

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case No: A174/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
C.E. THOMPSON	21/02/2020
	DATE

In the matter between:

MINISTER OF POLICE

APPELLANT

and

MOTLAKOLA NKEBENYANE

RESPONDENT

JUDGMENT

[1] This is an Appeal against the dismissal of a Special Plea by the Defendant pertaining to the Plaintiff's alleged failure to comply with Section 3¹ (1) of the Institution

¹ 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-

of Legal Proceedings against an Organ of State Act² ("the Act"), in that it was delivered out of the statutory prescribed time periods and there has been no Condonation Application as contemplated by Section 3(4)(a) and (b) of the Act. It is common cause that the Defendant has not consented, in writing in terms of Section 3(1)(b)(ii), to the institution of the action without such notice

[2] The relevant history of the matter is as follows:

2.1 On a date in January 2012³ the Plaintiff was allegedly arrested between Ficksburg and Thlokolana by members of the South African Police Services on allegations of stock theft. He was allegedly interrogated at the Ladybrand Police Station and detained at Ficksburg Police Station until 3 February 2012, whereafter he received free bail;

2.2 On 5 December 2013, the Summons pertaining to the alleged unlawful arrest of the Plaintiff was issued out of the Pretoria Magistrate's Court. The summons was served on some date thereafter;⁴

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- (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) *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*
 - (b) *a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.*
 - (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 conditions regarding notice to the organ of state as the court may deem appropriate."*

² 40 of 2002

³ I specifically used the phrase on a date in January 2012 as the specific day in January is the contentious point in this Appeal that gives rise to this Appeal

⁴ The Appeal Record does not contain the return of service however it is common cause that the Summons was served.

- 2.3 On 30 April 2014, the Defendant delivered a Plea inclusive of a Special Plea. The Special Plea raised the fact that the Section 3(1)(a) notice was delivered outside of the Section 3(2)(a) of the Act prescriptive time period and that the Defendant had not consented to the institution of legal proceedings;
- 2.4 On 9 September 2014 the Plaintiff launched a Condonation Application to seek condonation for the late delivery of the Section 3(1)(a) notice. The Defendant did not oppose the condonation application;
- 2.5 On 22 October 2014 an Order was granted by the Pretoria Magistrate's Court granting condonation for the late delivery of the Section 3(1)(a) notice, which application was granted on an unopposed basis;
- 2.6 Relevant to this matter, on 25 April 2017 the Plaintiff gave notice of his intention to amend his Particulars of Claim by changing the date of arrest of 31 January 2012 to that of 26th January 2012. The Plaintiff also gave notice that he intends to amend the place of arrest to Lady Brand Police Station. The Plaintiff also indicated that he wishes to introduce that he was detained at Senekal police station and, after appearing in court, was further detained at Frankfort Central prison. This intended amendment was not objected to by the Defendant and the amendment was effected by the Plaintiff;
- 2.7 On 20 October 2017, the Defendant filed a consequentially amended Plea, again inclusive of a Special Plea. In the Special Plea the

Defendant, again, raised the issue of non-compliance with Section 31(a) of the Act;

2.8 On 28 June 2017 the Plaintiff filed a Condonation Application, which Condonation Application was withdrawn on 19 March 2018;

2.9 On 26th September 2017, post the second Condonation Application, but prior to the withdrawal thereof, the Plaintiff caused a second notice in terms of Section 3(1)(a) of the Act to be delivered to the Defendant. It bears mentioning that this second notice constituted a follow up notice to the first notice and sought to correct the date of the Plaintiff's arrest. The identity of the Plaintiff and the cause of action was not altered.

[3] By agreement the Special Plea was to be adjudicated separate from the remainder of the issues in the matter. After hearing argument on the special plea, the Learned Magistrate dismissed the Special Plea on the basis that the Order of 22 October 2014, granting condonation, was sufficient in the circumstances and that no further condonation was required when the date of arrest was corrected. Otherwise stated, the Learned Magistrate did not deem it necessary for the Plaintiff to seek condonation for the second (amending) notice.

[4] The Plaintiff has raised the point *in limine* that this is not an appealable matter as it is not final in nature. I am of the view that this is incorrect. Had the Special Plea been upheld, it would have been dispositive of the relief claimed in the main proceedings. Accordingly, the decision by the Learned Magistrate is appealable.⁵

⁵ See in this regard *Robertson v First Rand Bank Limited t/a Wesbank* (CA352/2012) [2015] ZAECHGCH7 (24 February 2015) at para 13

[5] The gist of the Defendant's Appeal, and argument in the Court *a quo*, is that when the Plaintiff amended the date of arrest from 31 January 2012, in its initial Particulars of Claim, to 26 January 2012, in his amended Particulars of Claim, the Plaintiff was duty bound to cause a new Section 3(1)(a) notice to be served on the Defendant. This contention relied upon the fact that a new cause of action and a new plaintiff had been introduced into the matter.

[6] The issue of a new plaintiff being introduced can be succinctly dealt with. The defendant submitted during the hearing of the matter that a new plaintiff had been introduced. It was pointed out to counsel for the defendant that the plaintiff remained the same, it is only the date and circumstances of the arrest that differs. Although the plaintiff explained the error on the basis that his arrest was conflated with his son's arrest in the first notice and in the unamended particulars of claim did not suddenly make the plaintiff's son the plaintiff in this matter. This much was conceded by the defendant's counsel.

[7] This leaves the new cause of action argument raised by the defendant. The starting point in dealing with this argument is the wording of Section 3(2)(b) of the Act. Succinctly stated, an intended claimant is required to briefly set out the facts giving rise to the debt and such particulars of such debt as are within the knowledge of the intended claimant.

[8] In the matter of *Mothupi v MEC Department of Health Free State*⁶ it was stated that the object of Section 3 of the Act is "*to enable the State, a large and cumbersome organisation, to investigate claims so as to consider whether to settle or compromise*

⁶ (20598/2014) [2016] ZASCA2017 (22 March 2016)

a claim before costs escalate unnecessarily, or to properly prepare its defence – which may be frustrated if it is unable to investigate relatively soon after the alleged incident occurred."

[9] The question is whether the changing of the date of arrest and certain of the arrest particulars in the Particulars of Claim, and the subsequent advising of the Defendant of the change in the date by way of the second Section 3(1)(a) notice which must be read in conjunction with the first Section 3(1)(a) notice, invalidates the first Section 3(1)(a) notice.

[10] Statutory interpretation is the process of gleaning meaning and intent from the wording used by the legislature in order to deal with some or other identified mischief.⁷ It is clear from the intention of the Legislature, as expressed above, that the purpose of Section 3(1)(a) of the Act is to place the relevant organ of state in as good as possible situation to investigate a complaint against the mechanisms of the state that gives rise to potential delictual liability.

[11] To determine the facts as contemplated by Section 3(2)(b)(i), a good starting point is to determine what facts the Plaintiff will have to plead in order to sustain a cause of action. For a claim of unlawful arrest against the Defendant, the Plaintiff will

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) [16 March 2012]

"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

have to allege that he was arrested⁸ by a police officer, acting within the course and scope of his employment. The facts giving rise to the plaintiff's alleged debt is no more and no less than the aforesaid.

[12] However, to place the defendant in as good as possible position to investigate the alleged claim, the Act requires such particulars of such debt as may be within the knowledge of the plaintiff. The particulars giving rise to the debt, in my view, would constitute particulars such as the name of the arresting officer, where and when the arrest took place, occurrence book entries, CAS number and the like. Essentially, the particulars required is a notification of the evidence of which the Plaintiff is aware of at the time that it serves the Section 3(1)(a) notice on the Defendant.

[13] The Act does not indicate any penalty to the Plaintiff if the Plaintiff cannot provide particulars. As a matter of fact, the Act is silence as to the exact extent of the particulars that must be furnished. The Act only requires such particulars as are within the knowledge of the Plaintiff. The Act is silent as to any penalty to be visited upon the Plaintiff in the event that a Plaintiff is mistaken or even incorrect as to certain particulars.

[14] A mistake in the Section 3(1)(a) notice does not necessarily vitiate the Section 3(1)(a) notice.⁹

[15] That mistakes are made in drawing up pleadings is trite. Our law of procedure is aware thereof and caters therefor. This has been the position in our law for more

⁸ Wrongfulness need not be alleged, as an arrest is *prima facie* unlawful. See *Lomba v African National Congress* 2002 [5] SA 668 (SCA)

⁹ *Maguaga v Minister of Police* (CA342/2017) [2018] ZAECHC 78 (4 September 2018) at para [40]

than a 100 years. As late as 1911 it was stated in *Whittaker v Roos and another*; *Morant v Roos and another*¹⁰ "The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts." I see no reason why the same approach cannot be followed with a Section 3(1)(a) notice. In any event, the Section 3(1)(a) notice is not a full and comprehensive exposition of the Plaintiff's claim. It is not a pleading and must not be viewed with the same level of scrutiny as one would a pleading.

[16] It is common cause that the Plaintiff complied with the provisions of Section 3 of the Act, as condoned by the Court *a quo*. The Plaintiff gave notice to the Defendant that he intends to institute action against the Defendant for his unlawful arrest. In doing so he gave notice to the Defendant of the facts giving rise to the alleged debt. The problem comes in with the particulars given in relation to the facts giving rise to the alleged debt.

[17] The Defendant argues that had the correct date been given, it would have discovered that the arresting officer had since been deceased and it would have opposed the first condonation application and raised the issue of prejudice. The problem with this line of argument is that this contention appears nowhere on the papers before us. In order to succeed on the issue of prejudice, if success were to be achieved at all in this respect, the defendant would have had to satisfy the court hearing an opposed Section 3(1)(4) application that no other officers were involved or

¹⁰ 1911 TPD 1092 at 1102

present during the arrest of the plaintiff and that none of them can shed any light on why the plaintiff was arrested. No such contention exists on oath before us.

[18] Returning of a moment to the issue of the introduction of a new plaintiff, it bears mentioning that prior to the earlier mentioned concession, the defendant advanced the argument that the defendant was at all times under the impression that the plaintiff is actually the plaintiff's son. The fallacy to this argument is that nowhere, on the record before us, does the defendant state under oath that he was under the impression that the plaintiff was, in actual fact, the plaintiff's son and not the actual plaintiff himself. As the plaintiff and his son share the same names, there is nothing to indicate that from the inception of the matter the defendant considered the actual claimant to be the plaintiff's son and not the plaintiff. It is the lack of this indication that caused the earlier concession, which concession was rightly made in my view.

[19] The defendant (as appellant) prepared the record of the proceedings in the court *a quo* that was to be the appeal record. The defendant elected to include the plaintiff's second condonation application into the record but elected not to include is apparently existing answering affidavit in the appeal record. Thus none of the submitted grounds giving rise to the alleged prejudice and alleged reasons for not opposing the first condonation application emanates from the record before us.

[20] Moreover, on the Defendant's contention, for every possible mistake that could be made in a Section 3(1)(a) notice, a new Section 3(1)(a) notice is required. The absurdity in this approach is patently clear, for where does one draw the line in respect of which mistake necessitates a new Section 3(1)(a) notice and which mistake does not. If the Plaintiff had the date correct, but had the time of arrest incorrect, would a new Section 3(1)(a) notice be necessary. If the Plaintiff had the name of the arresting

officer correct, but the arresting officer's force number incorrect, would that necessitate a new Section 3(1)(a) notice. What would the Defendant require if the spelling of the arresting officer's name was incorrect, but all other details were correct. Would it also require a new Section 3(1)(a) notice. If this was to be the case, cases would suffer from inherent delays whilst new Section 3(1)(a) notices were served and further condonation applications were pursued.

[21] In my view the Plaintiff gave due notice of his intention to institute action against the Defendant for an unlawful arrest allegedly perpetrated by a police officer. The intended action has been instituted. In determining, at the eventual trial, whether the Plaintiff has proved its case on a balance of probabilities, the presiding officer will have to evaluate the Defendant's alleged and proved prejudice whilst, at the same time, taking into account what caused the Defendant's prejudice. This may result in a variety of orders by the presiding officer, including that the plaintiff's claim be dismissed or that absolution from the instance be granted. I make no determination in this regard as there is no evidence before us in in this regard.

[22] Accordingly, in my view there was substantial compliance with Section 3(1)(a) of the Act. The second Section 3(1)(a) notice was not a substantial notice giving notice of the intention to institute legal proceedings, but only served the purpose of correcting and incorrect date. The first Section 3(1)(a) notice informed the Defendant that the Plaintiff intends instituting action against the Defendant for the Plaintiff's unlawful arrest. The incorrect particulars relating to the debt, however, does not mean that the Defendant did not get substantial notice of the intended action against the Defendant. The incorrect particulars may have an impact on issues such as credibility and costs,

but in the circumstances of this case it does not vitiate the fact that notice was given, which late notice was condoned by the court.

[23] Furthermore, it was for the Defendant to object to the proposed amendment on the basis that it will suffer prejudice that cannot be remedied by an appropriate Order for costs. Even in the event of the amendment being allowed thereafter or in the event of the amendment, as in this case, being effected on an unopposed basis, still remains open for the Defendant to claim prejudice at the trial in that certain witnesses and/or documentation are no longer available due to the erroneous particulars set out by the Plaintiff's attorneys in the Section 3(1)(a) notice.

[24] This leaves the issue of costs. The entire dispute as to the Section 3(1)(a)-notice, its validity and the consequences of the erroneous particulars can be laid at the door of the plaintiff's attorneys. Little attention was paid by the plaintiff's attorneys to the correct drafting of legal documentation in circumstances where they act for two separate litigants with the same names. This lack of accurate and coherent drafting even finds its way into the plaintiff's heads of argument.

[25] In paragraph 1F of the plaintiff's heads of argument the following submission was made "*Plaintiff amended it's [sic] particulars of claim i.r.o the date of arrest 10 May 2017.*" On an ordinary reading of this submission the impression is created that the date of arrest is amended to 10 May 2017. During argument it was pointed out that the 10 May 2017 date actually relates to the date on which the Rule 55A(7) amended pages were delivered.

[26] In paragraph 1H the following submission is made "*plaintiff corrected an error by amendment on 11 April 2017*". In light of the previous amendments and errors, this

corrected error is not properly identified in the heads of argument for ease of understanding and digesting by the court. A further cryptic submission is made in paragraph 11 of the plaintiff heads of argument, namely "*Defendant's last amendment 19 July 2018.*"

[27] I can go through the entire heads of argument on behalf of the plaintiff and point out the cryptic and lackadaisical manner in which the heads of argument were drafted. The lack of attention to detail and the proper use of the chosen language with which to plead is shines through in the pleadings. Moreover, there seems to be little motivation for the plaintiff to bring this matter to finality as the action was already instituted close to some 7 years ago in 2013.

[28] In my view this is not a matter in which the costs should follow the result. The conduct on the part of the plaintiff's chosen legal representatives is the cause of the present appeal. A plaintiff can only escape the conduct of his chosen legal representatives so far and no further.

[29] In the premises I am of the view that the Appeal should fail and I propose the following Order:

1. The Appeal is dismissed;
2. The Respondent in the appeal (the Plaintiff in the court *a quo*) is to pay the costs of the appeal.



C E THOMPSON AJ

Acting Judge

Gauteng Division

I agree



T A MAUMELA J

Judge of the High Court

Gauteng Division

Appearances:

Appellant's Counsel

: Adv. M Vimbi

Appellant's Attorneys

: State Attorneys

Respondent's Counsel

: Mr A Grove

Respondent's Attorneys

: Mills & Groenewald Attorneys

Date of hearing

: 18 February 2020

Date of judgment

: 21 February 2020