

SOUTH AFRICA / JUDGMENT

Masindi v MEC Department of Health Limpopo Provincial Government (1666/2019) [2024] ZALMPTHC 1 (24 January 2024) [2024] ZALMPTHC 1

COURT

Limpopo High Court, Thohoyandou

BEFORE

Nemutandani

CASE / FILE NUMBER

1666/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL

DIVISION, THOHOYANDOU

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: No
REVISED

DATE:

24/1/2024
CASE
NUMBER: 1666/2019
In

the matter between:

MASINDI
PHINDULO GLORIA
PLAINTIFF
And
MEC
DEPARTMENT OF HEALTH
DEFENDANT
LIMPOPO
PROVINCIAL GOVERNMENT

JUDGMENT

NEMUTANDANI AJ

INTRODUCTION

[1] The Defendant raised two special pleas against the Plaintiff's summons. In the first plea, the Defendant Pleads that the Plaintiff failed to comply with the provisions of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, No. 40 of 2002 ("the Act"). The Defendant's contention is that the Plaintiff did not serve the notice on the Provincial Head of the Department of Health.

[2] The second special plea raised was the alleged Plaintiff's non-compliance with the statutory requirements of Section 2(1) and 2(2) of the State Liability Act 20 of 1957. On the day of hearing, the Defendant abandoned the second special plea following proof of compliance by the Plaintiff. The Defendant only proceeded with the first special plea mentioned above.

BACKGROUND

[3] The sequence of events is apposite. On 12 November 2019, the Plaintiff issued summons against the defendant for damages arising from alleged medical negligence by the Defendant's health care practitioners / employees stationed at Manavhela Clinic and Tshilidzini hospital respectively.

[4] The Plaintiff's cause of action allegedly arose in December 2017. This was after being discharged from Tshilidzini hospital following the delivery of her newborn baby.

[5] The Plaintiff through her legal representative wrote various letters to both the district office, Thohoyandou and the Provincial Head of the Department of Health, Polokwane. In the said letters, the Plaintiff's attorneys were amongst others requesting copies of the medical records.

[6] In Plaintiff's letters dated the 23, 28 , 31 May 2018, reference is made by the Plaintiff's attorneys to unanswered letters to the Defendant dated the 24 January, 12 February and 11 April 2018[1].

[7] On 28 June 2018, a letter dated the 19 June 2018 was served on the Provincial Head of the Department. In the said letter, reference is made to a letter of demand which was allegedly served on the 18 April

2018. It suffices to pause and mention that it is this letter dated the 17 April 2018 and served on the Head of Department on the 18 April 2018 that this special plea is premised on.

- [8] The summons was subsequently issued and served on the Defendant on 14 November 2019. The defendants filed a plea in response to the summons. The plea dated 21 February 2020 and the amended plea dated the 23 October 2023 incorporated the above special pleas.
- [9] The essence of the special plea is that there was non-compliance with the provisions of section 3 of the Act. The Defendant contends that the section 3 notice was not served at all.
- [10] On the other, the Plaintiff contends that the Section 3 notice is the letter dated the 18th April 2018 and was served within the time period prescribed by the Act. The mainstay of Plaintiff's argument is that the above letter constitutes notice.
- [11] The issue for determination is whether the Plaintiff complied with the provisions of Section 3 of the Act and an appropriate order as to costs in respect of both special pleas.

THE LAW

- [12] A notice is defined in the Act as a notice contemplated in section 3(1)(a) of the Act. The relevant portions of sections 3 and 4 of that Act provide 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 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 the requirements set out in subsection (2).
- (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) 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.
- 4. Service of notice
 - (1) A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is-

ANALYSIS

AND FINDINGS

- [13] The conventional explanation for demanding prior notification of intention to sue organs of State is that the state, with its extensive activities and large staff which tends to shift, needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them. I am also fortified by what the court stated in *Mohlomi v Minister of Defence*[2] that notices similar to the one required by Section 3(1) have been part of our statutory terrain for a long time especially the part occupied by the Departments of state, Provincial administration and local authorities once they become prospective Defendants..

- [14] A similar provision was contained in the erstwhile section 25 of the Compulsory Motor Vehicle Act 56 of 1972 where it was held in *Nkisimane and Others v Santam Insurance Co Ltd*[3] that the purpose of the section was to ensure that, before being sued for compensation, an authorized insurer would be informed of sufficient particulars about the claim and would be given sufficient time so as to be able to consider and decide whether to resist the claim or to settle or compromise it before any costs of litigation were incurred.
- [15] The undisputed contention by the Plaintiff is that on the 18th April 2018 a letter of demand was served on the provincial Head of the Department of Health. It was during arguments by Counsel for the Plaintiff that this court requested to be addressed on the contents of the said letter. This is a letter which has been referred to in a number of correspondences to the Defendant by the Plaintiff. The said letter bears a receipt stamp by the provincial Head's office of the 18th April 2018. I pause to mention that Counsel for the Defendant submitted and conceded that she has not had sight of the said letter.
- [16] At no stage did the Defendant request the letter dated the 18th April 2018 nor did the Plaintiff furnish the Defendant's attorneys with a copy of the said letter. The Defendant argued that the Plaintiff is attempting to sneak in the letter of demand or the section 3 notice by backdoor. It was further argued that in as much as the said letter is referred to in the Replication, it was not attached. The Defendant further argued that the letters appearing in pages 31 and 32 of bundle B are not section 3 notices as they do not stipulate what is claimed, why is it claimed when and how should the claimed amount be paid.
- [17] What the Defendant misses is that in the same bundle they referred this court to at paragraph 15 of their heads of argument, in a letter dated the 19 June 2018 appearing at pages 32 to 35[4] , Plaintiff's attorneys makes reference to a letter of demand served on the Defendant on the 18 April 2018. The Defendant did not request a copy of this specific letter from the Plaintiff. It would appear that the Defendant's attorney did not receive a copy of this letter from the Department. It is this letter that the Plaintiff submits that it is a demand in compliance with the required section 3 notice.
- [18] The Defendant does not dispute the existence of the said letter neither do they dispute that such a letter was served on the Defendant's Head of Department. Quite notably is the fact that the said letter was at all material times referred to in Plaintiff's correspondences to the Defendant. The said letters were dispatched within the six months period from the date of the alleged cause of action.
- [19] There is no shred of evidence to suggest that the letter dated the 17 April 2018 and served on the 18 April 2018 is not the very same letter that the Plaintiff contends that it was served.
- [20] I am not persuaded by the Defendant's argument that the Plaintiff is attempting to sneak in the letter of demand or the Section 3 Notice considering the fact that reference to the said letter of demand dates as far back as June 2018.

[21] Scrutinization of the contents of the said letter is equally pertinent. The said letter is clearly titled a letter of demand in terms of section 3(1)(a) of the Act, it gives a detailed background and circumstances surrounding the cause of action, grounds of the claim and the claim amount. The Defendant was further placed in mora. I accordingly find that the said letter contains the necessary facts giving rise to the debt and the particulars of such debt as are within the knowledge of the Plaintiff.

[22] For the above reasons, I find that the Plaintiff gave notice of intention to institute legal proceedings against the Defendant and complied with Section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 and same was given within the prescribed period of six months.

COSTS

[23] It is an established principle of our law that costs are within the court's discretion, which discretion must be exercised judiciously. The general rule is that costs will follow the cause. Had the Defendant's attorney obtained all correspondences served on the Department by the Plaintiff in respect of this matter, they wouldn't have raised this special plea. If only the legal practitioners properly engaged and corresponded with each other, the special plea(s) to which this judgment is responsive to would have been obviated.

[24] On the other hand, had the Plaintiff provided the Defendant's attorneys with a copy of the letter dated 17th April 2018, this special plea wouldn't have become a necessity. The very same way the second special plea did not become a necessity after proof of compliance was provided to the Defendant's attorneys. To this end, I am not persuaded that any of the parties is entitled to recover costs from the other party in respect of both special pleas.

[25] In light of the above conclusions, I accordingly make the following order:

1. The Defendant's First special plea dated the 23 October 2023 is dismissed.
2. Each party is to pay its own costs.

F S NEMUTANDANI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

Appearances For the plaintiff Adv Sibara Instructed by Madima (M) Attorneys, Thohoyandou For the defendant Adv Marais Instructed by State Attorney, Thohoyandou Date of hearing 29th November 2023 Date of Judgment 24 January 2024

[1] Page 26 – 30 of the Amended Index and Pagination of Notices Bundle B

[2]

[1996] ZACC 20; 1997 (1) SA 124 (CC) at para [9]

[3] 1978(2) SA 430 (A);

[4] Amended Index and pagination of Notices Bundle B

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