

Reportable: Yes / No
Circulate to Judges: Yes /
No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 788\2004

Date heard: 2006-10-16

Date handed in: 2006-10-20

In the matter of:

CATHARINA DAUTH

HELENA D H DAUTH

MACDOLENE OLYNE THIRD PLAINTIFF

PAMELA E NERO FOURTH PLAINTIFF

CHARLOTTE R OLYNE FIFTH PLAINTIFF

FIRST PLAINTIFF

SECOND PLAINTIFF

versus

THE MINISTER OF SAFETY

AND SECURITY

COLLIN LOCK

CHRISTOB FORTUNE

FIRST DEFENDANT

SECOND DEFENDANT

THIRD DEFENDANT

Coram: **MAJIEDT J**

REASONS FOR ORDER

MAJIEDT J:

1. At the commencement of this trial, Mr Van Niekerk who appears for

the plaintiffs herein, moved an amendment to the plaintiffs' particulars of claim. Notice of the proposed amendment was filed with the Registrar of this Court on 13 October 2006 (i.e. on the last court day preceding the date on which the trial was supposed to start) and it was delivered to the first and second defendants' Kimberley attorneys on 12 October 2006. The first and second defendants (to whom I shall hereinafter refer to as "*the defendants*") oppose the said application for amendment.

2. No substantive application on notice of motion supported by affidavit/s had been filed. The application was simply moved from the Bar by Mr Van Niekerk. Mr Potgieter, who appeared with Ms Henriques for the defendants, correctly pointed out during his address that this is a most unsatisfactory state of affairs, since the defendants have not been afforded a proper opportunity to consider the proposed amendments and to file opposing papers setting forth the basis of their objections.
3. After argument by counsel, it became apparent to all concerned that the unavoidable consequence of the application for amendment was that the matter had to be postponed indefinitely and it was so ordered. I also issued an order that costs regarding the application and the costs occasioned by the postponement stand over for later determination. I had reserved the reasons for the order which I now furnish.
4. One of the proposed amendments which the plaintiffs seek, concerns

an alternative averment to the effect that insofar as the Court may find that the plaintiffs had failed to comply with the provisions in sec 3, read with sec 4, of Act 40 of 2002 (*the Act*), that such failure be condoned by this Court. Mr Potgieter has submitted that, in the context of the provisions in the Act, such a proposed amendment is incompetent in law. Mr Van Niekerk, on the other hand, has adopted the position that a litigant can indeed seek such relief in his pleadings and at a subsequent trial. It is this particular dispute which requires adjudication herein, for the simple reason that it will guide the parties, more particularly the plaintiffs, in their further conduct of this matter.

5. The plaintiffs' claim is a delictual claim and concerns the alleged negligence of the second defendant (a member of the SA Police Service), which negligence allegedly enabled the third defendant to come into unlawful possession of certain firearms belonging to the SAPS and allegedly caused the subsequent shooting of various members of the public (two of them fatally) by the third defendant with the very same firearms. The averment is made in par. 24 of the plaintiffs' particulars of claim as it presently stands, that the first and second plaintiffs have properly complied with the provisions of sec 3, read with sec 4 of the Act. This has been denied by the defendants in their plea and they have continued to place same in issue throughout and more particularly at the pre-trial conference held in terms of Rule 37.

6. The plaintiffs now seek to introduce through their proposed

amendments an alternative averment which reads as follows (I have translated it from Afrikaans):

“That paragraph 24 in the particulars of claim be amended by the insertion of the following:

‘, alternatively and insofar as the Court may find that the first and second plaintiffs had failed to comply with the aforementioned provisions, the first and second plaintiffs aver that:

24.1 the debt in respect of their claims had not been extinguished by prescription;

24.2 good cause exists for their non-compliance; and

24.3 the defendants have not been prejudiced at all by any non-compliance on the part of the plaintiffs;

and that the Court is empowered to condone such non-compliance.”

7. A similar amendment to introduce an averment in the alternative is sought in respect of paragraph 26 of the particulars of claim with regard to the third, fourth and fifth plaintiffs.

8. A corresponding amendment of the prayers is sought in terms whereof the Court is asked to grant condonation of the various plaintiffs’ con-compliance with the said provision.

9. Mr Potgieter has submitted that, as I have indicated above, it is not competent in law to move an amendment regarding the notice requirements as the plaintiffs seek to do, due to the provisions contained in sec 3 of the Act. He has submitted that a substantive application on notice of motion supported by an affidavit/s should be

brought for condonation. Mr Van Niekerk, on the other hand, has submitted that such an application can indeed be made through a litigant's particulars of claim, supported by oral evidence during the trial.

10. The relevant parts of sec 3 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 the requirements set out in subsection (2).
- (2)
- (3)
 - (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.”

11.I have been referred to and could find only one case in which reference has been made to these provisions of the Act namely **Air-conditioning Design v Minister of Public Works, Gauteng 2005(4) SA 103 (T)** at 108 I – 109 A. A mere reference is made to the provisions of sec 3(4), quoted above, and this particular case does therefore not assist in the present matter.

12.It seems to me that, strictly speaking and on a mere reading of the provisions contained in sec 3(4), a substantive application brought on notice of motion with supporting affidavit/s is generally required in such instances where a creditor seeks condonation of his/her/its failure to serve a proper notice in terms of sec 3(2)(a) of the Act. Such substantive application should usually be brought even before an action is instituted. In the present case, however, in the interests of justice I did not deem it proper to deny the plaintiffs their right to access to justice and to close the doors of the court to them based on a mere formalism and technicality. In this case, based on the pleadings as they presently stand, I am of the *prima facie* view that the plaintiffs have a triable case in law and on the facts pleaded, and it would therefore be utterly improper to close the doors of the court to them. Mr Van Niekerk has correctly pointed out that the Act had seen the light of day as a consequence of the decision of the Constitutional Court in **Moise v Greater Germiston TLC: Minister of Justice intervening 2001(4) SA 491 (CC)** where sec 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 94 of

1970 was declared unconstitutional. The *ratio decidendi* of the Court was that the limitation contained in sec 2(1)(a) of that Act unreasonably limited the rights of prospective litigants to approach a court for adjudication of their claims and therefore the right to access to justice.

13. In this context therefore, I agree with Mr Van Niekerk that the Act has as its objective the expansion of the rights of a litigant to approach Court, and not the limitation thereof.

14. In summary therefore, I am of the view that, generally speaking, an application as provided for in sec 3(4) of the Act, has to be brought on notice of motion supported by affidavit/s, preferably prior to an action to be instituted against an organ of State. In the present case, however, I take the view that the plaintiffs are entitled to bring such application at the trial, supported by oral and documentary evidence where applicable. I also take the view that, once the amendment is granted, the issue of compliance with the notice requirements and, if necessary, condonation, should be finalised first and foremost before the trial on the merits itself proceed.

**SA MAJIEDT
JUDGE**

ADV JG VAN NIEKERK SC

ON BEHALF OF THE PLAINTIFFS
INSTRUCTED BY ELLIOT MARIS WILMANS & HAY

ADV D POTGIETER SC AND ADV J HENRIQUES
ON BEHALF OF DEFENDANTS 1 AND 2
INSTRUCTED BY TOWELL AND GROENEWALDT