**IN THE HIGH COURT OF SOUTH AFRICA**

**[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

**CASE NO. 1748/2017**

In the matter between:

**N[…] M[…] obo N[…] M[…]** **Plaintiff**

**And**

**MEC FOR HEALTH, EASTERN CAPE** **Defendant**

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**JUDGMENT**

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**JOLWANA J**

[1] The plaintiff alleged in her particulars of claim that her minor child N[…] was born with hypoxic ischaemic encephalopathy, microcephaly, impaired fine motor function and superadded hypoglycemia giving rise to spastic quadriplegic cerebral palsy and developmental delay. The plaintiff further alleged that these birth defects were as a

result of the defendant's breach of contract, alternatively negligence for various reasons which are not relevant for present purposes.

[2] The defendant defended the action and what is relevant for present purposes is the defendant's special plea which reads:

> "1. In terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act No.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 notice in writing of his or her intention to institute legal proceedings and that notice sent to the relevant designated official;
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> 2. Such notice must be served on the appropriate and relevant organ of state within six (6) months from the date on which the debt became due and must set out a cause of action of the creditor;
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> 3. Further, in terms of Section 4 of the Act such notice must be served on an organ of state by delivering it by hand or by sending it by certified mail to the relevant head of government.
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> 4. In this case it is alleged that:
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> 4.1 the plaintiff is a creditor;
>
> 4.2 the defendant is an organ of state;
>
> 4.3 the debt became due during the period August 2009.
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> 5. The plaintiff did not comply with the provisions of Sections 3 and 4 of the Act in that:
>
> 5.1 She did not give notice of her intention to institute this action within 6 months from the date on which the debt became due, as required by section 3 (2)(a) of the Act; and
>
> 5.2 She did not serve a proper notice on the relevant state Department or official, as required by the Act.
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> 5.3 Alternatively, the said notice (if issued – although denied) does not set out the nature of the cause of action and or facts upon which the claim is based."

[3] Predictably in matters of this nature the plaintiff launched an application for the condonation of the non-compliance with the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act).

[4] The order granted by this court in respect of the condonation application reads as follows:

> "1. The applicant first became aware of the damages claim against the respondent on 28 February 2017.
>
> 2. The applicant's non-compliance with the provisions of Section 3(1) and Section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is hereby condoned."

[5] The above order was granted on an unopposed basis as the defendant did not file a notice to oppose and/or an answering affidavit nor was there an appearance on behalf of the defendant when the above order was granted.

[6] Thereafter, both parties prepared for trial and filed a new Rule 37 minute in which parties agreed that the matter was ready for trial with the defendant indicating therein that it was ready to proceed with the trial on the merits only. Furthermore the parties also declared that they have no intentions of amending the pleadings or requesting trial particulars. It is not clear when this minute was done but the notice of filing thereof was served on the defendant on 16 July 2019.

[7] Furthermore the parties met on 17 July 2019 and agreed on a pre-trial checklist in which the defendant indicated that it was ready to proceed with the trial on liability only. The defendant indicated that that it would call 1 lay witness and 6 expert witnesses. Most significantly the parties agreed that there were no points *in limine* and/or

interlocutory issues which have arisen or which are anticipated to arise. On the basis of an agreement between the parties and the Judge being advised that the matter was trial ready and being satisfied that indeed it was, the matter was certified trial ready during the roll call convened in terms of the new Practice Directive[1] issued by the Judge President dated 25 June 2019. The matter was set down for trial to commence on 26 August 2019.

[8] However, on 16 August 2019 which was exactly 10 days before the trial date the defendant served and filed an amended plea which also included the same special plea in exactly the same terms as it was filed on 18 September 2017. Furthermore the defendant insisted that the matter was not ready to proceed because the plaintiff has not dealt with the defendant's special plea in so far as it relates to the proper service of the section 3(1) notice upon the head of department in terms of section 4(1) of the Act[2]. This prompted the Judge President to issue a directive for the parties to agree on a stated case for adjudication on whether the special plea was still a live issue or not.

[9] The said stated case recorded the following:

[1] Rule 3.5 of the Practice Directive reads: "All civil matters enrolled for hearing (whether in accordance with rule 37A or otherwise) shall be subject to a weekly roll call that shall henceforth be held before a judge (in open court) at each seat of the Division on Friday at 09h00 four (4) weeks prior to the week in which the matter is enrolled."

[2] Section 4(1)(a) reads:
"(1) A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subjection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is-

(a) a notional or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation 103 of 1994), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department;"

"1. The parties were directed on the roll call on 26 August 2019 by the Honourable Judge President to prepare a stated case to deal with the amended defendant's special plea, dated 16 August 2019.

2. In particular to deal with the point that has been raised by the defendant in her special plea that the plaintiff did not serve her notice to institute the action to the relevant state department or official as required in terms of the Institution of legal proceedings against certain organs of State Act 40.2002. (hereinafter referred as the act)

**BACKGROUND**

3. The Defendant pleaded the exact same special plea originally dated 18 September 2017.

4. The Plaintiff brought an application in terms of Section 3(4)(a) of the Act, for her failure to comply with Section 3(1) read with Section 2(a) and Section 4(1) of the act.

5. The Defendant filed no opposing affidavit.

6. The application served before the Honourable Jolwana J on 2 October 2018 and there was no appearance on behalf of the Defendant.

7. The court granted the application as it appear in the above court order.

8. It is the Plaintiff's contention that the effect of the condonation that was granted is that the Plaintiff's failure to serve a notice within six months on the Head of the Department or the Superintendent General was condoned.

9. It is the Defendant's contention that the condonation did not include the failure to serve on the head of the Department.

**ISSUES TO BE DECIDED BY THE COURT**

10. The issue to be decided is whether the Defendant's Special Plea dated 16 August 2019, in particular paragraph 5.2 remains an issue between the parties."

[10] As indicated above the defendant's special plea dated 16 August 2019 is in exactly the same terms as it was issued on 18 September 2017. It seems to me that the real issue is whether the order granted by this court on 02 October 2018 in which section 4(1) is not specifically mentioned included a condonation for its non-compliance.

[11] The plaintiff specifically addressed the issue of non-compliance with section 4(1) of the Act in her affidavit in support of the condonation application. The plaintiff therein made the following averments:

> "32. The Notice in terms of Section 3 of the Act was served on the Member of the Executive Council ("MEC") for the [Free State] (sic) Provincial Department of Health.
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> 33. My attorney has advised me that he was mistakenly under the impression that the MEC was the head of the Health Department. This incorrect impression was brought about by his understanding of the State Liability Act which identifies nominal heads of various government departments and institutions. It, however, appears that although the MEC is the executive authority of the health department, the accounting officer of the department has been designated as the head of the department. Consequently, my attorney did not serve the Notice in terms of Section 3 on the Head of the Department.
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> 34. My attorney advised me that this error was inadvertent and not made intentionally or designed to prejudice the respondent in any manner whatsoever.
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> 35. As to the satisfaction of the requirements for condonation as set out section 3(4)(a) of the Act, the following is relevant.
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> 36. As to the issues of prescription of my claim and good cause I refer the Court to what I have already stated above in this regard.
>
> 37. I attach hereto as ANNEXURE "NM4" a confirmatory affidavit of my attorney, Mr Nonxuba, with regard to all the above.
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> 38. Although the notice in terms of section 3 was served on the MEC and not the head of the department, the defendant has in no manner being prejudiced by this omission and has litigated in this matter, based on relevant instructions, in the normal course.
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> 39. I submit that the Respondent has suffered no prejudice by the omission of serving the notice on the MEC as opposed to the Head of the department."

[12] In the main Mr Jikwana who appeared for the defendant made three submissions. The first one is that the court order which specifically included section 3(1) and 3(4) of the Act excluded section 4(1) on the basis of the maximum *expressio unius est exclusio*

*alterius*. Secondly, the plaintiff made no mention of section 4(1) of the Act even in the above paragraphs, so went the submission. Thirdly in *Gcam-Gcam*[3] this court had made it clear that section 4(1) is required to be condoned as well.

[13] The first two points are difficult to understand. How it can ever be said that a litigant in the affidavit must go beyond the relevant factual averments and make specific mention of the relevant legislation is extremely problematic and must therefore be rejected. In any event I was not referred to any authority for this submission.

[14] Similarly the reliance on the maxim *expressio unius est exclusio alterius,* is on the facts of this case, misplaced. As with the first point, no authority was cited for its invocation nor was it shown how it is relevant in this matter. In *Ndaba v Ndaba*[4], writing for the full court, Petse JA, as he then was, had this to say:

> "[35] In any event, there is a more fundamental reason why the pension interests of the parties must, on the facts of this case, be an integral part of their joint estate. Central to the reasoning in my colleague's judgment is, in my view, the notion that a pension interest is neither immovable nor movable and that because the clause under consideration provides that only immovables and movables shall be divided equally between the parties, anything else not expressly mentioned is excluded. To my mind such a notion is unsound in law. By its very nature, movable property comprises both corporeal and incorporeal things. According to the learned authors of *Wille's Principles of South African Law* typical examples of incorporeal movables, inter alia, include real rights such as a pledge, notarial bond, mortgage bond, or any rights in personam that are connected with the transfer of movable property from one person to another or which can be satisfied by a money payment. It therefore goes without saying that the parties' entitlement to each other's pension interests, which can be satisfied by a money payment, falls squarely within the rubric of movables. Seen in this light, the *maxim expressio unius est exclusio alterius* is therefore unavailing..."

[3] Gcam-Gcam v Minister of Safety & Security (187/11) [2017] ZAECMHC 31 (12 September 2017)
[4] Ndaba v Ndaba 2017 (1) SA 342 (SCA)

[15] This brings me to the last point, the *Gcam-Gcam* case in which the court dealt quite extensively with section 4(1) and said:

> "[18] Regrettably, I find myself being in disagreement with the approach adopted in *Bahle* in so far as the National Commissioner was left out in a consideration of what constitutes substantial compliance with section 4 (1)(a) of the Act. The wording of the section is plain, simple and uses direct language. Nothing from a reading of the section points to any form of ambiguity or difficulty of interpretation. It makes it imperative (and not merely directory) for a claimant to serve the notice on the head of a department. In the case of the SAPS such head is the National Commissioner. The reason for the requirement that notice to institute proceedings against a department be served on the department's head at that early stage is not far to seek. In terms of section 36 of the Public Finance Management Act 1 of 1999 (the PFMA) the head of a department must be the accounting officer for the department. The responsibilities of accounting officers are set out in section 38 of the PFMA. Section 38 (1)(d) renders accounting officers responsible for the management of the liabilities of the department. It is also significant that the National Commissioner exercises control over and manages the SAPS in accordance with section 207 (2) of the Constitution of the Republic of South Africa, 1996 and is obliged to perform any legal act or to act in any legal capacity on behalf of the SAPS. As far as I could have discerned argument predicated on the pivotal role of the head of department does not seem advanced in *Bahle*, both before the court a quo and the full court.
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> [19] In terms of section 4 (1)(a) the notice must be addressed to and received by the National Commissioner. I am mindful of the pronouncement in *Maharaj and Others v Rampersad*. wherein the then AD held that in deciding whether there has been compliance with an injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance. However, substantial compliance which eschews the head of a department, whose responsibility includes the management of the department's liabilities, does not pass muster. The head must be involved in the relevant process and in deciding whether the claim should be resisted or settled. Were the section to be interpreted otherwise, the managerial role of the accounting officer would be subverted. A door to all manner of possibilities leading to unnecessary uncertainties would also be opened."

[16] I am in respectful agreement with Mbenenge ADJP (as he then was) in *Gcam-Gcam*. Section 4(1) must be complied with and where there has been non-compliance

an application for condonation in terms of section 3(4) must be made. This, in my view, is what in essence, *Gcam-Gcam* dealt with as in that matter there was no condonation application, with the plaintiff relying on the notion of substantial compliance. The court rejected that and held that a condonation application was necessary.

[17] In this case the plaintiff dealt with both the issue of non-compliance with the six month notice requirement as well as the failure to serve the notice on the correct functionary, namely the head of department in her application for condonation.

[18] Section 3(4)(a) of the Act reads:

> "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"

[19] Section 3(2)(a) reads:

> "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);"

[20] The defendant is clearly being disingenuous and opportunistic and extremely insensitive to the plight of N[…] who to date, as will be shown below, has been frustrated a number of times from having her case heard in court. It is necessary to remind the defendant of what the Supreme Court of Appeal has said on this Act. In *Madinda v Minister of Safety and Security*[5] Heher JA stated that:

> "[6] Section 3(4)(b) circumscribes a court's power to grant condonation by requiring that it be satisfied that
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> i) the debt has not been extinguished by prescription;

[5] Madinda v Minister of Safety and Security, Republic of South Africa 2008 (4) SA 312 (SCA)

ii) good cause exists for the failure by the creditor, ie to serve the statutory notice according to s 3(2)(a) or to serve a notice that complies with the prescriptions of s 3(2)(b); and

iii) the organ of state was not unreasonably prejudiced by the failure.

[7] The Act is an omnibus statute which as the preamble states is intended 'to regulate the prescription and harmonise the periods of prescription of debts for which certain organs of state are liable ; to make provision for requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debt'. Thus, it brings together and rationalises under one statutory umbrella provisions which were previously scattered through many statutes. (These are identified in the schedule of laws amended and repealed). The relevant repealed provision in this case was s 57 of the South African Police Services Act, 68 of 1995. That, in turn, was the successor to other provisions limiting actions against the SAPS which have, from time to time, received consideration by the courts. Such provisions have been held to be in favour of the police who should accordingly, in so far as the language permits, receive the protection offered by the section without imposing an unnecessarily heavy burden on a plaintiff: *Minister van Wet en Orde v Hendricks* [1987] ZASCA 55; 1987 (3) SA 657 (A) at 662E-662G. See also *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) at 497H-498C; *Mohlomi v Minister of Defence* [1996] ZACC 20: 1997 (1) SA 124 (CC) at para 9. Previously, s 57(5) of the 1995 Act permitted a court to dispense with an equivalent notice of intention to commence proceedings 'where the interests of justice so require', as to which see *Mugwena v Minister of Safety and Security* 2006 (4) SA 150 (SCA) at 155B-C. Before 1995 there was no power of condonation, a situation deemed to be unconstitutional in relation to analogous limitation provisions under the Defense Act 44 of 1957 in Mohloni's case.

[8] The phrase 'if [the court] is satisfied' in s 3(4)(b) has long been recognized as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See eg *Die Afrikaanse Pers Beperk v Neser* 1948 (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context."

[21] I do not see any reason why a stricter interpretation should be placed on section 3(4) by insisting that there must be a stand alone prayer for the condonation of the non-compliance with section 4(1). This in circumstances in which the facts relevant for section 4(1) non-compliance had been specifically pleaded and the defendant elected

not to oppose the condonation application and raise the very issue that is now being made a big and fundamental issue. It is worth emphasizing that section 3(4)(a) makes specific mention of subsection (2)(a) which in turn makes specific reference to both the six months notice requirement and the requirement for service upon the organ of state in accordance with section 4(1).

[22] Therefore, the defendant's submission that the granting of the condonation for sections 3(1) and 3(4) excludes non-compliance section 4(1) is not only opportunistic but also a disguised attempt at not wanting the matter to see the light of day in court. At best it is a genuine misunderstanding of the purpose of the Act which was authoritatively explained in *Madinda* and is binding on this court. Even if I am wrong on this point, upon a benevolent interpretation of the court order dated 02 October 2018, there must have been an acceptance by the defendant that non-compliance with section 4(1) was also granted. This would explain why the defendant continued with its preparation for trial even confirming that the matter was trial ready and indicating in the pre-trial checklist that *there are no points in limine and/or interlocutory issues which have arisen or which are anticipated to arise*.

[23] The defendant is also wittingly or unwittingly denying the plaintiff her constitutional right of access to court. Section 34 of the Constitution[6] gives the plaintiff right of access to court. The defendant is not an ordinary litigant. It is enjoined by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. It ought to be expected of the defendant to avoid a fruitless point taking in which costs are

[6] Constitution of the Republic of South Africa, 1996

incurred while nothing is achieved in circumstances where the point being taken is in any event not dispositive of the matter.

[24] I earlier on referred to the defendant being insensitive to the plight of the plaintiff and her minor child, N[…]. This file paints a picture in which on a number of occasions the defendant has been hell-bent on ensuring that the trial does not proceed. On 6 November 2018 the matter was postponed to the 3 December 2018 at the instance of the defendant for argument on a stated case on liability. On the 3 December 2018 the matter was postponed to the 7 December 2018 again at the instance of the defendant. It is not clear what happened on the 7 December 2018. The matter was however again before court on 12 December 2018 and the matter was postponed sine die. On 26 April 2019 the matter again could not proceed. It is recorded in that court order that the reason the matter could not proceed was due to the unavailability of the defendant's expert witness, Professor Cooper. Save for the 12 December 2018 when the costs were ordered to be in the cause, the defendant has been ordered to pay costs on each occasion the trial did not proceed. There has been no explanation for this state of affairs.

[25] However, I am not persuaded that the defendant should be ordered to pay costs on a punitive scale or *de bonis propriis*, as Mr Wessels submitted. Misguided as the defendant was in raising this point on the facts of this case, it is not a point that was raised directly and pertinently before to my knowledge. Courts should be extremely slow in awarding punitive costs against litigants as that could have an undesirable consequence of parties litigating in fear of punitive costs orders and thus undermine the development of our legal and constitutional jurisprudence.

[26] That the defendant is an organ of state and that the plaintiff and especially the minor child find themselves in the difficult position that they are makes no difference on the issue of costs. Litigants are generally entitled to raise legal points they genuinely believe in; whether in this case the defendant could have genuinely believed in the submissions that have been made is not very clear. The possibility that the defendant was only mistaken and/or ill-advised cannot be entirely excluded.

[27] In the result the following order is issued:

1. The defendant's special plea dated 16 August 2019 is dismissed with costs.

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**M.S. JOLWANA**

**JUDGE OF THE HIGH COURT**

Appearances

Counsel for the Plaintiff: J.J. WESSELS

Instructed by: NONXUBA INC. c/o POTELWA AND CO.

MTHATHA

Counsel for the Defendant: T.M. JIKWANA

Instructed by: State Attorney

MTHATHA

Head on: 26 August 2019

Delivered on: 27 August 2019