

SOUTH AFRICA / JUDGMENT

L.J.N v Emalahleni Local Municipality (2955/2020) [2022] ZAMPMHC 1 (26 January 2022) [2022] ZAMPMHC 1

COURT

Middelburg High Court, Mpumalanga

BEFORE

Mphahlele SS

CASE / FILE NUMBER

2955/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG (LOCAL SEAT)

CASE

NO.: 2955/2020

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

DATE:

26/01/2022

In

the matter between: L[....]
 J[....]
 N[....]
 Applicant
 versus
 EMALAHLENI
 LOCAL
 MUNICIPALITY
 Respondent

JUDGMENT

MPHAHLELE J

[1] This is an application in terms of section 3(4)(a) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 (“the Act”) for the condonation of the applicant’s alleged failure to serve a notice in compliance with section 3 of the Act.

[2] Section 3 of the Act provides as follows:

“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 notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) ...

(2) A notice must –

(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)..”

[3] On or about 25 September 2007, and at or near Zwane Street, Lynnville township, Witbank, the applicant (then a minor aged 4 years old) was injured whilst playing and frolicking near an electrical substation, under the control of the respondent. The doors to the entrance of the substation were at the time unlocked and not secured.

[4] The applicant instituted an action against the respondent for damages arising from the alleged negligent conduct of the respondent. The respondent raised a special plea of non-compliance with section 3 of the Act. In response to the special plea, the applicant brought this application for condonation in terms of section 3(4)(a) of the Act.

[5] The applicant’s evidence is that subsequent to the incident in issue, his grandmother instructed Ngema Sehope & Tshehla Attorneys to prosecute the claim. The grandmother did so under circumstances where the applicant was still a minor and his mother had already passed on. Subsequently, in 3 letters dated 27 February 2008, 26 March 2008 and 19

November 2008 respectively, the respondent acknowledged receipt of the letter of demand and informed the erstwhile Attorneys that the matter was receiving the necessary attention. The respondent further promised to direct further correspondence to the erstwhile Attorneys in due course. The respondent however omitted to give any further feedback in respect of this matter.

- [6] The matter was subsequently handed over to Ncongwane Attorneys. The applicant's grandmother subsequently passed on. The applicant submitted that, in the absence of both her mother and grandmother, he (as a minor) had no one to take over the mandate or to further the claim on his behalf and to give instructions to the attorneys to prosecute the claim.
- [7] The matter was eventually transferred to Marais Basson Attorneys on 28 February 2020. Taking into account the impact of the COVID-19 pandemic on the institution of legal proceedings at the time as well as the age of the applicant, a decision was taken against the appointment of a curator ad litem. The applicant was 17 years old at the time and turning 18 in September of the same year. Under the circumstances it would not have been cost effective to appoint a curator for such a short period of time. Immediately upon the applicant attaining the age of majority, a letter of demand dated 25 September 2020 was addressed to the respondent.
- [8] At this stage it is important to distinguish between the provisions relating to prescription period as set out in the Prescription Act 69 of 1969 ("the Prescription Act") from the 'expiry' notice provisions as set out in the Act.
- [9] In terms of the Prescription Act, a claim will prescribe three years from the date on which the debt becomes due. For minors, prescription begins to run one year after the date on which the relevant impediment ceases to exist. Section 2 (2) of the Act provides that a debt will be extinguished by prescription as contemplated in chapter III of the Prescription Act relating thereto. Therefore, the prescription of the applicant's claim is to be determined according to the way in which the Prescription Act deals with the claims of minors. However, in terms section 3(1) of the Act any person acting in a representative capacity in respect of, amongst others, minor children must give the relevant organ of state a written notice of its intention to institute legal proceedings for the recovery of a debt within 6 months from the date on which the debt became due, before the legal proceedings may be commenced.
- [10] The court in the matter of the Premier of the Western Cape Provincial Government NO v Lakay^[1] held that the legal position of persons without legal capacity in relation to claims against the State is the same as everyone else's. The court further held that the definition of 'creditor' in the Act included the natural guardian acting for the minor with the result that the natural guardian was obliged to give notice of the minor's claim.

- [11] Accordingly, in terms of section 3 of the Act, the notice of the intention to sue the respondent was supposed to be given within six months from the date when the debt became due.
- [12] The applicant was 4 years old at the time of the incident. The applicant's grandmother, in the absence of the applicant's deceased mother, instructed an attorney to institute the legal proceedings against the respondent. The erstwhile attorney dispatched the letter of demand to the respondent within the period of 6 months as contemplated in section 3(2) of the Act. The letter of demand was also made in respect of two other minor children who were also involved in the same incident. The respondent is attacking the letter to the extent that it failed to mention that the grandmother was acting on behalf of the applicant. The respondent contends that it was not able to attend to the letter since there was no description of the details of the children to be able to know their identity and whether indeed they were the children who were involved in the alleged incident.
- [13] In terms of section 3(2)(b) of the Act, the notice must briefly set out the facts giving rise to the debt and such particulars as are within the knowledge of the creditor.
- [14] In deciding whether there has been compliance with an injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved is very important[2].
- [15] The primary purpose of section 3 is to require that a notice of intention to institute legal proceedings be given to an organ of state at an early stage to facilitate the investigation of the proposed claim.
- [16] The letter of demand complained of was clearly written on behalf of the erstwhile Attorneys' 3 clients. The names of the 3 clients, inclusive of the applicant's grandmother, were stated at the top as the subject matter. The letter stated amongst others the following:
- '... Our instructions are that on 25 September 2007 and at or near Lynnvillle, Zwane Street children of the above named were involved in an accident wherein an electrical substation was left open and the playing children of our clients were electrocuted. ... '
- [17] The letter further stated that, if the respondent fail to pay the amount claimed in respect of damages, further legal action would be taken without any further notice to the respondent. The notice clearly indicated to the respondent that legal proceedings are contemplated in the event the matter is not settled between the parties.
- [18] In response, in 3 letters dated 27 February 2008, 26 March 2008 and 19 November 2008 respectively, the respondent acknowledged receipt of the letter of demand and informed the erstwhile Attorneys that the matter was receiving the necessary attention and even allocated a reference number. The respondent further promised to direct further correspondence to the erstwhile Attorneys in due course. In all its further correspondence, the respondent

never asked for the names and /or any further details, or at the least the names of the injured minor children.

- [19] In the respondent's letter dated 19 November 2008 mention is made of 3 names of the officials in the employ of the respondent who had knowledge of the matter. For enquiries, the applicant was advised to contact Nokuthula, one Mr Tshehla is part of the reference and the letter was signed by one AM Langa, the Municipal Manger. The respondent has failed to indicate in its papers whether or not any of the 3 mentioned officials are still in the employ of the respondent and if not, when they ceased to work for the respondent. If the 3 mentioned officials are no longer in the employ of the respondent, the respondent should have at the very least indicated the steps taken in trying to trace the said officials and the related challenges, if any.
- [20] Under the circumstances of this case, it is difficult to believe that the respondent would experience any difficulty in preparing its case on account of the delay in finalising this matter.
- [21] I also find the belated objection raised by the respondent against the letter to be disingenuous.
- [22] The circumstances of this case indicates that the notice dated 25 February 2008 issued by the applicant's erstwhile Attorneys complies with the requirements of section 3(2) of the Act. The applicant is therefore entitled to proceed with the legal proceedings against the respondent in respect of the claim for damages.
- [23] In the result I hereby make an order as follows:
1. The applicant's letter dated 25 February 2008 is found to be compliant with section 3(2) of Act 40 of 2002;
 2. The applicant's right to proceed with the legal proceedings against the respondent in this matter is hereby confirmed; and
 3. The respondent is liable for the costs of this application.

Mphahlele SS

Deputy Judge President

Mpumalanga Division, Middelburg

This Judgment was handed down electronically by circulation to the parties' representatives by e-mail. The date of the hand-down is deemed to be 26 January 2022.

FOR THE APPLICANT : Advocate T Carstens

INSTRUCTED BY : Marais Basson Attorneys

FOR THE RESPONDENT : Advocate DD Mosoma

INSTRUCTED BY : Dolamo Attorneys

[1]

[2011] ZASCA 224

[2] Maharaj & Others v Rampersad 1964

(4) SA 638 (A) at 646 C

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Prepared on 11 October 2026 · Esheria