

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

CASE NO : 362/09

In the matter between :

MINISTER OF SAFETY AND SECURITY

Appellant

and

MPHANGELI BAHLE

Respondent

JUDGMENT

BLOEM, AJ

- [1] This is an appeal against a judgment delivered by Makaula J on 12 April 2012, the learned Judge having granted leave to appeal to this court on 22 October 2012.
- [2] On 20 February 2009 the respondent instituted an action for damages against the appellant arising from his arrest on 31 October 2008 and subsequent detention until his release on 1 November 2008. The respondent pleaded *inter alia* that he complied with the provisions of the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002)(hereinafter referred to as "the Act"). The appellant delivered a special plea and plea over. In his special plea the appellant alleged that the respondent was barred from proceeding with his action against the appellant "*due to his failure to comply with the provisions of section 3(2)(a) read with section 3(3) of the ... Act*" and prayed "*for the upholding of his special plea with costs.*"
- [3] The issue whether or not the respondent complied with the provisions of the Act was debated before Makaula J who came to the conclusion that the appellant had substantially complied with the provisions of the Act. The

learned Judge accordingly dismissed the appellant's special plea with costs. It is against the dismissal of the special plea that the appellant now appeals to this court.

- [4] The issue in this appeal is whether or not a court can condone a creditor's failure to serve a notice on an officer referred to in section 4(1)(a) of the Act without an application for condonation where the organ of state received the notice within the six month period referred to in section 3(2)(a) of the Act.

- [5] The Act makes provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of a debt. In terms of section 3(2)(a) of the Act a person who intends to institute legal proceedings against an organ of state for the recovery of a debt must, within six months from the date on which the debt became due, serve a written notice on the organ of state in accordance with section 4(1) wherein he or she gives notice of his or her intention to institute legal proceedings. The South African Police Service (Department of Police) is an organ of state, being a national department. In this regard reference is made to section 1 of the Act as read with the first column of schedule 1 to the Public Service Act, 1994 (Proclamation 103 of 1994).

- [6] At the hearing of the special plea and by agreement the parties placed two documents before Makaula J as evidence. The first one is a letter dated 21 November 2008 that the respondent's attorney addressed to the appellant wherein he set out the facts giving rise to the respondent's claim for arrest and detention. The second one is a letter dated 23 January 2009 from the office of the Eastern Cape Provincial Commissioner of the South African Police Service wherein he advised the respondent's attorney "*that the matter has been referred to Mthatha Police Station as the incident occurred in their respective area*". Accordingly, as at 23 January 2009, at the latest, the organ of state had knowledge of the respondent's intention to institute legal action against the appellant based on his arrest and detention, that is within three months from the date when the respondent's cause of action arose. There can be no doubt that the respondent complied with the provisions of the section 3(2) of the Act to the extent that he served a notice on the South

African Police Service. In that notice he set out the facts giving rise to his claim and he gave notice of his intention to institute legal proceedings against the appellant.

- [7] The next enquiry is whether that notice was "*served on the organ of state in accordance with section 4(1)*", as required by section 3(2)(a). As Makaula J pointed out in his judgment, the appellant's main complaint was that the respondent did not comply with the provisions of section 4(1)(a). That section requires a notice, in the case of the South African Police Service, to be served on its National Commissioner by delivering it by hand or by sending it by certified mail or electronic mail or by facsimile. In this case it does not matter whether the notice was delivered by hand or sent by certified or electronic mail or by facsimile.

- [8] The notice was addressed to the appellant, not the National Commissioner of the South African Police Service. Although the notice was served on the organ of state, it was not served in accordance with section 4 (1). Is an application for condonation necessary where the respondent failed to serve the notice on the National Commissioner in accordance with section 4(1)?

- [9] The purpose of a notice contemplated in section 3 of the Act is to give the organ of state an opportunity to investigate the claim set out in that notice, to enable the organ of state to consider that claim responsibly and to decide, before getting embroiled in litigation at public expense, whether to defend the action or settle the claim. (Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) at 126D-E). In this case the notice was received by the appellant's office which must have referred it or caused it to be referred to the office of the Eastern Cape Provincial Commissioner. On 23 January 2009 the latter office referred it to the Mthatha police station, obviously for the respondent's claim to be investigated by members of the South African Police Service attached to that police station.

- [10] Against that background, does it matter that the notice was addressed to the Minister of Police, the appellant herein, instead of the National Commissioner of the South African Police Service?

[11] Mr Sishuba, counsel for the appellant, submitted that, because the notice was defective, the respondent should have applied to court for condonation in terms of section 3(4)(a) of the Act. The defect that he referred to is the respondent's failure to serve the notice on the National Commissioner. Despite the fact that the notice was served on the appellant (when it should have been served on the National Commissioner), there can be no doubt that the purpose of the Act was achieved when the Provincial Commissioner forwarded the notice to the Mthatha police station, obviously for the respondent's claim to be investigated. Mr Sishuba was unable to show how, in the circumstances of this case, the object of the Act was frustrated or undermined or how the appellant was prejudiced. In my view, since the Provincial Commissioner forwarded the notice to the Mthatha police station for the respondent's claim to be investigated, which happened within three months from the date when the cause of action arose and since the Provincial Commissioner assisted the respondent to bring the respondent's claim to the attention of the Mthatha police station for investigation thereof, the respondent has substantially complied with section 3(2)(a) which requires that the notice be served on the South African Police Service in accordance with section 4(1). (Moodliar NO and Others v Hendricks NO and Others 2011 (2) SA 199 (WCC) at 206C-D).

[12] Makaula J referred to the Moodliar case when he determined that service of the notice on the appellant and its onward transmission to the Mthatha police station substantially complied with the provisions of section 4(1). In that case Davis J referred to LC Steyn *Die Uitleg van Wette* (5th Ed at 201) where the learned author, in dealing with the issue of compliance, had the following to say:

'Somtyds egter word ook in hierdie verband slegs sogenaamde "wesentlike" nakoming vereis, maar dit word oorwegend gegee dat die korrekte standpunt gestel is in *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646D-D, waar verklaar word ...

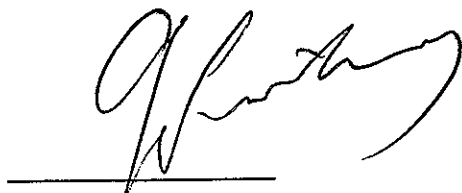
"The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance." (my underlining)

- [13] I do not agree with Mr Sishuba that the Moodliar case is distinguishable from the present one. The facts of this case show that "the object sought to be achieved" by the Act "has been achieved". There was accordingly compliance with the provisions of section 4(1), albeit substantial compliance.
- [14] Since the respondent has substantially complied with the provisions of section 4(1)(a), there was no need for him to make an application for the condonation of his failure to serve the notice in accordance with the provisions of section 4(1)(a). In any event, to require the respondent, in the circumstances of this case, to bring an application for condonation would be to place form over substance. There is accordingly no reason to disturb the finding of Makaula J *"that there has been substantial compliance with the provisions of section 4(1)(a) of the Act."*
- [15] This judgment should not be read to mean that, if a notice is sent to or served on a person or entity other than the officer referred to in section 4(1), such defective service will be treated as compliance with the Act. Each case must be considered on its own peculiar facts.
- [16] In the result, the appeal is dismissed with costs.


G BLOEM

ACTING JUDGE OF THE HIGH COURT

I agree. It is so ordered.


J PICKERING

JUDGE OF THE HIGH COURT

I agree. It is so ordered.


R BROOKS

ACTING JUDGE OF THE HIGH COURT

For the Appellant: Adv MH Sishuba, instructed by the State Attorney, Mthatha

For the Respondent: Adv V Kunju, instructed by M Bahle Attorneys, Mthatha

Date of hearing: 6 March 2015

Date of delivery: 19 March 2015