

SOUTH AFRICA / JUDGMENT

Gauta and Others v Lesedi Local Authority and Others (27292/11)

[2013] ZAGPPHC 20 (5 February 2013)

[2013] ZAGPPHC 20

COURT

North Gauteng High Court, Pretoria

BEFORE

N P Mngqibisa-Thusi

CASE / FILE NUMBER

27292/11

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NOT

REPORTABLE

IN

THE NORTH GAUTENG HIGH COURT

(REPUBLIC

OF SOUTH AFRICA)

Case

No.: 27292/11

DATE:05/02/2013

In

the matter between:

MOTAUNG

GAUTA

.....1st

Plaintiff

BAMBISA

HANDSOP STEPHEN

.....2nd

Plaintiff

KUBHEKA,

SOMBULUKU

JACOB.....3rd

Plaintiff

TSOTETSIMOHLOLO

JOHN.....4

th Plaintiff

KWAKE

NONGENILE.....5th

Plaintiff
 NKUTHA
 SANGO
 VICTOR.....
 6th Plaintiff
 MAKANA
 SAMUEL
 TJOMUZA.....7th
 Plaintiff
 MAHLATSI
 MOEKETSI
 JACOB.....8th
 Plaintiff
 and
 LESEDI
 LOCAL
 AUTHORITY.....1st
 Defendant
 WOZANI
 SECURITY (PTY) LTD
 t/a
 THE RED
 ANTS2nd
 Defendant
 MINISTER
 OF SAFETY AND
 SECURITY.....3
 rd Defendant

JUDGMENT

MNGQIBISA-THUSIJ:

[1] The plaintiffs are seeking the following relief:

1.1 that condonation be granted in terras of section 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (“the Act”), for the late service of its notice, dated 12 May 2011, on the South African Police Service (“the third defendant”);

1.2 that condonation be granted in terms of the provisions of section 3(4) of the Act for the service of the plaintiffs’ summons

prior to the expiry of a period of 30 days after service of the notice as required by section 5(2) of the Act;

1.3 that condonation be granted in terms of section 3(4) of the Act for the late service of the plaintiffs’ notices, dated 12 November 2009 and 27 September 2010, on the Lesedi Local Municipality (“the first defendant”);

1.4 a cost order against any opposition.

[2] The notices for which condonation is sought were issued in contemplation of an action for damages ("the main action")

instituted by the plaintiffs against the defendants as a result of alleged incidents which occurred in Ratanda township on 19 May 2008. The notices in question were issued on 12 November 2009 and 27 September 2010 on behalf of the second, third and fourth plaintiffs;

and on behalf of the first and fifth plaintiffs, respectively

and on the third defendant on 12 May 2011 in respect to all the plaintiffs.

[3] At the time summons were issued the first and third respondents had not responded to the notices. Further, when this application was launched, the first defendant had not entered appearance to defend the action.

[4] The first defendant entered its notice to defend the main action on 30 September 2011 and filed its plea on 4 November 2011. The third defendant filed its plea on 25 August 2011.

[5] In their pleas in the main action, the first and third defendants have raised the failure of the plaintiffs to issue notices

contemplated in section 3 of the Act within the prescribed time limit and the failure by some of the plaintiffs to issue the notices, as a defence. As a result of the objection raised by the first and third defendants to the main action, the plaintiffs launched these proceedings under section 3(4) of the Act.

[6] The first defendant is opposing the application for condonation. Third defendant did not file a notice to oppose. Consequently relief sought against the third respondent in these proceedings is granted.

[7] The issues to be determined relate only to the first defendant.

[8] Section 3(1) read with 3(2)(a) of the Act provides that a creditor who intends recovering a debt from an organ of state must give the organ of state written notice of its intention to institute proceedings against it within 6 months of the date on which the incident giving rise to the claim occurred. Further, the said notice must set out the circumstances giving rise to the claim and particulars which are within the knowledge of the creditor.

[9] In terms of section 3(4) of the Act, if an organ of state relies on the creditor's failure to serve the prescribed notice or has issued a defective notice, the creditor may apply to court for an order condoning such non-compliance. The court will grant condonation if it is satisfied that:

6.1 the debt has not been extinguished by prescription;

6.2 good cause exists for the failure by the creditor; and

6.3 the organ of state was not unreasonably prejudiced by the failure.

[10] In *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) the court held at paragraph 12 that:

“‘Good cause’ looks at all those factors which bear on the fairness of granting relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant’s responsibility therefor.”

[11] The plaintiffs allege on 19 May 2008 as members of the South African Municipal Workers Union (SAMWU) and while in the employ of the first defendant, were, together with other members involved in a legal strike when confronted by employees of the second defendant, known as the Red Ants, who were subcontracted by the first defendant. It is alleged that the Red Ants tried to disperse the strikers; skirmishes ensued resulting in the Red Ants assaulting the strikers using various weapons and shooting some of the strikers. As a result a number of strikers were injured and three people died.

[12] As a result of the injuries and the deaths, SAMWU instructed its attorneys to file claims against the defendants for the damage

suffered as a result of the alleged unlawful assaults and shootings allegedly committed by the Red Ants.

[13] It is common cause that:

10.1 the plaintiffs action had not prescribed by the time summons were issued on 13 May 2011.

10.2 the section 3 notices served on the first defendant on behalf of the second, third and fourth plaintiffs; and on behalf of the first and fifth plaintiffs on 12 November 2009 and 27 September 2010, respectively, were issued after the 6 months period prescribed in section 3(2) of the Act had expired.

10.3 no notices were issued on behalf of the sixth to eighth plaintiff in contemplation of the action instituted.

[14] In view of the fact that the notices on behalf of the first to fifth plaintiffs were issued out of time and that no notices were issued on behalf of the sixth to eighth plaintiffs, the issue to be determined is whether the plaintiffs have satisfied this court that there is good cause for the failure to comply and that such failure to comply is not unreasonably prejudicial to the first and third defendants.

[15] The following submissions were made on behalf of the plaintiffs. As it was agreed between the attorneys and SAMWU that action will be brought only on behalf of those strikers who were seriously injured and those who had died, it was necessary for the attorneys

and SAMWU to first identify who the plaintiffs would be. To achieve this it was necessary for the injured strikers to consult with medical practitioners in order to ascertain the seriousness of their injuries. Appointments for consultation with medical doctors could only be obtained several months later. In addition it became necessary for some of the injured to consult with medical specialists. It was only after the medical reports, received during August-September 2009, were the attorneys able to identify the plaintiffs. After the reports were received the notices in terms of section 3 were then prepared in October 2009. Counsel argued that without determining who the actual plaintiffs were, the notices would have been vague. It was further submitted that at that stage it was

not clear whether action should be instituted also against the third respondent. It was only after further investigations were done with regard to the involvement of members of the third defendant and on advice of counsel that a section 3(1) notice was prepared and served on the third defendant on 12 May 2011 on behalf of all the plaintiffs.

- [16] It was further submitted that no notices were issued on behalf of the sixth to eighth plaintiffs because SAMWU only instructed the attorneys a few days before summons were issued to include them as plaintiffs.
- [17] Counsel for the plaintiffs further argued that there was good cause shown for the failure in that the delay in issuing the notices, although long, was reasonable in view of the investigations which had to be done before it was clear who the plaintiffs were and that there are prospects that the plaintiffs would succeed in their action against the defendants. Furthermore, counsel argued that the failure to comply with section 3 did not cause the defendants unreasonable prejudice in that the defendants knew about the incident and the first defendant has only denied that the Red Ants were in their employ whereas the third defendant alleges that its members appeared on the scene only after the incident. Furthermore it was argued that the first defendant has not pleaded that due to the time lapse it would not be able to investigate the incident.
- [18] On behalf of the first defendant it was argued that the delay in issuing the notices was inordinately long and the plaintiffs had not sufficiently explained the delay. It was further submitted that the plaintiffs were barred from bringing the damages claim in that in terms of a settlement agreement concluded at the time between SAMWU and the first defendant, a reconciliation committee had been set up to deal with all disputes relating to the strike and that all issues relating to the strike had been finally resolved, including compensation for injuries suffered by some of the strikers. It is counsel's contention that the plaintiffs have not given a reasonable and acceptable explanation for the delay. Further, it is the contention of the first defendant that the plaintiffs' attorneys should be held liable for the failure to comply. Counsel submitted that if this application is dismissed it is not the end of the road for the plaintiffs since it is open to the plaintiffs to submit a claim to the Fidelity Guarantee Fund based on their attorneys' negligence. Furthermore, it is counsel's contention that the plaintiffs case has no prospect of success in that the plaintiffs have not established a link between the first defendant and the second defendant. It is the first defendant's contention

that the second defendant was only sub-contracted to clean up the township. Counsel did not, however, address this court on any unreasonable prejudice caused by the failure by the plaintiffs to comply with section 3 of the Act.

- [19] In *Minister of Safety and Security v De Witt* 2009(1) SA 457 (SCA) the court held that condonation for non-compliance could be granted where no notice has been given or where the notice is defective in some respect but proceedings instituted before the expiry of the prescription period. The court further stated that the purpose of condonation is to allow the action to proceed despite the fact that the peremptory provisions of section 3(1) have not been complied with.
- [20] I am satisfied that the plaintiffs have shown sufficient cause for the granting of condonation. The delay in the issuing of the notices has been fully explained. Even if the delay in the issuing of the notices was as a result of the plaintiffs' attorneys, the plaintiffs should not be held accountable for such laxity, if there was any, to the extent that the plaintiffs would be denied their right of access to the court. The fact that some of the notices were not issued, is not a bar to the court exercising its discretion in favour of granting condonation to the plaintiffs. I am of the view that in fairness to both parties, condonation should be granted as prayed for. There is no evidence shown that such condonation would cause unreasonable prejudice to the defendants.
- [21] Even though the plaintiffs are seeking an indulgence, the conduct of the first defendant warrants the plaintiffs to be awarded costs. With regard to costs, the plaintiffs are also entitled to the wasted costs occasioned by the removal of this matter from the unopposed roll and its postponement on 29 November 2011 due to the first defendant giving notice of its intention to oppose this application 7 days before the hearing even though the application was served on

it on 2 June 2011.

[22] Accordingly the following order is made:

1. Condonation is granted in terms of section 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 ("the Act"), for the late service of the plaintiffs' notice, dated 12 May 2011, on the South African Police Service;
2. Condonation is granted in terms of the provisions of section 3(4) of the Act for the service of the plaintiffs' summons prior to the expiry of a period of 30 days after service of the notice as required by section 5(2) of the Act;
3. Condonation be granted in terms of section 3(4) of the Act for the late service of the plaintiffs' notices, dated 12 November 2009 and 27 September 2010, on the Lesedi Local Municipality.
4. The first defendant to pay the wasted costs of 29 November 2011.

5. The first defendant to pay the costs of this application.

N. P. MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

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