

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION-MTHATHA)

CASE NO: 362/09

Heard on: 25 January 2012

Delivered on: 12 April 2012

In the matter between:

MPHANGELI BAHLE

PLAINTIFF

and

THE MINISTER OF SAFETY & SECURITY & ANOTHER

DEFENDANT

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The plaintiff issued summons against the defendant for *inter alia* unlawful arrest, unlawful detention and *contumelia*. The defendant raised a special plea in the following terms:

- “1. The plaintiff has sued the Minister of Safety and Security in his official capacity as the first defendant;
2. The plaintiff is barred from proceeding with this action due to his failure to comply with the provisions of Section 3 (2) (a) read with Section 3 (3) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act 40 of 2002).

Wherefore the first defendant prays for the upholding of his special plea with costs.”

[2] The plaintiff discovered two letters which were later introduced as evidence during argument. The first letter is a notice of intention to institute legal proceedings addressed by the plaintiff to the defendant. The second letter is a response by the Office of the Provincial Commissioner to the plaintiff reading thus:

“Kindly be advised that the matter has been referred to Mthatha Police Station as the incident occurred in their respective area.”

B. Issues:

[3] Though the special plea refers to **Sections 3 (2) (a)** read with **3 (3) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002** (*the Act*) the actual section relevant hereto is **Section 4 (1) (a) of the Act**. Therefore, the issue to be decided is whether the plaintiff complied with the provisions of the Act by serving the notice on the defendant instead of the National or Provincial Commissioners.

[4] Plaintiff’s argument is that there was substantial compliance with

Section 4 (1) (a) of the Act to the extent that the defendant received the notice and acted upon it immediately hence the response by the Provincial Commissioner.

[5] My understanding of the second leg of his argument is that the purpose of the Act was to forewarn the defendant of the impending action and to give him sufficient facts to enable it to investigate the claim and properly consider the issue. He further argued that that the defendant acted on the notice, indicates that the failure to serve on it did not result in any prejudice.

[6] The plaintiff further argued that there was no need for the plaintiff to have applied for condonation for the failure to serve on the defendant. He premised his argument on the assumption that condonation only applies in two scenarios, viz (a) where the plaintiff did not issue the notice within six months prior to the institution of the proceedings and (b) where there was no notice at all issued prior to the issue of summons.

[7] The plaintiff argued that even though the provisions of **Section 4 (1)(a)** are peremptory, the defect in these proceedings is not fatal and referred to the matter of *Unlawful Occupiers, School Site v City of Johannesburg*¹ where the following was said:

“[22] As to the first and second objections pertaining to the contents of the notice, it is clear that the reference to s 4(1) of PIE was a mistake. To that extent the notice was therefore defective. I am also in agreement with the contention that the grounds for the application stated in the notice were too

¹ 2005 (4) SA 199 SCA at para 22

sparse to meet the requirements of s 4(5)(c). The respondents should at least have been told that their eviction was alleged to be in the public interest. As the appellants also correctly pointed out it was held in *Cape Killarney Property* (at 1227E-F) that the requirements of s 4(2) must be regarded as peremptory. Nevertheless, 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.”

[8] The plaintiff further referred me to ***Nkisimane & Others v Santam Insurance Co Ltd***² where the following was stated:

“Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. (See the authorities quoted in *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) at 587A-C.) On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non or defective compliance therewith may not have any legal consequence (see, for example, *Sutter v Scheepers* 1932 AD 165). In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 327 *in fin*-328B and *Shalala’s* case *supra* at 587F-588H, and cf *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C-E). It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect.”

C. Legal position:

² 1978 (2) SA 430 at 434 B-E

[9] **Section 3 (1) of the Act** provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the said organ of state notice in writing of his or her or its intention to institute the legal proceedings. **Section 3 (2)(a)** stipulates that a notice must, 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)**. **Section 4 (1)(a)** provides as follows:

“Service of notice

- 1) A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is –
 - (a) A national 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. ”

[10] **Schedule 1 to the Public Service Act 103 of 1994** requires that the notice in terms of the Act should be served with the National Commissioner of the South African Police. Furthermore **Section 5 of the Act** deals with service of process and provides as follows:

- “(1) (a) Any process by which any legal proceedings contemplated in section 3 (1) are instituted must be served in the manner prescribed by the rules of the court in question for the service of process.

(b) Despite paragraph (a) any process by which any legal proceedings contemplated in section 3 (1) are instituted and in which the –

i) . . . ;

(ii) Minister of Safety & Security is the defendant or respondent, may be served on -

(aa) the National Commissioner of the South African Police Service as defined in section 1 of the South African Police Act, 1995 (Act 68 of 1995); or

(bb) the Provincial Commissioner of the South African Police as defined in section 1 of the South African Police Act, 1995, of the Province which the cause arose .”

D. Analysis:

[11] The facts of the ***Nkisimane*** case are not in all fours or similar to the facts of this matter. In the ***Nkisimane*** case, the defendant (respondent on appeal) pleaded that in terms of **Section 25 of the Compulsory Motor Vehicle Insurance Act 56 of 1972** the claims by the plaintiffs (appellants) had not been completed in the prescribed manner. Having had regard to the contents of the claim forms and the requirements of **Section 25, Trollip JA** concluded that there was substantial compliance with the provisions of that Section in that there was sufficient information setting out the nature of the claim thus affording to the respondent sufficient information to enable it to decide whether to resist each claim for compensation or to settle it before being sued. Similarly, ***Unlawful Occupiers***, *supra*, deals with the contents of the notice in terms of **Section 4 (b) of the Prevention of Illegal Eviction**

From and Unlawful Occupation of Land Act 19 of 1998.

[12] The issues dealt with in both *Nkisimane* and *Unlawful Occupiers* are found in **Section 3(2)(b) of the Act** which requires that the notice should 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 creditors. **Section 4 (1)(a) of the Act** deals with the manner of service of the notice and not the contents of the notice.

[13] The facts bear out that the defendant received the notice *albeit* it contrary to the provisions of the Act. Having received it, the defendant referred it to the proper functionary hence the Provincial Office's response referred to in paragraph 2 above. The contents of the statement are not in issue, what is in issue is the service of the notice. The plaintiff partially complied with the provision of the Act but for failure to serve on the National or Provincial Commissioners as alluded to. The defendants strongly argue that such failure to strictly comply with the provisions of the Act must not be condoned. I, with respect, disagree. I find the following *dictum* by **Davis J** apposite to the issue at hand;

“Insistence that a court cannot under any circumstances condone a deviation from strict compliance may, to some extent, run counter to the inherent jurisdiction of the court.”³

I am therefore of the view that there has been substantial compliance with the provisions of **Section 4 (1) (a) of the Act**.

³ 2011 (2) SA 199 (WCC) 2009 at page 205 para 27

[14] The defendants argued further that the failure by the plaintiff to bring a substantive application for condonation, even though that was brought to his attention, is fatal to the application. I respectfully disagree with that argument and agree with the plaintiff that that would have been necessary in the two scenarios referred to in paragraph 5 above.

In the result, I make the following order:

- 1. The special plea is dismissed with costs.**

M MAKAULA

JUDGE OF THE HIGH COURT

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