

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

Case no: 73418/2016

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 23/02/2024

In the matter between:

PETER THEMBEKILE MALGAS

First Plaintiff

ALFRED DISCO BIYELA

Second Plaintiff

BOSWELL JOHN MHLONGO

Third Plaintiff

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Defendant

J U D G M E N T – Section 3 of Act 40 of 2002

MAKHOBBA, J

[1] On 26 January 2024 the defendant filed its amended plea and practice note whereby the defendant raised a special plea on the failure by the plaintiffs to comply with section 3 of Act 40 2002¹.

[2] It is common cause that in its original plea, the defendant did not raise a special plea of failure to comply with section 3 of 40 of 2002.

[3] To the defendant's pre-trial questions² the plaintiffs replied as follow:

"18. Do the Defendants admit that they have not applied for condonation for the late delivery of the letter of demand?

- No application for condonation was made.
- The Plaintiffs persist with their statements in the particulars of claim namely that the Plaintiffs complied with the Act."

[4] In the founding affidavit on behalf of the plaintiff's it is submitted that the notice in terms of section 3 was timeously delivered in respect of the first plaintiff. In respect of the second and third plaintiff there was substantive compliance although such notice was three months late³.

[5] It is submitted further in the founding affidavit that the reason why the notice was late in respect of the second and third plaintiffs is that the exact history and nature of the matter was incomplete at the point of the first months of interaction between the legal team and the plaintiffs⁴.

¹ CaseLines 000001 Sub-paragraph 2 at 000001 – 146, 000001-147 and 000001-148 paragraphs of 12,4, 13.4 and 14.4 of the Defendant's plea to plaintiffs amended particulars of claim.

² CaseLines 000001-17.

³ CaseLines 33-2-10.

⁴ CaseLines 33-2-13 ap Par 5.2

[6] Thus, the issue before court is whether the plaintiff have timeously complied with the requirement of prior notice to the defendant in terms of section 3(1), 2(3) of Act 40 of 2002

[7] Counsel for the defendant argues that the six months period within which the plaintiffs were required to have issued a notice in terms of section 3 of Act 40 of 2002 is as follows:

7.1 The first plaintiff was released on 25 June 2015 and the six months period (Notice in terms section 3) lapsed on 25 December 2015.

7.2 The second and third plaintiffs were released on 25 March 2015 and the six months period lapsed on 25 September 2015.

[8] Counsel for the defendant submitted that the plaintiffs only sent their notices by registered post to the defendant on 21 December 2015. This is common cause between the parties. Counsel for the defendant submitted further that such notices only received by the defendant on the date after 21 December 2015. As a result, the notices were issued late.

[9] The result thereof is that such notice was only received by the defendant on date after 21 December 2015.

[10] Finally counsel for the defendant contended that, the plaintiffs application for condonation in this court was refused and not heard, the plaintiffs are therefore not entitled to institute and prosecute their actions before this court.

[11] It is contended further that this court is without the necessary power or jurisdiction to entertain the plaintiffs actions or claims⁵.

⁵ CaseLines 0006-74 paragraph 21; Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA).

[12] On behalf of the plaintiffs counsel provided three reasons why the court should dismiss the special plea. The reasons are as follow:

12.1 “The Defendant is bound by his pleadings”

12.2 “The defendant had to raise all his defences at once; he cannot plead his defences in a piecemeal fashion”

12.3 “The plaintiffs complied with section 3 of Act 40 of 2002”

The defendant is bound by his pleadings.

[13] Counsel for the plaintiff referred the court to the decisions in *Soth African Transport and Allied Workers Union and Another v Garvas*⁶ and *MJK v IIK*⁷ and submitted that the defendant is bound by the way in which it pleaded its second special plea. This plea it is argued is based on an erroneous premise that the debt was due in 2012.

Defendant cannot plead in a piecemeal fashion.

[14] According to counsel for the plaintiffs, the defendant should have raised all the defences at the same time. In this regard counsel for the plaintiff relies on the decision in *Crompton Street Motors CC v Bright Idea Projects 44(Pty) Ltd*⁸.

[15] It is further argued that the section 3 special plea should have been raised 2018 together with the special plea of non-joinder and misjoinder. The defendant should not be allowed to raise it now six year later.

Compliance with section 3 of Act 40 of 2002

⁶ 2013 (1) SA 83 (CC).

⁷ 2023 (2) SA158(SCA).

⁸ 2022 (1) SA 317 (CC).

- [16] It is submitted on behalf of the plaintiffs that it appears from the answering affidavit that the defendant received the notice somewhere in June 2016.
- [17] The plaintiffs instituted their action on 6 October 2016. Therefore the defendant could investigate the plaintiffs claim for the whole of July to September 2016.
- [18] The plaintiffs submit that there was compliance with section 3 of Act 40 of 2002. The court must dismiss the special plea.
- [19] In terms of section 3 of Act 40 of 2002 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 written notice of its intention to institute proceedings.
- [20] The creditor's written notice must be served on the organ of state within six months from the date on which the debt became due.
- [21] Section 3 (4) (a) of Act 40 of 2002 reads as follows:
- “(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.”*
- [22] In this matter before me, the notice furnished by the plaintiffs to the defendant were sent by registered post on 21 December 2015. I am satisfied that all the plaintiffs' notices in terms of section 3 of Act 40 of 2002 were sent to the defendant late, contrary to the provisions of section 3 of Act 40 of 2002.
- [23] In my view it was imperative for the plaintiff to ask for condonation in terms of section 3 (4) (a) before a trial date was set. It is clear from the pleadings and

the pre-trial that the defendant did raise with the plaintiffs the shortcomings in respect of the provision of section 3 of Act 40 of 2002. It is further my view that the plaintiffs should have made sure that they have complied with the provisions of section 3 of Act 40 of 2002 before the trial date was set.

[24] The case law referred to by counsel for the plaintiff does not have a bearing in the issues before me and can therefore not assist the plaintiffs.

[25] I make the following order:

25.1 The plaintiffs claim is dismissed on account of their failure to comply with the requirement of the notice in terms of section 3 of Act 40 of 2002

25.2 Costs of suit including cost of two counsel.

**MAKHOB A J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD AND RESERVED JUDGMENT: 21 February 2024

JUDGMENT HANDED DOWN ON: 23 February 2024

Appearances:

For the Plaintiffs: Adv L de Klerk SC with Adv D Thaldar (instructed by) Gildenhuys Malatji Incorporated

For the Defendant Adv G Shakoane SC with Adv D D Mosoma (instructed by) State Attorney Pretoria.