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**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: BISHO]**

Case No: 459/2022

In the matter between:

SINOXOLO MNTUPI

APPLICANT

AND

**MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, EASTERN CAPE PROVINCE**

RESPONDENT

JUDGEMENT

MTSHABE AJ

[1] The Applicant, Sinxolo Mntupi is an adult, unmarried female person who was born 13 July 1991 and currently resides at No. 4[...], Phase 3 Scenery Park, East London, Eastern Cape Province.

[2] On 3 August 2022, the Applicant issued summons against the Respondent, claiming an amount of R5 000 000-00 (five million rands), for alleged negligence of her treatment at Cecilia Makhiwane Hospital.

[3] On 22 August 2022, the Applicant delivered a Notice in Terms of Rule 41A in the State Attorney's office at East London.

[4] Rule 41A deals with mediation as a dispute resolution mechanism. Clause 2(a) reads as follows:

"In every new action or application proceeding, the Plaintiff or Applicant shall, together with summons or combined summons or notice of motion, serve on each Defendant or Respondent a notice indicating whether such Plaintiff or Applicant agrees to or opposes referral of the dispute to mediation." And 2(b) reads as follows: *"And the Defendant or Respondent shall, when delivering a notice intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of plea or answering affidavit, serve on each Plaintiff or Applicant or the Applicant's or Plaintiff's attorneys, a notice indicating whether such Defendant or Respondent agrees to or opposes referral of the dispute to mediation."*

[5] A month after the Respondent was served with summons, delivered a notice of appearance to defend on 7 September 2022. Note that the summons as I have indicated above were served 3rd August 2022.

[6] The notice of appearance to defend, dated 6 September 2022 and served upon the Applicant on 7 September 2022 emanates from the office of the State Attorney, East London, C/O Shared Legal Services, Office of the Premier, King Williams Town.

[7] I must also mention that on 10 August 2022 the combined summons Notice in Terms of rule 41A were served at the office of MEC for Health, Eastern Cape at Gqokumbana Building, Independence Avenue, Bhisho. However, the main documents (summons, particulars of claim and rule 41A notice were served on 22 August 2022 in the office of the State Attorney East London¹.

¹ See Returns of services that attached to document headed essential index

[8] On or about 20 October 2022, the Respondent delivered her **Special Plea and Plea Over**. The Special Plea is directed to the non-compliance with Section 2 of the State Liability Act 20 of 1957.

[9] Section (2) of the State Liability Act, provides as follows:

“The Plaintiff or Applicant, as the case maybe or his or her Legal Representative must, within 7 days after a summons or notice instituting proceedings and which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney.”

[10] In paragraph 2 of the Respondent’s Special Plea following is stated: *“The Plaintiff has not complied with Section 2 of the State Liability Act 20 of 1957 in that prior instituting (my underlings) these proceedings no copy of the summons was issued to the office of State Attorney operating within the area of jurisdiction of the court which the process was issued.* My reading of Section 2 of the State Liability Act, in particular sub section 2 is that it does not say **“prior”** to the instituting the proceedings. The subsection states that the Plaintiff or Applicant as the case may be, or his or her Legal representative must, within 7 days after a summons or notice instituting proceedings and which the executive authority of a department is cited as nominal Defendant or Respondent has been issued served a copy of that summons or notice on the office of the State Attorney. Further, unless I have a wrong Act of subsection 2 of the Sate Liability Act does not say within 5 days after service of the process serve a copy of that process_to the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued.

[11] Section 2(2) of the State Liability Act does not state that a copy of the process must be served on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued. The Act states that a copy of that summons or notice must be served on the State Attorney. The words *“operating within the area of jurisdiction of the court the process was issued”* have been left out subsection 2 of the State Liability Act.

[12] The Applicant having been served with the **Special Plea** of non-compliance with Section 2 of the Sate Liability Act, brought an application to this Court for an order on the following terms:

12.1 “Condoning the non-compliance with Section 2 of Act 20 of 1957.

12.2 Leave for Plaintiff to pursue the civil action in respect of her claim for medical negligence against the Respondent to finality.

12.3 Costs in the event of that application is opposed.”

[13] Let just mention that the Applicant brought an application with the heading **NOTICE OF MOTION which** is like *Form 2(a)* of the Uniform Rules of Court. When proceedings have already started and are pending in Court, as it is the position in this case, because summons have already been issued and plea has been delivered, the proper approach in my view is not to bring an application in terms of *Form 2(a)* with a **Notice of Motion**, rather to bring an application in terms of *Rule 6(11)* which reads as follows:

“6(11) Notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings maybe be brought on notice supported by such affidavits as the case may require and set down at the time assigned by the registrar or as directed by a Judge.”²

The use of **Notice of Motion** in application proceedings is covered in rule 6(1) read with rule 6(5). In fact, I can mention that Counsel for the Applicant capture this in her heads that the application is an interlocutory application.

[14] I now turn to the application before me. The return of service dated 10 August 2022, informs that the summons and notice in terms of rule 41A were served upon the Respondent (MEC for Department of Health) in Bhisho. The second return of service dated 23 August 2022, informs that the combined summons and particulars of claim together with the notice in terms of rule 41A were served on 22 August 2022

² Erasmus Superior Court Practice rule 6(11)

to the office of the State Attorney, No. 17 Fleet Street, Old Spoonet Building, East London. From 10 August 2022 to 22 August 2022, it is **8 (eight)** court days.

[15] The Special Plea of the Respondent/Defendant reads as follows:

“Non-compliance with Section 2 of the State Liability Act 20 of 1957.

1. In terms of Section 2 of the State of Liability Act, 1957 (20 of 1957) (the State Liability Act), the Plaintiff or his or her legal representative must-

1.1 After any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant has been issued, served a copy of that process on the head of the department concerned at the Head Office of the Department and

1.2 Within 5 days after service of the process has contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued.

1.3 The Plaintiff has not complied with Section 2 of the State Liability Act 20 of 1957 in that prior instituting these proceedings no copy of the summons was issued to the office of the Ste Attorney operating within the area of jurisdiction of the court which the process was issued.

1.4 The Plaintiff's claim is thus bad in law for non-compliance with State Liability Act 20 of 1957 and barred from proceeding against the Defendant.”

[16] The complaint by the Respondent/Defendant in the *Special Plea* is that no copy of the summons was served to the office of the State Attorney prior the instituting of the proceedings. My view is that the State Liability Act Section (2) does not say that the copy of the summons must be issued to the office of the State Attorney prior the institution of the proceedings.

[17] The summons was served in the office of the State Attorney, East London. In the *Special Plea* the Respondent/Defendant has not stated which Office State Attorney the summons ought to have been served at. I must also mention that the Defendant in her ***Notice of appearance to Defend*** writes her address as the State

Attorney, Defendant's Attorneys, Old Spoorinet Building, 17 Fleet Street, East London C/O Shared Legal Services, Office of the Premier, 32 Alexander Road, King Williams town.

[18] The issue for determination by this court is whether the Applicant should be condoned for non-compliance with Section 2 of the Act 20 of 1957. Section 2 of the State Liability Act as I have indicated above has two subsections. Subsection 1 informs that in any action or other proceedings instituted by virtue of provisions of Section 1 the executive authority of the Defendant concerned must be cited as nominal Defendant or Respondent. To this extent the *executive authority* in the Act is defined, in relation to a Provincial Department, to mean the Member of the Executive Council of the Province who is accountable to the Provincial Legislature for that Department. In this case, the Applicant has correctly cited the Member of the Executive Council responsible for Department of Health in the Eastern Cape Province. Accordingly, I am of the view that the Applicant has complied with subsection 2(1) of the State Liability Act.

[19] Section 2(2) provides for a Plaintiff or Applicant or his or her legal representatives must **within 7 days** after a summons or notice instituting proceedings and in which the executive authority of a Department is sited as nominal Defendant or Respondent has been issued, serve a copy of that summons on notice on the State Attorney. As I have indicated above, is view that the summons was served at the office of the State Attorney.

[20] The Respondent in the *Special Plea* refers to **5 days**. It is not clear to where did the Respondent get *5 days* for the service of the summons. As I have indicated above, the State Liability Act provides that the summons must be served within **7 days** and in this case the summons was served on the 8th day. That being the case, the Applicant would have been in out of service by **1 day**.

[21] I picked from the Counsel for the Respondent that the non-compliance by the Applicant is that the summons and particulars of claim were not served upon the Office of the State Attorney. It is not the Respondent's case that the non-compliance by the Applicant relates to 7 days of service of summons within 7 days and that they

were served after those 7 days. Respondent's case is clear, that is, summons was not served.

[22] As I have indicated above, I am of the view that the summons when they were served at the office of the State Attorney, East London to me that is the office of the State Attorney for the Respondent.

[23] In any event, even if I am wrong in my view that the summons and particulars of claim were served upon the office of the State Attorney, East London, there is no prejudice that has been suffered by the Respondent for the services of the summons in the office of the State Attorney, East London.³ In the case **Molokwane** supra, the court stated the following with regards to Section 22(2) of the State Liability Act:

“With these imperative iterations in mind, I turn to s 2(2) of the State Liability Act. Its purpose, especially the requirement that a summons must be served on the State Attorney within 7 days after it was issued, is clearly to ensure that the relevant executive authority (the Minister in this case) is afforded effectively legal representation in the matter by the State Attorney. If the State Attorney provides such legal representation, in any manner whatsoever, despite it not having been served by sheriff within seven days of the process commencing such proceedings, this purpose would have been served. That would also be the position where, as in the present case, there was no service on the State Attorney at all. In other words, it is not so much about how the State Attorney obtained the knowledge the process commencing proceedings, as the representation of the party in the legal proceedings itself.”

In this case the State Attorney even if the service was not effected at the office of the Shared Legal Services in King Williams Town, State Attorney filed a notice of appearance to defend after a month it was served with the summons in the office of the State Attorney, East London. The purpose of the Act in my view was achieved because the Respondent (MEC, for Health) was represented by the office of the State Attorney.

³ Minister of Police and others v Samuel Molokwane [2022] ZASCA 11 (15 July 2022)

[24] I must mention that the State Liability Act does not provide for condonation on non-compliance with Section 2(2) of the State Liability Act. When a special plea of non-compliance has been raised, it is my view that special should dealt with as one would deal with a Special Plea of prescription. If I condoned non-compliance with Section 2(2) of the State Liability Act by the Applicant, I am left with one question in mind that is does that dismiss the special plea or upheld it. The answer is nowhere to be found in both propositions because before me I am not called upon to determine the issue of the Special Plea. If I was called to decide it, I would have come to a different conclusion. As I have indicated above there is no prejudice that has been suffered by the respondent for non-compliance with section 2 of the Act. The critical point is that the MEC for Health is represented by the State Attorney in the action, by entering appearance to defend the action, by filing a plea. To me the purpose of the section has been achieved. The argument by the Respondent that the applicant should be barred from proceeding against the defendant/respondent is simply untenable.

[25] I must mention that there is no provision in the **State Liability Act** to the effect that if section 2(2) is not complied with, the legal proceedings must be dismissed. If there has been non-compliance, what the Court would or should be called upon to determine is whether there was substantial compliance in the sense that the purpose of section 2(2) has been achieved, and whether there is any prejudice to the defendant.

[26] My view is that the purpose of section 2(2) of the State Liability Act, especially the requirement that summons must be served on the State Attorney within seven days after it was issued, is clearly to ensure that the relevant “executive authority” (MEC for Health in this case) is afforded effective legal representation in the matter by the State Attorney. If the State Attorney provides such legal representation, in any manner whatsoever despite it not having been served by the sheriff within seven days of the process commencing such proceedings, this purpose would have been served. My view is that in this case that purpose has been achieved in this case.

[27] Lastly, both counsel in their heads of arguments correctly referred me to a case of *Madinda v Minister of Safety and security*⁴. They were correct to refer me to that case, however the case *Madinda* deals with non-compliance with Section 3 requirements of Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002. The reason for condonation in terms of Act 40 of 2002 is that the Act provides in Section 3(4) that if organ of State relies in a creditor's failure to a serve the notice in terms of sub-section 2(a), the creditor may apply to a court having jurisdiction for condonation of such a failure. Then section 3(4)(b) circumscribes a court's power to grant condonation by requiring that it be satisfied that:

1. The debt has not been extinguished by prescriptions.
2. Good cause exists for the failure by the creditor, ie to serve the statutory notice according to Section 3(2)(a) or to serve a notice that complies with the prescriptions of Section 3(2)(b); and
3. The organ of state unreasonable prejudice by the failure.
4. Accordingly, my view is that the case of *Madinda* is not applicable to non-compliance of Section 2(2) of the State Liability Act.

[28] Further, during the argument Counsel for the Respondent gave me the case of *Siphokazi Nombewu obo Indiphile Nombewu v MEC for Department of Health*⁵ which I am of the view that it is distinguishable from the one before me. That case also deals with non-compliance with Section 3(2) of Act 40 of 2002. It doesn't not deal with non-compliance with Section 2(2) of State Liability Act that case is correctly decided on the cause of action based on non-compliance with Act 40 of 2002.

[29] Having considered the submissions made by the Counsel and read the papers, I cannot find that the applicant has not complied with the State Liability Act more so that there is no prejudice to be suffered by the respondent, even if there was non-compliance.

[30] Accordingly, I make the following order:

⁴ 2008 (4) SA 312 SCA

⁵ No. 170/2021 Eastern Cape Division, Bisho judgment delivered on 30 September 2024.

1. The applicant is condoned for the non-compliance with section 2 of the State Liability Act, No. 20 of 1957.
2. The applicant is granted leave to pursue the civil action in respect of her claim for medical negligence against the respondent to finality.
3. Each party will pay its own costs.

N.R. MTSHABE
ACTING JUDGE OF THE HIGH COURT

Counsel for Applicant : A. Teko
Instructed by : Magqabi Seth Zitha Attorneys
East London

Counsel for Respondent : S.Z. Mlalandle
Instructed by : State Attorney
East London

Date heard : 13 February 2025
Date delivered : 13 May 2025