



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT**

Case no. EL 2440/2023

TO BE CIRCULATED AMONGST JUDGES

In the matter between:

A[...] D[...] obo

O[...] M[...] AND TWO OTHERS

Applicant

and

BUFFALO CITY METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

STRETCH J.:

[1] The applicant has instituted action on behalf of her three children against the respondent for payment of R10 000 893 in damages arising from the death of her husband by electrocution.¹ The respondent, in defending the claim, has delivered a special plea that the applicant has failed to comply with the provisions of s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Legal Proceedings Act).

[2] Section 3 of the Legal Proceedings Act reads as follows:

‘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 to in writing to the institution of that [sic] legal proceedings –

- (i) without such notice; or
- (ii) upon receipt of a notice which does not comply with the requirements set out in subsection (2).

(2) A notice must –

¹ The amount of R10 000 893 is taken from the applicant’s prayer to her amended particulars of claim. It is not supported by the quantum of the claims reflected in the particulars with respect to general damages, medical and related expenses and loss of support and/or earnings. The quantum of what is being claimed and in respect of whom, is not clear at all. The claim vacillates between what appears to be a claim for the plaintiff and three children, a claim for three children only and a claim for four children. During argument I was informed that the plaintiff is not persisting with a claim in her personal capacity but only on behalf of her three children. This is also evident ex facie her founding affidavit. Insofar as it may be necessary to say so, I am further satisfied that the respondent’s attorneys have been duly mandated in terms of rule 7 of the Uniform Rules of Court.

- (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.

[3] The applicant's case is that on or about 11 May 2019 her husband was electrocuted while walking at KwaNobhetele Squatter Camp, Scenery Park, East London. As a consequence thereof, he sustained severe bodily injuries resulting in his death at Frere Hospital, East London.

[4] The matter was reported to the police and the applicant's affidavit as a complainant was filed in the police inquest docket that same day. According to the police docket, the applicant's spouse was electrocuted by illegal electricity connections. The applicant avers that during November 2023 (more than four years after her husband had passed away), she happened to hear for the first time that victims of electrocution incidents were claiming damages in court. On 4 December 2023 she consulted with her attorneys. On 8 December 2023 a notice in terms of s 3 of the Legal Proceedings Act was delivered to the respondent, and summons was served on the respondent on 18 December 2023.

[5] The present application appears to be in response to the respondent's special plea. Therein, the applicant denies that she failed to comply with section 3 of the Act, and seeks a declaratory order that she did, pleading that she did not know the identity of the debtor and the facts giving rise to her claim before she consulted with her attorneys on 4 December 2023. Having delivered her notice within a week thereafter, it is the applicant's case that she delivered the notice well within the six-month period provided for in s 3.

[6] In the alternative, so it would seem, the applicant pleads that in the event of this court finding against her on this point, she should in any event be granted condonation.

[7] The Legal Proceedings Act does not provide for declaratory relief. The Act makes it clear that if the organ of state relies on the applicant's failure to serve notice within the requisite six-month period (or at all for that matter) the applicant may apply for this court to condone such failure. In this Division particularly, if a special plea of this nature is raised, and a replication has been delivered to the effect that the applicant has complied with the act, or no replication has been filed, the usual case flow management order would be for the action pertaining to the special plea to be disposed of separately in advance. The advantage of this course of action is not difficult to determine. It is trite that a special plea is a self-standing pleading to be dealt with in action proceedings, where averments may be properly interrogated by way of the presentation and the testing of viva voce evidence, and the issue is decided on a balance of probabilities.

[8] The declaratory relief which the applicant seeks as her main relief in her notice of motion, is provided for in s 21(1)(c) of the Superior Courts Act 10 of 2013, which states that a Division of the High Court has the power, in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation that person may have. On the other hand, the application proceedings provided for in s 3(4)(a) of the Legal Proceedings Act envisage a situation where the applicant admits non-compliance with the six-month notice period, but seeks to make out a case for the condonation thereof, upon satisfaction of all of the three grounds set forth in section 3(4)(b) of the Legal Proceedings Act.

[9] To this extent I am inclined to agree with the respondent's contention that the distinction is important when consideration is given to the standard of proof. In condonation applications brought in terms of the Legal Proceedings Act by way of the alternative relief which the applicant seeks, a court does not decide

matters on a balance of probabilities, but on an overall impression of whether the applicant has satisfied the three requirements referred to in section 3(4)(b) of the Act. On the other hand, the declaratory relief which the applicant seeks in the main, must be decided on the usual standard of a balance of probabilities, invariably only where issues have been properly ventilated in a trial setting.²

[10] I say this because it is trite that a declaratory order should not be sought in motion proceedings if there is a real and genuine bona fide dispute of fact, incapable of resolution on the papers, and a party foreseeing a dispute of fact should not attempt to resolve the dispute by way of motion proceedings. A declaratory order has the effect of settling the dispute between the parties once and for all. If it is sought in motion proceedings, the respondent does not have the opportunity of testing the applicant's averments by way of prudent cross-examination.

[11] In the matter before me the question of declaratory relief arises from a dispute raised in the respective pleadings. Differently put, a triable issue has been raised by way of the respondent's special plea in the action. The reason it is described as a triable issue is because the applicant has denied the respondent's averment that she gave her notice of intended legal proceedings out of time. It requires to be dealt with by way of a separate trial, the reason being that if the respondent succeeds, the main *lis* between the parties is disposed of once and for all.³

² See *Madinda v Minister of Safety and Security* 2008 (4) SA 322 (SCA) par 8; *Fakie NO v CC11 Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) par 42.

³ A special plea raises a special defence that does not necessarily flow from an allegation in the claim and destroys or postpones the operation of the cause of action. Differently put, it embodies a substantive, self-contained defence outside of the allegations which form the backbone of the plaintiff's cause of action. See *Brown v Vlok* 1925 AD 56.

[12] It is so that the applicant has chosen to keep her options open, seeking a declarator as her main relief, failing which she seeks condonation. The problem as I see it, is that the applicant has pleaded as a fact, in her particulars of claim that she has complied with the provisions of s 3 of the Legal Proceedings Act. This she has repeated in her replication in the action proceedings, introducing for the first time in the action proceedings, a prayer for alternative relief in the form of condonation. Significantly, this pleading which forms part of her replication in the action proceedings reads thus:

- ‘7. In the circumstances, it is denied that, for the reasons pleaded by the Defendant, Plaintiff’s claim for damages became due on 11 May 2019 and/or six months thereafter as implied herein. The Defendant is put to the proof thereof.
8. **Alternatively**, to the extent *that the court finds* (my emphasis) that the Plaintiff’s notice in terms of section 3 of Act 40 of 2002 was served out of time, which is denied, a condonation application will be brought in terms of section 3(4) of Act 40 of 2002.’

[13] The plaintiff’s replication is clear. It envisages (quite properly) that the special plea will be set down as a separate trial, where the disputed fact of compliance will be ventilated and decided upon. In the event of this court finding that the applicant’s notice (on the facts) was indeed out of time, the applicant then reserves her right to seek the court’s condonation of this failure.

[14] However, instead of referring the matter for case management when it was ripe for hearing and ready for the special plea to be allocated a date on the trial roll, the plaintiff has effectively determined that the defendant’s special plea (where the defendant is *dominus litis*) must be adjudicated by way of application. This is impermissible. It is clear that the applicant replicated because she wanted to raise fresh facts in answer to the defendant’s plea of non-

compliance with s 3 of the Legal Proceedings Act, otherwise it would not have been necessary for her to replicate if only to deny the allegations in the plea.⁴ For her now to plead in the alternative by way of application is tantamount to her *mero motu*:

- (a) converting a portion of the action into an application thereby litigating on a different front altogether;
- (b) prevailing upon this court to decide action proceedings solely on affidavit;
- (c) depriving the respondent of the right to test the applicant's version by way of cross-examination, particularly on the fact that she deposed to a statement soon after the morbid incident, and that she has not explained the entire period of delay before she sought the advice of an attorney.⁵

[15] The applicant is *dominus litis* with respect to the main claim. She has chosen her battlefield and has selected to enter the fray by way of action. She cannot do battle at two fronts with two different weapons. Her claim for declaratory relief by way of application proceedings must accordingly fail.

[16] What remains then is whether it would be in the interests of justice for this court, as the upper guardian of minors, to close its doors on the applicant's children because she has elected to approach this court by way of application in addressing an issue raised in action proceedings, and for this court to dispose of the entire application by also addressing and making a ruling on the alternative relief for condonation.

⁴ See *Milne NO v Shield Insurance Insurance Co Ltd* 1969 (3) SA 352 (A)

⁵ See *Minister of Justice and Correctional Services and Another v Nene* [2024] 9 BLLR 926 (LAC)

[17] The issue of declaratory relief, in my view, could not have been decided on the papers in any event. This much has correctly been contended on the respondent's behalf in seeking to have the first leg of the application dismissed.

[18] To my mind, this matter is on all fours with the SCA case of *Member of the Executive Council for Health: Eastern Cape Province v Mbodla*.⁶ Mr Mbodla, who was injured in a car accident on 25 June 2006 instituted an action against the MEC for Health for negligent treatment at the Nelson Mandela Hospital. The MEC raised two special pleas. The first was that Mr Mbodla did not comply with the notice requirement in s 3 of the Legal Proceedings Act. The second was that his claim had prescribed in terms of sections 10, 11 and 12 of the Prescription Act 68 of 1969. This prompted Mr Mbodla to bring an application for condonation for failure to comply with the provisions of s 3 of the Legal Proceedings Act. In turn, the MEC delivered a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court, averring that his claim had prescribed and accordingly condonation could not be granted.⁷ The notice averred that Mr Mbodla's grounds for disputing that his claim had prescribed were bad in law and that he knew of the identity of the MEC as his debtor and the facts giving rise to his claim when he received treatment in hospital as early as 25 June 2006.

[19] Before the matter came to court Mr Mbodla delivered an amended notice of motion in which, instead of applying for condonation, he sought a declaratory order that he had timeously complied with the Legal Proceedings Act, contending that he only acquired knowledge of the identity of his debtor and the

⁶ Neutral citation: *MEC for Health: Eastern Cape v Mbodla* (449/2013) [2014] ZASCA 60 (6 May 2014). Even the period of delay in instituting action in that matter is similar to that in the matter before me.

⁷ Section 3(4)(b)(i) of the Legal Proceedings Act.

facts giving rise to the debt in April 2011, and that the notice which he gave on 2 June 2011 was accordingly not out of time. The Eastern Cape High Court (Griffiths J) granted a declaratory order to this effect. The MEC appealed the order.

[20] As in the matter before me, Mr Mbodla's contention in his affidavit was that he was a lay person and not conversant with the law, in particular the law relating to vicarious liability for the wrongful conduct of employees, and that he only learned that he had a claim after consulting his attorney in April 2011. As in the matter before me, under the heading of prejudice he mentioned that 'the incident was fully investigated in terms of a detailed departmental enquiry shortly after it transpired'. No further information was given about this enquiry. It was not known why it was undertaken or what the outcome thereof was.

[21] On appeal Wallis JA⁸ held that the issue of compliance with the Legal Proceedings Act and the question of prescription could not have been properly determined on affidavit in the court below. The appeal court held that it was inappropriate for the court below to have reached a final conclusion on the issue of prescription and compliance with the statute on the papers alone. The MEC's appeal was accordingly upheld. The order of the lower court was set aside and substituted with an order referring the application for the hearing of oral evidence.

[22] Taking into account the circumstances of this case and the fact that the main claim is pursued with regard to the best welfare interests of minor children, I am of the view that a similar order would be both just and expeditious.

⁸ with Mthiyane DP, Maya JA, and Van Zyl and Mathopo AJJA concurring

[23] Rule 6(5)(g) of the Uniform Rules of this court provides for this type of situation. It reads as follows:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

[24] If this action had been placed before me for case flow management *sans* any attempt from the applicant to divert action proceedings into motion proceedings, I would simply have certified the matter trial ready on the issue of the special plea only. There seems to me to be no reason why such a simple order cannot be made, with the applicant to pay the wasted costs of this premature and inappropriate application. I say premature and inappropriate, because the applicant has specifically denied, in her replication to the respondent’s special plea pertaining to notice, that her notice was given out of time, and states that she puts the respondent ‘to the proof thereof’. Immediately thereafter she pleads in the alternative, that should it be found that her notice was served out of time, she will seek condonation in terms of s 3(4) of the Legal Proceedings Act. These are matters which would ordinarily have been traversed, if so pleaded, in separate action proceedings pertaining to the special plea. That is the forum where they belong. It goes without saying that the applicant, having jumped the gun and having attempted to effect an impermissible diversion, is liable to pay the respondent’s costs for opposing this unnecessary application.

ORDER:

1. The application is referred to the trial court for inter alia, viva voce evidence to be presented with respect to the respondent's special plea and the plaintiff's replication thereto in the applicant's action under case number EL2440/2023.
2. To this end, the matter is certified trial ready and a trial date may be applied for for the separate adjudication of the special plea.
3. The applicant is ordered to pay the costs of this application, including the costs of counsel on scale B.⁹

I.T STRETCH
Judge of the High Court

Counsel for the applicant: V. Madokwe
Instructed by N. Tyatyeka Attorneys and Consultants
KuGompo
Tel. 043 740 0223
Cell. 082 719 8794 / 066 504 4783
Email info@ntsikeleloattorneys.co.za

Counsel for the respondent: C.D. Kotze
Instructed by Webber Wentzel
Care of Smith Tabata Attorneys
KuGompo
Ref. Ms K. Swartz-Beets/ag/rj
Email kara-lees@smithtabata.co.za
amandag@smithtabata.co.za

Handed down by way of electronic mail to the instructing attorneys on 20 May 2026

⁹ In dealing with the forward conduct of this matter, the applicant is reminded that her first-born child is no longer a minor.

