and order of Tsoka J, delivered on 6 August 2008. In terms of the said judgment the Appellant's Summons and Particulars of Claim were set aside in terms of Rule 30(3) of the Uniform Rules of Court together with costs.

2]The Appellant was granted leave to appeal to the Full Bench of the South Gauteng High Court on 3 November 2009.

3]The essence of the appeal is that the Court *a quo* was incorrect in setting aside the Appellant's summons in terms of Rule 30 of the Uniform Rules of Court where the Appellant failed to serve a notice, within a six month period after the debt became due, on the Respondent in terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 (hereinafter referred to as "the Act").

4]The Appellant issued a summons against the Respondent for what he alleges was his unlawful arrest and detention, unlawful assault and defamation, all of which is alleged to have occurred on 4 August 2005.

5]On 17 July 2007, the Appellant gave notice to the Respondent of its intention to institute legal proceedings in terms of Section 3(2) of the Act. Thus, the said notice was give more than the prescribed 6 months after the incident giving rise to the debt occurring.

6]Sections 3(1) and (2) of the Act read:

"3. Notice of intended legal proceedings to be given to organ of State

1) No legal proceedings for the recovery of a debt may be instituted against an organ of State unless –

(a) the creditor has given the organ of State in question notice in writing of his or her or its

intention to institute the legal proceedings in question; or

(b) the organ of State in question has consented in writing to the institution of that legal proceedings –

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

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 section 4(1); and

(b) briefly set out –

(i) *the facts giving
rise to the debt;
and*

(ii) *such particulars
of such debt as
are within the
knowledge of the
creditor.*

3) ...

4) ...”

7]After notice was given in terms of Section 3(2) of the Act, the Respondent did not object and/or complain and/or raise any plea of non-compliance with the provisions of the Act nor did the Respondent claim any prejudice as a result of the late issuing of the notice.

8]On 21 May 2008 the Appellant issued its Summons and Particulars of Claim. On 5 June 2008, the Respondent indicated by way of notice that the Appellant’s summons constituted an irregular step and was defective. The Respondent afforded the Appellant the opportunity of withdrawing its Summons in terms of Rule 30(2)(b) of the Uniform Rules of Court. The Respondent indicated in its Rule 30(2)(b) notice that the Appellant’s

Summons constituted an irregular step and was defective in that:

- “1. The Plaintiff failed to comply with the notice requirements in Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 (“the Act”) necessary before legal proceedings for recovery of a debt may be instituted against an organ of State in that it served notice on the Defendant more than six months after the date on which the debt became due;*
- 2. The organ of State in question has not consented in writing to receipt of the late notice in terms of Section 3(1)(b)(ii) of the Act;*
- 3. The Plaintiff has not applied for condonation of the late notice in terms of Section 3(4) of the Act.”*

9]On 10 July 2008, the Respondent served an application in terms of Rule 30(1) of the Uniform Rules of Court in terms of which it sought an order:

- “1. Declaring that the Summons and Particulars of Claim of the Respondent are defective.*
- 2. Striking out and/or setting aside the Respondent’s Summons and Particulars of Claim on the basis of the non-compliance with the pre-emptory (sic) requirements of The Institution of*

Proceedings Against Certain Organs of State Act, 40 of 2002.

3. *Costs.*

4. *Further or alternative relief.”*

10]The application in terms of Rule 30(1) was supported by an affidavit deposed to by Maushami Chetty, an attorney representing the Respondent in the matter.

11]While the Respondent chose to file an affidavit, this was not strictly necessary. In **Chelsea Estates and Contractors CC v Speed-O-Rama** 1993 (1) SA 198 at 202 E-F, Mullins J stated:

“Defendant’s notice in terms of Rule 30 certainly did not require to be supported by an affidavit. All that Rule 30(2) requires is that the notice must specify the particulars of the irregularities complained of. It is analogous to an exception. Nor does Rule 30 provide for any form of reply.”

12]In this affidavit, Ms Chetty indicates that despite the Appellant being afforded an opportunity to cure the defect of its non-compliance on the 11th of June 2008, the Appellant failed to avail itself of this opportunity and the application was accordingly served which was heard by Tsoka J on 29 July 2008.

13]On 6 August 2008, Tsoka J granted the order in favour of the Respondent in terms of Rule 30(3) by setting aside the Appellant's Summons and Particulars of Claim together with costs.

14]The Appellant contends that the Respondent's decision to follow the procedure in Rule 30 was misplaced. Mr Joubert who appeared on behalf of the Appellant argued that the relief claimable under Rule 30 of the Uniform Rules of Court was not applicable or competent in the current case. He argued that in view of the fact that the Court has a discretion to grant condonation in respect of the Appellant's failure to comply with the requirements of Section 3(2) of the Act, that the appropriate procedure that the Respondent ought to have followed was to have raised a special plea of non-compliance with Section 3(2) of the Act.

15]Mr Joubert relied on the judgment of the Supreme Court of Appeal in the case of **Minister of Safety and Security v De Witt** 2009 (1) SA 457 (SCA) for the interpretation of Section 3 of the Act.

16]Lewis JA in **Minister of Safety and Security v De Witt**, *supra*, after considering the purpose of the Act, stated at page 459, paragraph [4], regarding Section 3(4) of the Act and the aspect of condonation, as follows:

"As I have said, the way in which the legislature has sought to avoid drawing a hard-and-fast rule that may cause undue hardship to a

plaintiff is to make provision for time limits, and notices of intention to sue, but also to enable a court to condone a failure to comply with the requirements. Section 3(4) gives the court a discretion to condone non-compliance, subject to three requirements being met.”

17]The three requirements referred to by the Supreme Court of Appeal are set out in Section 3(4)(b) of the Act.

18]Section 3(4) of the Act reads as follows:

“3. Notice of intended legal proceedings to be given to organ of State.

1)

2)

3)

4) (a) If an organ of State relies on a creditor’s failure to serve a 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.”*

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such condition regarding notice to the organ of State as the court may deem appropriate.”

19]Lewis JA indicated further at paragraph [7] of the judgment that De Witt met an objection to his summons by way of a special plea. In argument and

in the Respondent's heads, Ms Goedhart conceded, correctly in my view, that the Supreme Court of Appeal held in **Minister of Safety and Security v De Witt** that an application for condonation for failure to comply with Section 3(1) of the Act may be brought after the institution of proceedings. Furthermore, Ms Goedhart argued that the SCA has held that the appropriate course for Defendant to adopt where a creditor has failed to give the organ of State in question a notice in writing as contemplated in Section 3(1) and (2) of the Act is to raise this defence by way of special plea and not in terms of Rule 30(2)(b) of the Uniform Rules of Court.

20]Notwithstanding the foregoing Ms Goedhart argued that when the matter came before Tsoka J, a defect going to the root of her claim could be attacked under Rule 30. Ms Goedhart relied on the judgment of Van der Merwe J in **Deputy Minister of Tribal Authorities and Another v Kekana** 1983 (3) 492 at 495 H – 496 B where it states:

“According to the clear wording of the Rule, any irregular proceeding may be attacked under this Rule and the Court is empowered to set aside such irregular proceeding. I can think of no reason in principle why a defect going to the root of the claim cannot be attacked under this Rule...”

21]In my view, the portion relied on by Ms Goedhart was *obiter*. The authors in Erasmus, **Superior Court Practice**, Service 23, 2005 B1-191 indicate in a footnote to the commentary as follows:

“In view of the provisions of Rule 18(12) which were inserted on 27 November 1987, it is doubtful whether the obiter judgment is still applicable.”

22]I am of the view that the learned authors are correct in this regard and that the use of Rule 30 in dealing with the defect going to the root of the claim is not apposite since the introduction of the provisions of Rule 18(2) of the Uniform Rules of Court on 27 November 1987.

23]In response to the Court’s enquiry as to whether the Appellant’s failure to comply with the notice requirements in terms of Section 3(2) of the Act was a special defence analogous to a defence of prescription and that it ought to be pleaded as such, Ms Goedhart argued that it should still have been heard in terms of Rule 30. Mr Joubert referred to the case of **De Polo v Dreyer and Others** 1989 (4) SA 1059 (W) in support of the contention that special defences should be raised by way of a special plea. Morris AJ clearly indicated that such special defences should be raised by way of special plea where he indicated at 1061 E of the judgment as follows::

“... Usually, as will appear from a case to which I was referred in argument and which I shall discuss later, a special defence such as prescription, want of locus standi, prematurity or the like, is raised by way of a special plea, and may be subject to a replication, thereafter to be dealt with perhaps under Rule of Court 33, especially Rule 33(4).”

24]The Respondent, having conceded that an application for condonation could be brought after institution of proceedings and that the Rule 30(2)(b) procedure is not apposite, sought to convince the Court that, despite the fact that the Appellant was given the opportunity to seek condonation on the 5th of June 2008 when the Rule 30(2)(b) application was served and again on the 11th of June 2008 when the attorneys engaged each other, he failed to do so.

25]Ms Goedhart argued that the application for condonation was not expeditiously made and in this regard relied on the case of **Minister of Agriculture and Land Affairs v C J Rance** 2010 (4) SA 109 (SCA) at 118 B where the Supreme Court of Appeal reiterated that condonation must be applied for as soon as the party concerned realises that it is required. Ms Goedhart argued that, what she terms, the “*Appellant’s inertia*” in seeking condonation must count against the Appellant.

26]Ms Goedhart also sought to convince this Court that the Respondent was suffering prejudice and relied on the affidavit of Ms Chetty to substantiate the argument relating to prejudice.

27]I am not convinced that the grounds for condonation should be argued and determined at the hearing of a Rule 30 application. Mr Joubert indicated that while the wording of paragraph 19 of the Particulars of Claim was not a modicum of clarity insofar as it sought to allege that condonation will be sought, he indicated that it was, nevertheless, an allegation which the Respondent had to deal with by means of a special defence. I am inclined to

agree with this submission.

28]The Supreme Court of Appeal in **Minister of Safety and Security v De Witt**, *supra*, clearly indicated at paragraph [10] on pages 461 and 462 that an application for condonation is only required where the organ of State makes objection to the absence of the notice and it stated as follows:

“Thus either a complete failure to send a notice, or the sending of a defective notice, entitles a creditor to make the application. Even this is qualified; it is only ‘if an organ of State relies on a creditor’s failure to serve a notice’ that the creditor may apply for condonation. If the organ of State makes no objection to the absence of a notice, or if valid notice, then no condonation is required. In fact, therefore, the objection of the organ of State is a jurisdictional fact for an application for condonation, absent which the application would not be competent.”

29]Mr Joubert relied on this passage and it is my view that unless there is an objection by the organ of State, it is not competent to apply for condonation. Ms Goedhart indicates that the Respondent had objected to the fact that the notice was not timeously given by the Appellant, as required by Section 3(1) of the Act, where she argued the three occasions as being:

29.1]On the 5th of June 2008 where the Rule 30(2)(b) of the notice was

served;

29.2]On the 11th of June 2008 during a telephonic conversation between the attorneys;

29.3]When the application in terms of Rule 30 was finally launched on 10 July 2008.

30]In considering these three occasions, I am not persuaded that any of the said three occasions constitute an objection envisaged in terms of Section 3(4)(a) of the Act. Ms Goedhart sought to convince the Court that the notice in terms of Rule 30(2)(b) constituted an objection as envisaged in Section 3(4)(a) of the Act. I am of the view that Rule 30 is meant to deal with an irregular step taken by a party in terms of the Uniform Rules of Court. It is not meant to serve as a ground for objection in respect of procedural aspects relating to other legislation. Rule 30(1) clearly indicates, in this context that :

“(1) A party to a cause in which an irregular step has been taken by any other party may apply to Court to set it aside.”

31]The “*irregular step*” mentioned in the rule related only to an irregular step taken by a party in respect of the Uniform Rules of Court. I am, accordingly, of the view that if Rule 30 was intended to serve as a notice of objection in respect of proceedings other than the Uniform Rules of Court, it would be casting the net far too wide and would lead to abuse. In any event, Rule 30

was never intended to serve as a basis for the objection to procedural irregularities in respect of other legislation. Rule 30 was meant to deal with irregular steps taken by parties involved in litigation where the irregularity emanated from the use of the Rules of Court .

32]Ms Goedhart sought to convince the Court that at the time the order was made by Tsoka J, the decision in **Minister of Safety and Security v De Witt**, *supra*, was not made and accordingly that was the law extant at the time. This reasoning, in my view, is erroneous in that the Supreme Court of Appeal did not deal with Rule 30 of the Uniform Rules of Court. Insofar as the Supreme Court of Appeal interpreted the provisions of the Act, and more particularly Section 3 of the Act, it did so to clarify the meaning of the Sections of the Act and not to add to or to vary the Act. Accordingly, it cannot be said that when the Rule 30 application was argued before Tsoka J that the law was different to what the law was when the Supreme Court of Appeal interpreted the provisions of the Act in **Minister of Safety and Security v De Witt**. Rule 30 was not different to what it is now and the reliance by the Respondent on **Deputy Minister of Tribal Authorities and Another v Kekana** in this regard, as indicated earlier, is erroneous.

33]In the circumstances I am of the view that the Respondent should not have proceeded in terms of Rule 30 of the Uniform Rules of Court with a view to object to the validity of the Appellant's notice given in terms of Section 3 of the Act. The appropriate course that the Respondent should have adopted in

the matter was to have either objected to the notice in terms of the Act or to have delivered a special plea after summons was served. The delivery of a special plea would have allowed the Appellant to file a replication in terms of Rule 25 of the Uniform Rules of Court and would have allowed a proper ventilation of the issues relating to condonation.

34]Accordingly, I make the following order:

34.1]The Appeal is upheld with costs.

34.2]The order of the court *a quo* is set aside and substituted with the following order:

“The application in this matter is dismissed with costs”

HORN J _____

I concur

MAYAT J _____

I concur

Counsel for the Appellant: Adv. DJ Joubert

Instructing Attorneys: Schickerling Bowen & Hesselink

Counsel for the Respondent: Adv. G Goedhart

Instructing Attorneys: Webber Wentzel

Judgment Date: 18th August 2010