

SOUTH AFRICA / JUDGMENT

Citi v Minister of Higher Education and Training (34790/2017) [2018] ZAGPPHC 680 (21 September 2018) [2018] ZAGPPHC 680

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Mosopa

CASE / FILE NUMBER

34790/2017

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
Case
no: 34790/2017
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED
In

the matter between:

BAFANA
FREDDIE
CITI
APPLICANT
and
THE
:MINISTER OF HIGHER EDUCATION &
TRAINING
RESPONDENT

JUDGMENT**MOSOPAAJ:**

- [1] This is an application for relief in terms of section 3(4) for failure to comply with provisions of sections 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 (The "Act"). The Applicant in the alternative seeks an order declaring that the Plaintiffs case has not prescribed.

BACK GROUND

- [2] The Applicant on a date and month not mentioned in the year 4003 completed an N6 in Engineering studies plus Trade and as a result thereof was eligible to be conferred a National N Diploma in Engineering.
- [3] On the 23 May 2013, Applicant applied for the conferment of such a diploma through Ekurhuleni East College FET (The "College"), The Applicant on a date not specified on the Applicant founding affidavit was informed to approach the office of the Respondent as it is the one which issues Diploma Certificates .
- [4] It appears the Applicant's endeavours to obtain the Diploma were frustrated by the Applicant as he alleges that he attempted to convince the Respondent to award him the degree with no success, by embarking on personal visits to the office of the Respondent, making telephone calls and also writing letters to the Respondent's office. He also engaged the office of the public Protection with no success.
- [5] Applicant under case number 35238/2016 legally unrepresented approach the Johannesburg High Court for relief to compel the Respondent to issue him with the Diploma. It is not clear what is the outcome of that matter but what the Applicant alleges is that in the same application he sought order to compel the Respondent to compensate him for the loss of economic opportunities and emotional suffering but he was advised to seek a legal representative as Court cannot make such an order.
- [6] The Applicant despite the Respondent not awarding him the Diploma managed to secure employment with M Direla Sechaba contractors and other projects as Operations Manager on the 1 November 2014. The appointment was subject to the condition that he must furnish the employer with his Diploma Certificate within 30 days, failing which he will forfeit his position as Operation Manager and his employment with company in general. His commencing salary was supposed to be R315, 558, 00 per month. The Applicant failed to submit the Diploma and his employment was terminated.

- [7] The Applicant consulted with his current attorneys on February 2017 and a letter in terms of section 3(1)(a) of the Act was dispatched to the Respondent dated the 3 April 2017 which was received on the 7 April 2017. Summons was consequently issued on the 22 May 2017 and served on the Respondent on the 24th May 2017. On 4 August 2017, Respondent served its plea wherein two special pleas were raised, namely, for non-compliance with the provisions of section 3 of the Act and secondly, that the Respondent claim has prescribed.
- [8] It is important to note that the Applicant was eventually awarded his Diploma Certificate which was received on the 3 November 2016, which certificate was received by the Applicant by way of courier. The date on the Diploma indicates the 1 September 2014 being the date on which the certificate was awarded to the Applicant,

LEGAL PRINCIPLE

- [9] Sections 3 and 4 of the Act provides;

"3(

- 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 in writing of his or her or its intention to institute the legal proceedings in question, or
 - (b) The organ of the state 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 requirement set out in subsection(2);
- (2) A notice must-
 - (a) within six months from the date on which the debt become due, be served on the organ of state in accordance with section 4(1); and
 - (b) briefly set out;
 - (i) the fact giving rise to the debt;
 - (ii) such particulars of such debt as are within the knowledge of the creditors.
- (3) For purpose of subsection (2)(a)"
 - (a) a debt may not be regarded as being due until the creditors has knowledge of the identity of an organ of state and of facts giving rise to the debt, but a creditor must be regarded as having acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge and;
 - (b) 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 relied on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to Court having jurisdiction for condonation of such failure;;
- (b) The Court may grant an application referred to in paragraph
 - (a) if it is certified that
 - (i) The debt has not been extinguished by prescription;
 - (ii) Good cause exist for failure by the creditor; an
 - (iii) The organ of state was not unreasonably prejudiced by the failure".

[10] Section 1 of the Act defines what an organ of state is and section 1(a) of the Act refers to any national or provincial department. It is no doubt that the Respondent falls squarely within the definition of an organ of state. As a consequence for the Applicant to have proceeded with the enforcement of a debt against the Respondent he was obliged to have first invoked the provisions of section 3(1)(a) within a period of six months from the date the debt became due. It is apparent from the papers that Applicant failed to comply with such provisions hence this application is brought in terms section 4(a).

[11] In *Madinda v Minister of Safety and Security, South Africa* [2008] ZASCA 34; 2008 (4) SA 312 SCA at para 6 Hefer J A stated; " Section 3(4)(b) circumscribes a Court's power to grant condonation by requiring that it be satisfied that:-

- (ii) Good cause exists for the failure by the creditors i.e. to serve the statutory notice according to section(3)(b); and
- (iii) The organ of state was not unreasonably prejudiced by the failure.

Par 8: "The phrase" if (the Court) is satisfied "in section 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability, rather is the overall impression made on a Court which brings a fair mind of the fact& set up by the parties see e.g. *Die Afrikaanse Pers Beperk v Mese* 1948

(2) SA 295(C) at 297. I s e no reason to place a sticker construction on it on the present context".

Par 9: "The first requirement speaks for itself: the Court must be sati:]fie d that the Applicant relies on an exact cause of action. That is so in the present instance has never been disputed (see also *Minister of Agriculture and Land Affairs v J Rance (Pty) Ltd* 2010 (4) SA 109 (SCA)".

ISSUES

FOR DETERMINATION

[12] The following are the issues for me to determine;

12.1, whether the Applicant's claim has prescribed;

12.2. good cause exists for failure by the creditor to serve statutory notice according to section 3, and

12.3. whether the organ of state was deliberately prejudiced by such failure.

PRESCRIPTION OF APPLICANT'S CLAIM

[13] The Respondent in its plea raised a special plea that the Applicant's claim has prescribed for the following reasons;

13.1. That the Applicant's claim arose on the 25 May 2013 when the applied for a certificate in a letter attached to the Applicant's particulars of claim as "BFC".

13.2. The Applicant's claim was instituted on 22 May 2017, a period of four years after the alleged cause of action arose and as such Applicant's claim has prescribed.

[14] Section 3(2) (a) requires a creditor (Applicant) to give a notice within six months from the date on which the debt became due to be served on the organ of state. Section 2(l)(a) and (b) of the Act also deserves mention and provides as follows;

"(2) Subject to section (3) and (4), a. debt which became due-

(a) Before the fixed date, which has been extinguished by prescription and in respect of which legal proceedings were not instituted before that date, or;

(b) after the fixed date,

will be extinguished by prescription as contemplated in chapter III of the Prescription Act, 1969 (Act 68 of 1969) read with provisions of that Act relating thereto.

[15] Section 11 (chapter III) of the Prescription Act 68 of 1969 provides;

,

(11) The periods of prescription of debts shall be the following;

(a) Thirty years in respect of-

(i) Any debt secured by mortgage bond,

(ii) Any judgement debt,

(iii) Any debt in respect of any taxation or levied by or under any law,

(iv) Any debt owed to the state in respect of any share of the profits, royalties or my similar consideration payable in respect of the right to mine minerals or other substances;

- (b) Fifteen years of any debt owed to the state and arising out of an advance or loan of money or a sale or lease of land by the state to the debtor, unless a longer period applies in respect of the debt in questions in terms of paragraph (a);
- (c) Six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a national contract, unless a longer period applies in respect of the debt in question in terms of paragraph
- (a) or (b),
- (d) Save where an Act of Parliament provides otherwise, three years in respect of any other debt:

[16] The relevant provision of the Prescription Act will be section 11(d) for the purpose of the determination of prescription in this matter which provides for a debt to be extinguished by prescription after a lapse of three years. Mr Nkosi contended that the prescription started to run on the 1 November 2014 on the date the Applicant

secured employment with M Direla Sechaba Construction and Other Projects. Consequently when the letter of demand in terms of section

3 of the Act was dispatched to the Respondent the matter had not yet prescribed. The matter was going to prescribe a day before 1 November

2016. Mr Nonyana on behalf of the Respondent contended that on the 23 May 2013 Applicant was aware of his economic opportunity, As a result that is the day on which the debt became due.

[17] The date on which the Applicant alleges that the action arose i.e. 1 November 2014 was the day on which the Applicant assumed his new employment. The Applicant completed his Diploma in 2013 and since that time he has been battling with the Respondent to confer him with his Diploma Certificate. I am of the considered view that since that day he knew that the Respondent is denying him an economic opportunity because the diploma was the correct tool to afford him an economic opportunity. I am of this view because the college advised him that the Respondent is the only institution that can award him with his Diploma. At that stage he knew the identity of the organ of state which he was supposed to deal with. This assertion can be safely supported by the fact that the Applicant even launched an application against the Respondent in the High Court under case number 35238/2016 wherein he amongst others sought compensation for loss of economic opportunities against the Respondent.

[18] I therefore find that the cause of action in this matter arose on the 23rd May 2013 and at the time when the Applicant issued summons the matter has already prescribed.

GOOD CAUSE SHOWN

- [19] It is trite that for the Applicant to be successful in this kind of application must meet all the requirements as provided for in section 4(b) of the Act. (See *Madinda v Minister of safety and security*).
- [21] The Applicant on his version was advised by Court, when he was unrepresented at the stage he launched an application to the Johannesburg High Court to get himself a legal representative, It is not clear from the Applicants founding affidavit when this application was heard. But what is recorded is that the Court did not order Respondent to compensate the Applicant for loss of economic opportunity. For the entire year in 2016, the Applicant after receiving advice from Court did nothing to pursue such advice. With no explanation of what happened from the date he was so advised until the February 2017, he avers that he only consulted with his attorneys in February 2017. No date is indicated in February when he consulted with his attorney. His attorneys with no explanation again only dispatch the letter to the Respondent on the 3rd April 2017.
- [22] This matter came from May 2013 when Applicant dispatched a letter to the college requesting his Diploma certificate. The Applicant mentions that he made telephones calls to the office of the Respondent and also paid visits to that office without specifying dates when such visits arid telephone calls were made. I am therefore of the considered view that the Applicant failed to show good cause of his delay. Moreover after securing employment on the 1 November 2014 the Applicant failed to indicate in his papers what steps he took to ensure that the Respondent award him his Diploma Certificate.

PREJUDICE

- [23] The Applicant's dispute with the Applicant started in May 2013. Almost a period of five years has since elapsed. There is a possibility that the witnesses which the Respondent intends to call in defence of the Applicant's action had passed away, for one reason or the other had left the employment of the Respondent. It will therefore be difficult for the Respondent to secure such witnesses for the purpose of attendance of trail. It is therefore my considered view that if the application is allowed the Respondent will suffer prejudice.

GENERAL

- [24] The Applicant after receipt of the Respondent's answering affidavit did not file any replying affidavit. Mr Nkosi in his heads of argument raises a point relating to the defect in the Respondent's affidavit. Mr Nkosi contended that such affidavit does not comply with the Regulations promulgated in terms of the Justice of the Peace and Commissioner of Oath Act 16 of 1963 in that the affidavit shows that the deponent deposed to the affidavit in Johannesburg and the address provided by the Commissioner of Oath reflects Pretoria. In essence Mr Nkosi contends that the Respondent's answering affidavit was not deposed in the presence of the Commissioner of Oath.

- [25] The Regulations requires the affidavit to be deposed in the presence of the Commissioner of Oaths. The provisions of the Regulations are peremptory. I fully agree with the submission made by Mr Nkosi 1pven though the Respondent were not afforded a proper opportunity to deal with such issue as no replying affidavit was filed by the Applicant.
- [26] Even if I can rule. that the replying Affidavit of the Respondent 1s defective and deal with the matter as contained in the Applicant's founding affidavit there is no way I can find in favour of the Applicant.
- [27] As already stated the Applicant's claim has prescribed, Applicant failed to show good cause and if the application is allowed the Respondent will suffer a great deal of prejudice.

ORDER

[28] Having regard to the above, I make the following order;-

- (1) The application is dismissed;
- (2) Applicant is ordered to pay Respondent's costs

M J MOSOPA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant Mr H. J. Nkosi

INSTRUCTED BY H J Nkosi INC Attorneys

FOR RESPONDENT : Adv P. Nonyana

INSTRUCTED BY : The State Attomey

Pretoria

Date of hearing 14/08/2018

Date of Judgement: 21/09/2018

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