FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case no.:4400/2004

In the matter between:

DIGOEREGOERE BUSINESS PROJECTS CC **Applicant/Defendant**

And

MALUTI-A-PHOFUNG MUNICIPALITY **Respondent/Plaintiff**

CORAM: C. J. MUSI, J

HEARD ON: 22 SEPTEMBER 2011

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 18 NOVEMBER 2011

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[1] This is an application for condonation. The applicant seeks the following relief:

> "1. Condoning the applicant's non-compliance with the provisions of the Institution of Legal Proceedings Against Certain Organs of the State Act, 2002.
>
> 2. Ordering the Respondent to pay the costs of this application.
>
> 3. Granting such further and/or alternative relief as this Court deems meet."

[2] I shall, for the sake of convenience, refer to the applicant as the defendant and to the respondent as the plaintiff.

[3] On 9 July 2004 the defendant was awarded a tender, by the plaintiff (an organ of State), to provide health and hygiene training to 56 000 households falling within the plaintiff's boundaries at R300-00 per household. In the appointment letter it is stated that the tender shall be conditional upon sufficient funds being made available by the Department of Water Affairs and Forestry on an annual basis.

[4] After rendering part of the service the defendant invoiced the plaintiff for R304 106. 40 on 10 August 2004. The plaintiff paid the said amount on 31 August 2004. On 9 September 2004 the plaintiff paid another R304 106. 40 into the defendant's bank account. The plaintiff discovered its mistake and informed the defendant on 20 October 2004 about the double payment.

[5] On 29 October 2004 the defendant admitted the double payment and requested twenty working days from 1

November 2004 to refund the money.

[6] On 2 September 2004 the Phofung Project Consultants (Pty) Ltd, who were the plaintiff's agents, informed the defendant that due to a 38% reduction in the budget allocation no further training should be embarked upon until additional funding for social facilitation health and hygiene training has been allocated. The services of the defendant were suspended. The defendant was aggrieved by the suspension and was of the view that it was being prevented from performing in terms of the agreement. It also alleged that the plaintiff owes it money for services rendered.

[7] When the plaintiff did not receive the refund, as promised, it issued summons on 20 December 2004, claiming R304 106. 40 plus 15.5% interest thereon, arising from the duplicate payment. The parties were then engaged in extensive negotiations for a period of approximately two years in an endeavour to resolve the issues in dispute.

[8] On 11 February 2005 the defendant's attorney wrote a letter to the plaintiff wherein the following was stated:

"1. The Maluti-A-Phofung Municipality suspended our clients' (sic) contracts (sic) through no fault of their own, for unsubstantiated budgeting (sic) reasons. This matter is still to be resolved.

2. Our clients (sic) are not convinced that there was any budgetary reasons for suspending their (sic) contract, as the suspension happened in the middle of a financial year, and at the beginning of the same financial year the Municipality had sufficient budget (sic) for 1 full year. Our instructions are to claim penalties for the unlawful suspension…

3. As a gesture of our client's goodwill we propose that we meet to discuss possible settlement of all the issues outstanding including withdrawing your claim against our client. We believe that this would be in the interest of all parties including the Municipality in the light of possible bad publicity that it matter could attract…"

[9] On 12 May 2005 the plaintiff's attorneys placed on record, in a letter to the defendants, that it will calculate what is due to the defendant, if any, and what the defendant owes it after taking into consideration the double payment which was made to the Defendant. The plaintiff's attorney further recorded the following:

"2.4 That if no settlement can be reached after the Defendant has been furnished with the said calculation, then the matter will proceed to litigation and the Defendant must then file its plea.

2.5 That all pleadings will be held in abeyance pending the outcome of a possible settlement between the parties…

4. Should no agreement be reached between the parties and the matter proceeds, then you will have to <u>file your Plea and Counterclaim herein</u>…" (My underlining).

[10] On 18 January 2006 the defendant wrote a letter to the plaintiff wherein it *inter alia* stated:

> "Your client had unilaterally terminated our client's contracts (sic) and our client is lodging a counterclaim for damages for breach of contract in the sum of the balance of the contract. With regard to a further meeting, we would be available during the first and second week of February. We propose that such meeting will (sic) be held in Johannesburg."

[11] The parties continued with settlement negotiations. On the 26 May 2006 the plaintiff wrote the following to the defendant:

"1. That the parties were *ad idem* that the contract was not cancelled, alternatively that it was not the intention of any party to cancel or repudiate the contract.

2. That the parties were *ad idem* with the calculations as per your letter dated 18 January 2006.

3. That the parties were *ad idem* that retraining was not done by your clients in respect of 7 265 units.

4. That the parties were *ad idem* to remain bound to the existing agreement although it was clearly expressed that a detailed contract should be finalised to regulate the rights and obligations of the respective parties.

5. The parties were also *ad idem* to suspend the exchange of further pleadings in the current Supreme Court case pending finalization of a possible settlement."

[12] On 2 October 2006 the defendant wrote to the plaintiff to advice it that the negotiations have broken down. It stated it thus:

> "We further advice that our client has instructed us to terminate all negotiations as it is quite clear to them that your client is dragging out the negotiations indefinitely and has no intention of settling the matter. You will be served with our plea and counterclaim shortly."

[13] On 20 October 2006 the defendant filed its plea and counterclaim. In its plea the defendant alleged that it had

rendered services to the plaintiff in the amount of R422 400.00 which amount it had not yet invoiced at the time of duplication of payment. It alleged that it is entitled to set off the amount due and payable to it against the amount paid by the plaintiff.

[14] It confirmed, in its counterclaim, that the contract was awarded to it. It alleged that it rendered services to the amount of R422 400.00 plus 14% vat in terms of the tender agreement and that the amount of R481 536.00 was due and payable to it.

[15] Secondly, it alleged that the suspension of the contract was unlawful and for spurious reasons. It further alleged that the suspension caused undue delay which is punishable in terms of the tender agreement. It claimed R1 050 000.00 for penalties or punitive damages.

[16] Thirdly, it alleged that the suspension of the contract for a period in excess of two years and the bad faith negotiations of the plaintiff was tentamount to an unlawful termination. It claimed R3 600 000.00 for loss of profit and earning. It

further claimed an amount of R153 116.26 which it alleged was a 5% retention that was held by the plaintiff. It alleged that due to the unlawful cancellation of the contract the 5% retention became due and payable.

[17] On 19 January 2007 the plaintiff filed its plea to the counterclaim. It did not plead non-compliance with the provisions of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act).

[18] On 27 March 2007 the plaintiff indicated by letter to the defendant that it is prepared to allow it to continue with training of 3500 households from 1 April 2007 subject to three conditions, firstly that the defendant submit the required “happy letters” in respect of the total number of trained households before 1 April 2007, secondly that the defendant sign a comprehensive agreement regulating the rights and obligations of the parties for the remaining part of the contract and lastly that the claim and counterclaims be withdrawn on the basis that each party pay its own costs.

[19] The defendant did not respond to the letter of 27 March

2007. It served a notice of bar on the plaintiff. On 10 May 2007 the plaintiff wrote to the defendant requesting it to give a clear and unambiguous undertaking that it will continue with the contract under the conditions stipulated in the letter of 27 March 2007. The undertaking was not forthcoming

[20] On 24 April 2009 the defendant filed an amended plea and counterclaim. The counterclaim consisted of two claims (A and B).

[21] In claim A the defendant alleged that it rendered services to the plaintiff in the amount of R422 400.00 plus 14% VAT and that the plaintiff is indebted to it in the amount of R177 429.60 which represents R481 536.00 less R304 106.40.

[22] In claim B it alleged that the suspension of the contract amounted to a unilateral and unequivocal tender to perform less than what was due in terms of the contract and therefore a repudiation of the agreement between the parties. It further alleged that it accepted the repudiation and communicated such acceptance to the plaintiff. It alleged that as a result of the repudiation it suffered damages to the amount of R13

735 200.00 plus 14% VAT. The amount of R15 658 128.00 being the amount that the defendant would have earned had the plaintiff not repudiated the contract.

[23] It therefore claimed for cancellation of the agreement; payment of R177 429.60 (claim A); payment of R15 658 128.00 (claim B); 15, 5 % per annum interest on the aforementioned amounts from date of summons and costs of suit.

[24] On 13 July 2009 the plaintiff filed a replication to the defendant's amended plea and a plea to the amended counterclaim. In its plea to the amended counterclaim the plaintiff pleaded for the first time, that the defendant had failed to notify it timeously or at all as required by section 3 of the Act.

[25] On 20 August 2010 the plaintiff applied for an order requesting the defendant to give security for costs. On 7 September 2010 the defendant was ordered to furnish security for costs in respect of its counterclaim in the form and amount as determined by the Registrar.

[26] Security for costs was provided in May 2011. The present application was brought on 24 May 2011.

[27] The defendant argued firstly, that the plaintiff waived its right to rely on section 3 of the Act, secondly that it substantially complied with the provisions of the Act because the parties were engaged in litigation and it sent a notice to the plaintiff, thirdly that it made out a proper case for condonation.

[28] The plaintiff focussed on the condonation application and argued firstly, that the relief sought in prayer 1 of the notice of motion is undefined and contrary to what the Act empowers a Court to grant, secondly that the counterclaim has prescribed, (strangely, the plaintiff did not plead prescription, at all, in its plea to the counterclaim) thirdly that no good cause for the failure to comply with section 3 and lastly that the plaintiff did not show the bona fides of its claim. With regard to the allegations of waiver and substantial compliance it argued that the notices are deficient because they do not quantify the defendant's claim.

[29] The plaintiff is of the view that the defendant was supposed to give notice in respect of both claims. The defendant on the other hand argued that it does not have to give any notice in respect of claim A because it is a claim for specific performance and not a debt as defined in the Act.

[30] The term debt is defined in section 1 of the Act as follows:

> "'Debt' means any debt arising from any cause of action –
>
> a) Which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any –
>
> (i) act performed under or in terms of any law, or
>
> (ii) omission to do anything which should have been done under or in terms of any law; <u>and</u>
>
> (b) for which an organ of State is liable for payment of damages,
>
> Whether such debt became due before or after the fixed date…"

[31] It is clear that paragraphs (a) and (b) of the definition must be read in conjunction. There is no need to depart from the clear, plain and unambiguous language of the definition. See **Shenkar v The Master and Another** 1936 AD.136; **R v Sapreco Meats (Pty) Ltd and Another** 1970 (2) SA 530 (R;A.D).

[32] In **Director-General v Kovac Investments** 2010 (6) SA 646

(GNP) at paragraph 8 to 9 it was correctly, in my view, stated that:

> "[8] The enquiry does not stop in paragraph (a) of the definition of 'debt' in the Act. Paragraph (b) of the definition lists, in addition to the features mentioned in para (a), another feature that the contractual, delictual or other claim must possess: it must be a claim for which an organ of state is liable for the payment of damages. There are therefore two legs to the enquiry whether a claim is a debt in terms of the Act. Firstly, it must arise from a contract, a delict 'or any other liability' – secondly, it must render the organ of State liable for damages.
>
> [9] For purposes of the second leg of the enquiry, the claim needs to be characterised. If the claim is for specific performance, then the claim, while it would amount to a debt in the context of the Prescription Act, does not qualify as a debt for purposes of the Act."

[33] A claim for payment of an amount due for services rendered in terms of a contract does not constitute damages. It is claim for specific performance. It does not constitute a debt as contemplated in the Act. Claim A is therefore not a claim for damages and is accordingly not subject to the provisions of the Act.

[34] It is common cause that the provisions of the Act do apply to claim B. Section 3 of the Act reads as follows:

"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 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) 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."

[35] The defendant alleged that the plaintiff waived its right to rely on section 3 of the Act.

[36] The defendant states the following in its founding affidavit:

"40. The plaintiff was represented at all relevant times and its attorneys took measures to protect its rights and no doubt, to preserve evidence and to ensure that a proper and full defence would be put up.

41. The plaintiff has accordingly suffered no prejudice by the

failure to provide a notice of the type contemplated in section 3 of the Act. Indeed, the plaintiff did not even raise this issue when it initially filed its plea to the counterclaim

42. I respectfully submit that this, in itself, not only demonstrates the absence of prejudice, but is a sufficient basis for contending that it had waived its right to rely upon this as a defence. The plaintiff, with full knowledge of its right to rely upon section 3 of the Act, filed a plea in which it failed to assert this right and, indeed, remained silent for approximately 4 years thereafter."

[37] The plaintiff's response to these paragraphs is as follows:

"**AD PARAGRAPH 40 THEREOF:**

I take note of the contents hereof.

AD PARAGRAPH 41 THEREOF:

In this regard I wish to point out that the amount of damages which is now being claimed by the Defendant, has been increased significantly since the original plea had been filed, and the basis thereof has been changed *in toto*. Further legal argument will be advanced at the hearing in regards with the prejudice suffered by the Plaintiff in this regard.

AD PARAGRAPH 42 AND 43 THEREOF:

I have been advised that the contents of these paragraphs contain legal argument and that such legal argument will be addressed at the hearing of the matter."

[38] In **Road Accident Fund v Mothupi** 2000 (4) SA 38 (SCA) at paragraphs 15 to 19 the requirements for inferred waiver are set out as follows:

> "[15] Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it . The right in question in the instant case is the statutory provision specifically accorded to the fund to avert claims which are out of time. 'It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is concluded in peremptory terms…"
>
> [16] The test to determine intention to waive has been said to be objective… That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations… secondly, that mental reservations, not communicated, are of no legal consequence… and thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party

concerned, that is to say, from the perspective of the latter's notional *alter ego*, the reasonable person standing in his shoes…

[18] The outward manifestations can consist of words, or some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists…

[19] Because no one is presumed to waive his rights …one, the onus is on the party alleging it and two, clear proof is required of an intention to do so. The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis."

[39] It has been said that there is a presumption, even in some cases a strong one, against waiver. See **R H Christie The law of Contract in South Africa 5th ed** at page 441. In **Xenopoulos and Another v Standard Bank of South Africa LTD and Another** 2001 (3) SA 498 (WLD) at 512 D-F Wunsh J clarified the position as follows:

"I do not consider that there is a presumption. The position is that, in weighing up the probabilities to decide whether a party asserting a waiver has proved it, a court takes into account that it is unusual for persons to give up rights or property gratuitously unless there is a reason for their conduct…" I agree.

[40] Once a waiver of a right has been communicated, by word or conduct, to the other side it is irrevocable; the right has perished. It is not necessary to show that the opposite party altered its position to its detriment as a result of the waiver. See **Glaser v Millward** 1950 (4) SA 587 (WLD) at 588 A-B.

[41] In **Glaser v Millward** supra at 590 G-H Roper J was of the view that where an attorney withdraws a plea on behalf of a client, even without consulting such client, the client is nevertheless bound by what the attorney has done. He puts it thus:

> "Her attorneys have the conduct of the case in their hands and are under a duty to protect her rights in the litigation which they carry on under a power of attorney given to them by her. They are quite entitled to make admissions on her behalf under the power of attorney and when they make them their client is bound by them; and if they made this withdrawal without consulting her, she is nevertheless bound by what they have done, and it would be quite idle to put her in the witness-box or to produce an affidavit by her to the effect that she never knew in effect what was done and never intended to waive her rights."

[42] On the other hand it has been said that a client is not bound

by the actions of his/her legal representative – attorney or counsel – where such legal representative has exceeded the mandate given to him/her and he/she has achieved an object that had not been intended by his/her principal. See **Ras v Liquor Licensing Board; Area no 11 Kimberley** 1966 (2) SA 232 (C.P.D) at 237 C-D.

[43] In **Bikitsha v Eastern Cape Development Board and Another** 1988 (3) SA 522 (ECD) at 528 B-C Mullins J came to the following conclusion:

> "It seems quite clear on authority that an attorney has no authority to waive his client's right unless specifically authorized thereto."

[44] It is clear that no one is presumed to have waived a right and it is accepted that once a right has been acquired it is not easily renunciated. The view that for acts of great prejudice – like waiver – an attorney needs a special mandate seems to me to be the better view. See **Bikitsha** supra at 527 I-J and **Ras v Liquor Licensing Board** supra.

[45] The plaintiff is represented by the same attorneys since at

least 20 December 2004, the day on which it issued summons, to date. After summons was issued the parties were engaged in extensive and protracted negotiations. There is no indication that the plaintiff's legal representative/s did not have an express mandate to enter into agreements of the nature that it did. If that was the case, one would in any event expect the plaintiff to say so and distance itself from such agreement. It did not do so. I must therefore assume that the plaintiff's attorneys had the required mandate.

[46] In the letter dated 12 May 2005 the plaintiff's attorneys recorded the terms of an agreement between them. In paragraph 4 thereof it is clearly stated that the parties agreed that "should no agreement be reached between the parties and the matter proceeds then you will have to file your client's Plea and Counterclaim herein."

[47] The parties therefore agreed on the way forward. If part of the agreement was that a section 3 notice must first be served before the counterclaim is served then surely the plaintiff's attorney would have recorded it as such. Likewise if it was the plaintiff's view that the section 3 notice must first

be served then surely that would have been part of the agreement. It was not.

[48] When the plaintiff filed its plea on 19 January 2007 it did not invoke section 3 of the Act. Even after it filed its plea to the counterclaim it wrote a letter to the defendant on 27 March 2007 wherein it *inter alia* stipulated certain preconditions – which were not accepted – for the withdrawal of the claim and counterclaim. Again no mention was made of section 3.

[49] It is only in its plea to the amended counterclaim that the plaintiff decided to invoke the provisions of section 3 of the Act. This plea was filed on 13 July 2009. No reason is given as to why non – compliance with section 3 was not raised on 19 January 2007, or between 19 January 2007 and 13 July 2009.

[50] As pointed out above, the defendant, in its founding affidavit, states that the plaintiff with full knowledge of its right to rely on section 3 of the Act, filed a plea in which it failed to assert its right and indeed remained silent for approximately two years thereafter. This was not denied by the plaintiff. It must

therefore be accepted that the plaintiff had full knowledge of its right and failed to assert same.

[51] In any event the plaintiff – a major municipality – was represented by attorneys and counsel who, it must be assumed, were fully aware of the protection afforded to the plaintiff by the statutory limitation provisions which (judging by the many reported cases) are frequently invoked by municipalities. See **GMF Kontrakteurs (Edms) Bpk v Pretoria City Council** 1978 (2) SA 219 (TPD) at 223 H to 224 A.

[52] In **Minister of Safety and Security v De Witt** 2009 (1) SA 457 (SCA) at paragraph 10 Lewis JA said:

> "If the organ of State makes no objection to the absence of a notice, or a valid (sic) 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."

[53] The delay on the part of the plaintiff to invoke the provisions of section 3 is also a factor that needs consideration. No explanation, whatsoever, is given for the failure to invoke the

provisions of section 3 prior to 13 July 2009 is proffered. It is clear that there was a duty on the plaintiff to speak but it remained silent. It gives no explanation for its silence. The correspondence, the delay in invoking section 3 and the objectives of the Act having been met, as I point out below, shows that the invocation of section 3 is done in bad faith.

[54] It is clear that the plaintiff delayed between 19 January 2007 – when it first pleaded to the counterclaim - and 13 July 2009 – when it pleaded to the amended counterclaim - to assert its right. No reason is given for the delay. Under the circumstances it is clear that it raises a "technical procedural defence" without a bona fide or satisfactory reason why it raises it so late. See **GMF Kontraktuers (Edms) Bpk** supra.

[55] On the other hand the defendant also had a duty to comply with the provisions of section 3. It however gives a plausible and satisfactory explanation for its failure i.e. that the parties were entangled in negotiations and that during the negotiations certain agreements were reached and further that there was substantial compliance with section 3 – an issue which I discuss below.

[56] I am satisfied that the plaintiff's conduct and outward manifestation reasonably entitled the defendants to conclude that the plaintiff a local authority that was legally represented and fully aware of its right decided not to invoke the provisions of section 3 of the Act. It is, in my view, clear that it must be inferred that the plaintiff waived its right to rely on section 3 of the Act. Its conduct is inconsistent with any other hypothesis.

[57] The defendant argued that it substantially complied with the provisions of the Act. It points out that in its letter dated 11 February 2005 it informed the plaintiff that it (plaintiff) suspended the contract without a valid reason and that it was going to institute a claim for penalties for the unlawful suspension of the contract (see paragraph 8 above). On 18 January 2006 it informed the plaintiff that the plaintiff unilaterally terminated the contract and that it was going to institute a counterclaim for damages for breach of contract in the sum of balance of the contract (see paragraph 10 above).

[58] In terms of section 3(2)(a) and (b) the notice must be served within 6 (six) months from the date on which the debt became due and it must briefly set out the facts giving rise to the debt and such particulars of the debt as are within the knowledge of the defendant.

[59] It has been said that legislation such as the Act is aimed at providing the plaintiff with an opportunity to investigate the matter sooner rather than later when such investigations might prove more difficult, so that it can consider its position, and if so advised, to pay or compromise the debt before becoming embroiled in costly litigation. See **Abrahamse v East London Municipality and Another, East London Municipality v Abrahamse** 1997 (4) SA 613 (SCA) at 624D-E; **Moise Greater Germiston TLC: Minister of Justice Intervening** 2001 (4) SA 491 (CC) at paragraphs 10-13.

[60] In **Mohlomi v Minister of Defence** 1997 (1) SA 124 (CC) at paragraph 11 Didcott J elaborated on the negative impact inordinate delays have on the effective and efficient resolution of disputes. He said:

> "Inordinate delay in litigating damage the interest of justice. They

> protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of the ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared…"

[61] From these authorities it is clear that the Act was promulgated for the benefit of the plaintiff. It is designed to aid State organs. It encourages the resolution of legal claims within a reasonable amount of time, because it is in the best interest of State organs that disputes are resolved as soon as possible.

[62] In its founding affidavit the defendant states the following:

> "37. Over the years the parties engaged in extensive negotiations regarding the issues in dispute. Correspondence was exchanged between the parties directly and their respective legal representatives. Much of this correspondence is privileged and is accordingly not attached hereto.
>
> 38. This exchange culminated in the letter of 18 January

2006 referred to above.

39. Having regard to the aforesaid, I respectively submit that:

3.9.1. The defendant had forewarned the plaintiff as early as February 2005 and/or January 2006 that it intended to claim damages for the plaintiff's wrongful cancellation of the agreement.

3.9.2. Since the acceptance of the repudiation and communication thereof was contained in the counterclaim, it was unnecessary and indeed overly formalistic to, in addition, provide a separate notice. Alternatively, the letter of 18 January 2006 constitutes sufficient and substantial notice."

[63] The response to these allegations is quite telling. The plaintiff responded as follows:

"AD PARAGRAPHS 35, 36 AND37 THEREOF

The contents hereof are admitted.

AD PARAGRAPH 38 THEREOF.

I note the contents of this paragraph. In this regard I wish to indicate that prior to the letter dated 18 January 2006, Defendant and its legal representatives accepted the fact that the services of the defendant has merely been suspended and not terminated as stated in the letter referred to. It was indeed

> the Defendant who repudiated the agreement by not agreeing to continuing with the services at request of the Plaintiff. In this regard I refer to the contents of annexure “D”.”
>
> AD PARAGRAPH 39 THEREOF
>
> I have been advised that the contents of this paragraph constitute legal argument and will legal argument therefore be advanced in this regard at the hearing of the matter.”

[64] It is apparent that the plaintiff does not deny that it was forewarned about the defendant’s intention to institute a counterclaim.

[65] The only argument presented by the plaintiff in order to meet the defendant’s allegations was that the letters cannot be regarded as written notices as envisaged in section 3 because they did not quantify the defendant’s claim.

[66] The legal position is that the written notice is peremptory but the content thereof is directory. See **Van Niekerk v Verwoerd Burger Staatraad** 1989 (4) SA 244 (TPD) at 251 G-H; **Avex Air (Pty) Ltd v Borough of Vryheid** 1973 (1) SA 617 (A) at 621 G-H; **Coetzee v Minister of Law and Order and Others** 1984 (4) SA 752 (EC) at 755 A-H.

[67] In as far as the defendant relied on the fact that the counterclaim itself is a notice in terms of section 3 that submission is misplaced and clearly wrong. The notice must precede the institution of proceedings. A counterclaim does not embody an intention to institute proceedings it is a form of instituting legal proceedings.

[68] It has been said that the achievement or otherwise in any particular case of the object of a provision such as section 3 is of importance in deciding whether there was substantial compliance with the requirements of the particular provision. See **Avex Air (Pty) Ltd v Borough of Vryheid** supra at 622 A-B. In **Commercial Union Assurance Co of South Africa Ltd v Clarke** 1972 (3) SA 508 (A) at 516 C and 517 D Holmes JA said the following:

> "As to that, legislative provisions requiring a claimant to give due notice prior to the institution of proceedings have more that once engaged the attention of this Court; and the Court has adopted a robust and practical approach as distinct from a legalistic one… Each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other."

In deciding whether the objects of a particular statute that limits the rights of a claimant have been satisfied, the provisions of the statute must be restrictively construed and not extended beyond its express limits. See **Avex Air (Pty) Ltd v Borough of Vryheid** supra at 621 F-G; **Mbali v Minister of Police** 1984 (2) SA 596 (TK) at 598D.

[69] Substantial compliance with the Act means actual compliance in respect to the substance essential to the achievement of the objectives of the Act. It must be clear that the purpose for which the limitation was enacted has been met. I must be satisfied that the provisions of the Act have been followed sufficiently so as to meet the intent for which it was adopted. The defendant bears the onus of proving that it has substantially complied with the provisions of the Act. Each case must be decided on its own special facts. An important question to consider is whether any purpose would be served by a further but procedurally correct notice.

[70] On 11 February 2005 the plaintiff was informed that the defendant intends to claim penalties for the unlawful

suspension of the contract. The contract was still extant. The parties were still locked in negotiations.

[71] When the negotiations deadlocked the defendant informed the plaintiff that it (plaintiff) had unilaterally terminated the contract. It further informed the plaintiff that it accepted the repudiation and that it elected to claim damages for breach of contract in the sum of the balance of the contract.

[72] It is clear that the letter of 11 February 2005 only related to a claim for penalties in terms of the contract, which was claim two of the original counterclaim. The letter dated 18 January 2006 related to a different cause of action viz the repudiation of the contract. The debt only became due when the repudiation was accepted and the acceptance communicated to the plaintiff. See **Christie supra** at 487; **HMBMP Properties (Pty) Limited v King** 1981 (1) SA 906 (N) at 910 A-F.

[73] The letter of 11 February 2005 is no longer relevant because in the amended counterclaim the claim for penalties was jettisoned.

[74] The letter of 18 January 2006 clearly states that the debt arose out of a breach of the contract between the parties. The plaintiff was aware of the contract. The letter also clearly states that damages will be claimed for the balance of the contract. This letter is understandably short on detail. The detail required in the notice is also linked to the purpose of the Act. It is to help in facilitating the investigations, by making it easier. The more detail the easier it is to investigate. The detail contained in the notice will depend on the facts of each case. Where the parties were involved in extensive negotiations and they both know what the litigation is all about there is no need for a detailed account of all the facts.

[75] Mr Claassen SC, on behalf of the plaintiff, is correct that the letter of 18 January 2006 does not state the quantum of the claim. Section 3 of the Act does not require that the quantum be specified in the notice.

[76] In Avex **Air (Pty) Ltd v Borough of Vryheid** supra at 621 F-G Botha JA said:

> "Hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts, section 254 (2) must be restrictively construed and not extended beyond its express limits… no particulars not expressly prescribed by the section, such as the legal basis of the local authority's alleged liability, or the amount claimed in a money claim need therefore be set forth in a notice under section 254 (2)."

[77] I agree. There is also no express provision in section 3 that the quantum of the damages must be specified in the notice. There is therefore no need to do so.

[78] There was compliance with the substance essential to meet every objective of the Act. The plaintiff had ample opportunity to investigate this matter. It actually investigated it. It agreed with the defendant that after their negotiations deadlocked the defendant may institute its counterclaim. It knew exactly which contract was at issue. All investigations necessary were exhausted. In any event the plaintiff did not proffer any argument against the defendant's argument in relation to substantial compliance other than to argue that the notice did not quantify the claim. No purpose would be served by a further notice that specifically states that it is a notice in

terms of section 3 of the Act. There was substantial, if not actual, compliance with the provisions of section 3 of the Act.

[79] My findings in relation to waiver and substantial compliance render it unnecessary to consider the issue of condonation.

[80] The notice of motion does not contain a prayer for declaratory relief to the effect that the plaintiff waived its right to rely on section 3 alternatively that the defendant substantially complied with the provisions of section 3. (See paragraph 1 of this judgment).

[81] There is a prayer, for what it's worth, for further and/or alternative relief. In **Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd** 1984 (4) SA 87 (T) at 93 E-F Coetzee J said:

> "The prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. Whatever the court can validly be asked to order on papers as framed, can still be asked without its presence."

[82] In **Tsosane and Others v Minister of Prison** 1982 (2) SA

55 (c) at 63 E-G it was said that:

> "In any event and insofar as the relief sought may not have been appropriate or even legally competent, I would have been prepared to grant an appropriate order directed at the decision of the second respondent (assuming the merits of the matter justified this) under the prayer for further or alternative relief. Relief may be granted under this prayer where what is sought is not inconsistent with the substantive relief claimed and where further the basis for such relief has been laid in the supporting papers and dealt with in the answer of the respondent (see ***Queenland Insurance Co Ltd v Banque Commerciale Africaine*** 1946 AD 272 at 286; ***Rooibokoord Sitrus (Edms) Bpk v Louw's Creek Sitrus Koöperatiewe Maatskappy Bpk*** 1964 (3) SA 601 (T) at 608."

The sentiments expressed in **Tsosane** supra were endorsed albeit in slightly different terms in **Port Nollorth Municipality v Xhalisa and Others; Luwalala and Others v Port Nollorth Municipality** 1991 (3) SA 98 (C) at 112 C- F.

[83] The legal position can be summarised as follows. An order in terms other than those set out in the notice of motion may be granted provided that it is foreshadowed in the founding affidavit and dealt with in the answering affidavit. There must

be satisfactory and sufficient evidence on the papers to justify such an order. The applicant should not be penalised for an oversight in the formulation of his/her/its prayers in the notice of motion. The relief granted must not be inconsistent with the substantive relief claimed. If no proper basis for the alternative relief is laid or if it is inconsistent with the substantive relief claimed it should not be granted. The absence of a prayer for further or alternative relief is no bar against granting such relief.

[84] The issues relating to waiver and substantial compliance were expressly and fully dealt with in the founding affidavit. The plaintiff responded thereto. Those issues where argued during the hearing of the application. A proper basis was laid for the order I intend to make. The defendant, in its founding affidavit, states that it brought the application for condonation *ex abundante cautela.* It is still of the view that there was waiver and substantial compliance. There is sufficient evidence on the papers to justify such an order.

[85] After the plaintiff invoked section 3 the defendant could have requested the plaintiff to consent in writing to the institution of

these proceedings without a notice or with a defective notice. It did not do so. On the other hand the plaintiff, taking into consideration the unique facts of this case, should not have invoked section 3 at that late stage and secondly it should not have opposed this application. The opposition was unreasonable and vexatious.

[86] The defendant seeks an indulgence. The general rule is that it should pay the plaintiff's costs of opposition if reasonably incurred.

[87] The opposition in this matter was unreasonable, vexatious and unnecessary as a result of which the costs of this application was increased by such opposition. The plaintiff relied on section 3 contrary to the purpose for which it was enacted. It did not do so in order to meet the objectives of the Act or in the interest of justice. It abused the statutory regime that was enacted for its benefit and protection. In my view the plaintiff should be ordered to pay the defendant's costs in consequence of the opposition. See **Makings v Makings** 1958 (1) SA 338 (AD) at 342 A-C.

[88] I accordingly make the following order:

a) The plaintiff/respondent waived its right to rely on the provisions of section 3 (1) of Act 40 of 2002.

b) The defendant/applicant must pay such costs of the application as would have been incurred had there been no opposition.

c) The costs incurred by the defendant/applicant in consequence of the opposition must be paid by the plaintiff/respondent.

C.J. MUSI, J

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