Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

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

Case No: 439/98
Heard 02/02/2011
Delivered: 06/05/2011

In the matter between:

NONKULULEKO JUDITH MSINDWANA **PLAINTIFF**

VERSUS

NONTSASA KILI AND 11 OTHERS **DEFENDANTS**

JUDGMENT

MJALI J:

1. The plaintiff instituted an action for payment of a sum of R1000 000.00 for damages arising from certain defamatory statements alleged to have been made by the defendants at various meetings and in the course of their duties either as employees of the Department of Education, Parents Teachers and Students Association, Education Transitional Task Team, Conflict Management Team, Internal Management Team or Commission of Enquiry. In her particulars of claim the plaintiff states that as a result of the

actions of the defendants she was removed from the school as principal and assumed duty at the Department of Education offices in an undisclosed capacity. That according to her has resulted in her not being considered for promotion to higher positions and loss of better income opportunities. The alleged defamatory statements were made during 1995 but the plaintiff only instituted these legal proceedings in May 1998.

2. It is not in issue that the envisaged claim for damages is a claim for the recovery of "a debt" brought against the body or persons representing the Department of Education, an organ of State.

3. The institution of legal proceedings in 1998 on a cause of action that occurred in 1995 prompted the filing of a special plea by the defendants in terms of which they asserted that the plaintiff's failure to institute legal proceedings within the prescribed period was fatal to its claim, and they sought an order that the claim be dismissed with costs. The special plea was formulated as follows.

"In terms of the provisions of sub-section (2) of section 67 of the Republic of Transkei Constitution Act No. 15 of 1976 the plaintiff was obliged to institute the proceedings within twelve months from the date on which the cause of action arose."

4. On a proper reading, sub-section (2) of section 67 of the Republic of Transkei Constitution Act No. 15 of 1976 not only requires the institution of proceedings within twelve months but in addition requires that notice in writing of the intention to bring such proceedings and the cause thereof be given to every defendant at least one month before the commencement of the proceedings. Mr Gagela, counsel for the defendants argued that the plaintiff's claim had expired as it was not instituted within the period of twelve months as required by the now repealed Republic of Transkei Constitution Act *No. 15 of 1976* as well as the subsequent Acts containing similar provisions, namely the Public Service Act No. 103 of 1994 and The Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002.

5. Coupled with the special plea there was a prayer that the special plea be

heard separately from the merits. The plaintiff opposed the special plea on the grounds that the Act relied on by the defendants was repealed and that the cause of action arose in the New South Africa. The defendants then sought to abandon the special plea and proposed to deal with the merits.

6. In view of the fact that the issue raised in the special plea constituted a legal point the court *mero motu* required that the parties deal with it. This is an *a fortiori* situation of the one described as follows by Ngcobo J in **Cusa v Tao Ying Metal Industries** 2009 (2) SA 204 (CC) [also reported at 2009 (1) BCLR 1 (CC) – Ed] at paragraph [68]:

> *"Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."*

7. Mr Gagela contended that although the Transkei Constitution Act No.15 of 1976 was repealed in toto by the Interim Constitution in April 1994, the Public Service Act No. 103 of 1994 which came into operation on 3 June 1994 contained a similar provision. In terms of section 39 (2) of that Act no action against the state shall commence after the expiry of 12 months unless notice in writing of the intention to bring such proceedings and the cause thereof has been given to every defendant at least one month before the commencement of the proceedings.

8. I pause to mention that the Interim Constitution makes no mention of the repeal of the Republic of Transkei Constitution Act No. 15 of 1976. Instead section 230 of the interim Constitution repealed laws specified in Schedule 7 that accorded the TBVC states —independent status, including the Republic of Transkei Constitution Act No 48 of 1963 and the Status of the Transkei Act. Dealing with a similar situation the Constitutional Court gave guidance in **The State versus Kholekile Witness Thunzi And Siyabulela Mlonzi With Minister for Justice And Constitutional Development** Case CCT 81/09 [2010] ZACC 12 that the reference in the interim Constitution to the Transkei Constitution Act No 48 of 1963 seems to be an error, since this Act

was repealed *in toto* and replaced by the Republic of Transkei Constitution Act 15 of 1976.

9. At the time the cause of action arose as well as at the time of the institution of the proceedings in this matter section 39 of the Public Service Act No. 103 of 1994 which contained provisions similar to section 67 (2) of the Republic of Transkei Constitution Act 15 of 1976 was in force.[1] That means that either way the plaintiff was obliged not only to institute proceedings against the defendants before the expiry of a period of twelve months but also to first issue notices of intended legal proceedings to the defendants.

10. Relying on the said provisions Mr. Gagela submitted that the plaintiff failed to issue the required notice to the defendants. He argued further that no application has been made for the condonation for the late institution of proceedings as well as the failure to notify the defendants as required by the Act. This is a fact that Mr Sotshongaye, counsel for the plaintiff was constrained to concede but nevertheless argued for the dismissal of the special plea as the granting thereof would result in non-suiting the plaintiff. In my view there is substance in Mr. Gagela's argument.

11. I turn now to the issue of non- suiting the plaintiff. Whilst it is trite that parties have a right to have justiciable disputes settled in a court of law, it is equally trite that such right comes with an obligation that legislative prescripts as well as rules of procedure must be complied with. Failure to do so could after consideration of the relevant factors result in an application for condonation being refused. Our courts have on numerous occasions pronounced on the fact that rules are not merely for the convenience of the parties and the court, but are designed to enhance the efficacy of the courts and the overall administration of justice. Compliance with the rules is therefore not a matter of choice but imperative. See: **Star Marine Yacht Services v Nortier** 1993 (1) SA 120 (SE) at 121D–E. Coetzee J, in **Reitmann v Jansen van Rensburg** 1984 (2) SA 174 (W) at 179H, said:

"Rules are made to be followed and Rules are there so that rights and duties

1 It came into operation in June 1994 and was only repealed by the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002 which contains similar provisions. That Act came into operation on 28 November 2002.

flow, in the event of non-compliance legal results flow."

12. Statutory requirements of notice as well as the time within which proceedings against organs of the state must be instituted have long been familiar features of South Africa's legal landscape. In **Mohlomi v Minister of Defence** 1996 (12) BCLR 1559 (CC) the following is stated,

"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests 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 ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken".

13. In this matter there is neither an application for condonation for the inordinate delay nor have the reasons thereof been explained to enable this court to exercise its discretion. In the absence of any information it cannot be said that good cause exists for the inordinate delay as well as the failure by the plaintiff to serve the statutory notice. It cannot be assumed that the defendants will not be unreasonably prejudiced by such failure.The plaintiff flouted the legislative prescripts as well as the rules of court at its peril. I am in the circumstances unable to condone the plaintiff's failure to institute action within the prescribed period.

14. Turn now to the issue of costs. An order for cost is a discretion by the court, which discretion must be exercised judicially, having regard to what is fair to both parties. The general rule is that a successful party should be entitled to costs unless there are circumstances which should disentitle such a party to an order for costs. I can see no reason why I should deviate from the norm. Costs must follow the results.

15. In the result the following order is made:

The special plea is granted. The plaintiff is to pay costs.

GNZ MJALI

JUDGE OF THE HIGH COURT, MTHATHA.

On behalf of the Plaintiff	Adv. Sotshongaye
Instructed by	Sangoni Incorpoted
On behalf of the Respondents	Adv. Gagela
Instructed by	A. N. Msindwana & Company