IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 7843/2009

In the matter between:

RAVI PERUMAL **PLAINTIFF**

and

ETHEKWINI MUNICIPALITY **DEFENDANT**

Order:

a. The question of law is resolved in favour of the defendant.
b. The plaintiff's letter dated 10 June 2008 does not constitute compliance with section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.
c. Plaintiff is liable for the costs of the hearing on 23 August 2016.

JUDGMENT

CHETTY, J:

1. This matter came before me as a special case in terms of Uniform Rule 33, where the following was stated to be common cause:

a. An incident involving the plaintiff, which forms the subject matter of this claim, occurred on 28 May 2008.
b. The defendant is an 'organ of state' as defined in the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 ('the Act').
c. The plaintiff's attorney sent a letter dated 10 June 2008 to the defendant, who received it on 13 June 2008.
d. The defendant responded to the letter on 29 July 2008.

e. It is not disputed that the letter from the plaintiff's attorney referred to in (c) above, was received within six (6) months of the incident in terms of section 3(2)(a) of the Act.

f. The plaintiff's claim has not been extinguished by prescription.

2. A dispute on a question of law which has arisen is whether the letter addressed by the plaintiff's attorney dated 10 June 2008 to the defendant, constitutes compliance with section 3 of the Act.

3. It is pertinent to set out the provisions of s 3 of the Act, as the plaintiff's letter referred to above must be interpreted against the applicable legislative provisions in order to determine whether there has been compliance with the statute for the institution of an action against an organ of state.

4. Section 3 of the Act provides that:

'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) 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) <u>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</u>.

(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.' (my underlining).

5. Following the incident on 28 May 2008 in which the plaintiff sustained injuries, he consulted with his attorney. The letter written by the attorney, referred to as annexure 'A' in the stated case, is critical to the determination of the matter. The letter from the plaintiff's attorney, dated 10 June 2008, is addressed to Mr. T Arbuckle at the Ethekwini Municipality. It reads as follows:

'Sir

<u>RE : RAVI PERUMAL</u>

We act for and on behalf of our client, Mr R Perumal.

> Our instructions are that our client was injured in his eye on 28 May 2008 due to the negligence of employees of the Ethekwini Municipality. Attached hereto is an affidavit of our client setting out how the same injury was sustained.
> Further be advised that our client has now been referred to an ophthalmic surgeon for further treatment, due to the fact that he has lost vision in the said eye.
> Kindly inform us as to whether your offices would be prepared to cover his medical costs in respect thereof, as a matter of urgency.
> We await your response hereto.'

6. In reply, a letter was received from the defendant's insurance department, signed by the Deputy City Manager and addressed to the physical address of the plaintiff. Nothing in my view turns on the fact that the letter was not addressed to the plaintiff's attorney, and no prejudice appears to have resulted therefrom. The letter of the defendant reads as follows:

> 'I am in receipt of your letter dated 11 June 2008 and advise as follows. The Ethekwini Municipality cannot accept liability for any damages caused, as no negligence is attributable to them or any of their employees in this regard at the time of the incident.
> The incident occurred on 26 May at the Snake Park. After consultation with the client Rashida from Shireen Amod (sic) office it was not reported immediately to the Department concerned and it was only brought to our attention 4 days later. Under these circumstances, the Department cannot accept liability as no negligence is attributable to them.
> Any inconvenience is sincerely regretted.
>
> Your faithfully
> Deputy City Manager (Treasury)'

7. The contention of the plaintiff, as set out in the special case, is that the letter addressed by the plaintiff's attorney complies with the requirements set out in s 3 of the Act in that it informed the defendant of the plaintiff's claim, allowing the defendant an opportunity to investigate the circumstances of the incident and to formulate an opinion as to whether it wished to contest the claim. The results of the investigation would define the nature of the response from the organ of state. As authority for this proposition, counsel referred to the decision in *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A) where Botha JA made the following observation at 621H-622A:

> 'The object of sec. 254 (2) is clear. It is to ensure that the local authority concerned is timeously informed of the threat of legal proceedings contemplated

against it, and of sufficient particulars of its alleged act or omission to enable it to investigate the matter and to consider its position in regard to the claim to be made before becoming involved in the costs of legal proceedings. (See *Pakco (Pty.) Ltd*. v *Verulam Town Board and Others, supra* at p. 634; and cf. *Administrator, Transvaal*, v *Husband, supra* at p. 394; and *Minister of Defence* v. Carlson, supra at p. 235). The achievement or otherwise in any particular case of the object of sec. 254 (2) is clearly of importance in deciding whether there has been substantial compliance with the requirements of sec. 254 (2). (Cf. *Maharaj and Others v Rampersad*, 1964 (4) SA 638 (AD) at p. 646).'

8. Mr *De Beer SC*, who appeared on behalf of the plaintiff, submitted that in determining whether the letter from the plaintiff's attorney complied with the requirements of s 3, I should also have regard to the manner and content of the response from the defendant. In this regard, counsel submitted that there cannot be any doubt that following the plaintiff's attorney's letter to the defendant, the incident was investigated. As a result of those investigations the defendant indicated that it was unable to accept liability for "*any damages caused*". It follows, as I understood counsel's argument, that the letter of 10 June 2008 addressed to the defendant was properly interpreted by the recipient as a demand for payment, and after investigation, the defendant decided to refute liability.

9. Accordingly, the plaintiff submits that the purpose of the notice envisaged in s 3 of the Act had been achieved. It was further contended that the defendant has suffered no prejudice (and none has been alluded to) as a result of any purported deficiency in the letter of 10 June 2008. Alternatively, even to the extent that it may be found that there was no strict compliance with the legislation (which is denied), it was submitted that there has been substantial compliance with the legislation. In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) Brand JA at para 22 pointed out that

> "…it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved (see eg *Nkisimane and others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) para 13)."

10. While the *Unlawful Occupiers* case concerned compliance with section 4(2) of PIE, the underlying enquiry, whether one is dealing with an eviction or in a damages claim such

as the present, is whether the party receiving the notice is aware of the case it has to meet. At a factual level, the question is whether the letter addressed to the municipality by the plaintiff's attorney achieved the purpose set out in the Legal Proceedings against Certain Organs of State Act 40 of 2002. For this reason it was submitted that the point of law raised by the defendant amounts to a technical defence which has no practical effect on the parties. In light thereof, Mr *de Beer* submitted that the point is bad in law and must fail, attendant upon the defendant being liable for the plaintiff's costs of the stated case, including that of senior counsel.

11. Our courts, particularly in the era of our constitutional democracy have repeatedly cautioned against promoting slavish adherence to form above substance. Although not referred to in argument by either counsel, the views expressed by Petse ADJP in *OR Tambo District Municipality v Wild Coast Guards CC* [2010] JOL 26486 (E) in the context of an appeal, where a special plea was raised based on non-compliance with s 3(1) of the Act, throws light on the approach to be taken in adjudicating such applications:

> '[17] In the alternative Mr *Mbenenge* argued that even if we were to reject his principal submission and have regard to both letters they still, even when read together, failed to pass muster as a valid written notice within the contemplation of section 3(1) of the Act in conformity with what has, in a long line of judicial pronouncements, been held to constitute substantial compliance with statutory prescripts of the kind now under consideration in this appeal.
>
> [18] I must confess that I have great difficulty in appreciating the logic and rationale in the approach inherent in Mr *Mbenenge's* principal submission on this score for two reasons. First it is my judgment that this argument entirely ignores the rationale for the existence of statutory prescripts such as section 3(1) of the Act and the purpose of such legislation as articulated in the judicial authorities cited in the main judgment. Secondly, and this is equally a telling factor in my view, such an approach is not only overly technical but also has the effect of putting form above substance which courts ordinarily eschew. Thirdly and even of great significance is that when once regard is had to the response letter from ORTDM the view that the written notice addressed to ORTDM on the behest of WCG adequately served its purpose…..
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> [19] Thus the argument heavily relied upon by Mr *Mbenenge* in his oral submissions before us cannot be sustained. Suffice it to mention that were we to uphold this argument we would in effect be adopting an overly technical approach and thus not taking due cognisance of the reality of the situation which

was that the appellant's municipal manager clearly had no illusion about what the letter addressed to ORTDM by respondent's erstwhile attorney sought to convey to the appellant. Were we to hold otherwise we would thereby be doing something totally at variance with clear and binding authority as proclaimed in a plethora of judgments of our courts approved and reaffirmed in *Moise's* case referred to in the main judgment.

[20] For the sake of completeness I should perhaps add that Mr *Mbenenge* might well have had a valid point if for example the letter addressed to ORTDM had elicited no response and when faced with the present legal proceedings ORTDM were to say: we received the letter of "demand" but did not have the slightest inkling of what was required of us. But this is not what the argument advanced on behalf of ORTDM postulates. Quite on the contrary what the contention advanced on behalf of ORTDM boils down to is this: whilst your written notice might have been couched in the vaguest of terms and despite its shortcomings we were left in no doubt of what precisely was required of us as we knew what you sought to achieve and pertinently responded to your written notice. To now seek to persuade us to ignore this telling factor ie the municipal manager of ORTDM knew what WCG sought to convey would, in my view, be irrational and untenable because to uphold Mr *Mbenenge's* proposition on this score in the circumstances of this case would be adopting a dogmatic approach whereas all judicial authorities on this score are decidedly against such an approach. This is particularly all more the reason when, as in this case, the purpose for which the written notice is required which is to ensure that an organ of the state "receives warning of the contemplated action and is given such information as would enable it to ascertain the facts, consider them and decide whether to avoid litigation or not" is served. In the context of this case the contention that the written notice in issue though bereft of sufficient detail and inelegantly drafted or even misguided nevertheless achieved, in my view, its purpose brooks of no argument to the contrary.

[21] ……..the common thread running through all the judgments referred to and discussed by my colleague, as I understand them, is that in each case the question of whether there has been substantial compliance with the statutory prescripts of the kind now under consideration in *hoc casu* is not to be answered in the abstract but with specific reference to the peculiar circumstances of each

> case. …….I consider it apposite to refer to the judgment in *Groepe v Minister of Police & others* 1979 (4) SA 182 (E) at 184 H where the following is stated:
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> > "The purpose for which this notice is required to be given is of importance. That purpose is to ensure that the State, or the person to be sued, receives warning of the contemplated action and is given sufficient information so as to enable it or him to ascertain the facts and consider them. The section is enacted for the benefit of the recipient of the notice, and *that purpose must be served*." (My emphasis)'

12. In general therefore, courts should direct their attention to whether the object of the notice has been achieved. See for example *Theart and Another v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA), which was concerned with the notices issued in terms of s 4(2) of the Prevention of Illegal Eviction Act 19 of 1998. Put differently and in the context of the present matter, the enquiry must be whether the letter addressed by the plaintiff's attorney meets the object and purport of the legislation. See also *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA).

13. Mr *Buthelezi*, who appeared on behalf of the defendant, while accepting that there was no prejudice occasioned to the defendant as a result of the contested letter of 10 June 2008, nonetheless submitted that the plaintiff had failed to comply with the legislative requirements embodied in s 3 of the Act. His argument was essentially that the letter makes no mention of a *demand* on the defendant, and more importantly, gives no indication that in the event of the defendant failing to pay, that the letter constituted the plaintiff's notice of its intention to institute legal proceedings against the defendant. At best, according to Mr *Buthelezi*, the letter can be construed as an 'indulgence' sought on behalf of the plaintiff for payment of his medical expenses. In this regard, the letter clearly states the following:

> 'Kindly inform us as to whether your offices would be prepared to cover his medical costs in respect thereof.'

14. It was further submitted that it cannot be argued that the letter constitutes a demand for payment of medical expenses, either in part or in full, from the defendant. The tenor of the letter, it was submitted, was more in the vein of a respectful request for assistance in light of the injury sustained by the plaintiff. Counsel for the defendant pinned his case on the rationale in *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) where the Court was dealing with the circumstances when an application for condonation will be granted where there has been a failure to comply with s 3 of the Act. Of particular importance concerning the issue before me is the following statement at para [9] where the Court held:

> 'The section expressly refers to notice of intended legal proceedings, and is peremptory: no legal proceedings *may* be instituted against an organ of State *unless* the creditor has given notice in writing of his or her intention to sue,…'.

15. The defendant contends that the plaintiff failed to comply with s 3(1)(a) of the Act. That section requires a claimant to give '*his or her or its intention to institute the legal proceedings*'. It was submitted by the plaintiff that in order to determine whether the injunction in s 3(1)(a) has been met, one should not only have regard to the contents of the plaintiff's letter, but also the defendant's reply thereof, which provides the clearest indication as to how the letter was interpreted. I am not persuaded that that is a correct premise to interpret whether there has been compliance with s 3(1). The section does not require an overall conspectus of the facts to ascertain whether there has been compliance. It places the necessity for the issuance of a demand squarely on the '*creditor*'. That is an objective assessment, based on a '*notice in writing*'. As indicated above, there is nothing in the letter of 10 June 2008 which forewarns the defendant that should it not pay towards the plaintiff's medical expenses, legal proceedings will be instituted against it.

16. While the special plea raised by the defendant may be construed as being overly technical, the point which cannot be overlooked is that a notice in terms of s 3 must comply with the requirements of the legislation. It is evident, in my view, that the plaintiff's letter of 10 June 2008 cannot, even of the most benevolent interpretations, be construed as a notice to institute legal proceedings. It is simply silent on this score. I am bound by the decision of the SCA in *De Witt* which states that the language in the section is peremptory.

17. Mr *Buthelezi* submitted that the defendant's point of law raised in its plea should be upheld with costs. The consequence thereof is not necessarily the end of the road for the plaintiff, especially as the stated case records that the plaintiff's claim has not been extinguished by prescription. As established in *De Witt* supra, where an organ of state contends that either no notice or a defective notice was issued, the creditor may apply for condonation in terms of s 3. The SCA stated the following at para 10:

> '…the purpose of condonation: it is to allow the action to proceed *despite the fact* that the peremptory provisions of s 3(1) have not been complied with. Section 3 must be read as a whole. First, it sets out the prerequisites for the institution of action against an organ of State: either a written notice or consent by the organ of State to dispense with the notice. Second, it states the requirements that must be met in order for the notice to be valid. And

> third, it states what the creditor may do should he or she have failed to comply with the requirements of ss (1) and (2): he or she may apply for condonation for the failure. 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 a 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.'

18. The ambit of this application is not to consider the merits or otherwise of an application for condonation. That is a matter for the plaintiff to pursue in the event of the special plea being upheld. If such an application were to be brought, a Court would no doubt that into account that even if a revised or new notice in terms of s 3 were to be issued, it would make no material difference to the attitude of the defendant to the claim – it would still deny liability and contest the claim.

19. The other point alluded to, but which has become unnecessary for me to determine, is the sufficiency of the notice to the defendant, even if I were to consider that it (the letter of 10 June 2008) complied with s 3(1) of the Act. Apart from the point that the letter did not constitute a demand or notice to institute legal proceedings, was the letter was circumscribed only to requesting the payment of medical costs?. Although the letter was only directed at the defendant paying the medical costs, it would appear that the letter was more widely construed by the defendant who responded that it rejected liability for "*any damages caused*". It is common cause that the summons embraced a claim for both medical expenses as well as general damages despite the letter of 10 June 2008 referring only to medical expenses.

20. In light of the submissions before me and the case authority I have referred to, I accordingly make the following order:

a. The question of law is resolved in favour of the defendant.
b. The plaintiff's letter of 10 June 2008 does not constitute compliance with section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

c. Plaintiff is liable for the costs associated with the hearing on 23 August 2016.

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CHETTY J

APPEARANCES

For the Applicant:	Adv H A de Deer SC
	Instructed by Shireen Amod & Co
	Ref: (Mrs Amod/RT/P52)
For the Respondent:	Adv B J Buthelezi
	Instructed by Linda Mazibuko & Associates
	Ref: (Mr Mchunu\\llg\EM177.FN)
Date of hearing:	23 August 2016
Date of judgment:	2 November 2016