



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: 3236/2021

In the matter between:

JABULANI VICTOR MBONAMBI

Plaintiff

and

JOHANNES MOFOKENG

1st Defendant

MINISTER OF POLICE

2nd Defendant

CORAM:

MTHIMUNYE, AJ

HEARD ON:

28 NOVEMBER 2023

DELIVERED ON:

28 FEBRUARY 2024

- [1] The plaintiff instituted action against the defendants for damages of R3 000 000.00 (Three Million Rand) arising from the first defendant having laid false charges of trespassing against the plaintiff which led to the plaintiff being charged at the Bethlehem Police Station under CAS number 311/09/2019. The matter culminated in the prosecutor refusing to prosecute.

- [2] The first defendant is a Lieutenant Colonel and a member of the South African Police Service and a Station Commander at Bohlokong Police Station. At all material times, he was acting within the course and scope of his employment. The second defendant is the Minister responsible for the South African Police Services being sued in the main action in his representative capacity.
- [3] Pursuant to receipt of the plaintiff's summons, the defendant raised a special plea of non-compliance with section 3 of the **Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002** ("the Legal Proceedings Act" alternatively "the Act"), being that the plaintiff failed to give notice in writing within a period of 6 months from the date on which the debt became due as provided for in the Act.
- [4] The charges against the plaintiff were laid on 25th September 2019, the date on which the defendants argue that the debt became due. The section 3 notice was served on the defendants on 29th May 2020, more than eight months after the date on which the case was opened. It is for this reason that the defendants plead non-compliance. The plaintiff averred that although the case against him was opened on 29 September 2019, he only became aware of it when the Investigating Officer approached him on 5th December 2019 for an interview. It was only then that he became aware of the facts giving rise to the claim as well as the identity of the organ of state. Consequently, he gave the notice on 29 May 2020 which date fell within the prescribed 6 months' notice period.
- [5] This court is called upon to determine whether or not the plaintiff complied with the provisions of section 3 of the Legal Proceedings Act as it avers and if not, to uphold the defendants' special plea of non-compliance as averred by the defendants. To do so, one must look at the provisions of section 3 of the Legal Proceedings Act as well as the relevant facts of this matter. I now turn to do so.
- [6] Section 3 of the Legal Proceedings Act provides that:

"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 legal proceedings in question; or*
- (b) the organ of state in question has consented in writing to the institution of that legal proceeding (s)-*
 - (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 6 (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) For purposes of subsection (2) (a) –

- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and ..."*

[7] I do not deem it necessary to discuss subsection (1) and (2) as they are self-explanatory and not in dispute in respect of what is before this court to determine. The question on which this matter turns rests on sub-section (3). Subsection (3)(a) clearly states that the debt does not become due until the creditor acquires knowledge of the identity of the organ of state and of the facts giving rise to the debt. The plaintiff averred that he only acquired knowledge of the charges against him on 05 December 2019 when the Investigating Officer approached him for an interview. That the plaintiff only acquired knowledge of the identity of the state organ, and of the facts giving rise to the debt on 05

December 2019, was undisputed by the defendants and no evidence was led to the effect that the plaintiff became aware of the case against him on the date the case was opened or earlier than 5 December 2019. There was also no evidence before this court to the effect that the plaintiff should be regarded to have acquired such knowledge earlier than 5 December 2019. From a simple mathematical reckoning of days, it is obvious that the notice was served within a period of 6 months from the date on which the plaintiff acquired knowledge as envisaged in section 3(3) (a). For this reason, the defendants' special plea has to fail.

- [8] I now turn to deal with the issue of costs. The approach to costs rests on two principles, firstly that unless expressly otherwise enacted, the granting or not of costs falls within the discretion of the court, which discretion is to be exercised judiciously. The second principle is that generally, costs follow the results, i.e. they are awarded in favour of the successful litigant.

Consequently, I make the following **Order**:

1. The defendants' special plea is dismissed with costs.


D.P. MTHIMUNYE, AJ

Appearances:

For the Plaintiff: Adv M A Mashinini
Advocate in terms of section 34(2) read with section 84(1) & (2) of the Legal Practice Act 28 of 2014.

For the Defendants Adv K Nhlapo-Merabe
Chambers, Bloemfontein
Instructed by the State Attorney, Bloemfontein