



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D2639/2021

In the matter between:

SABELO ANDILE MBELE

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 31 August 2023 at 11:45am

ORDER

1. The special plea raised by the defendant is upheld, with costs
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JUDGMENT

Chetty J:

[1] The plaintiff instituted proceedings against the defendant arising from his alleged wrongful and unlawful arrest on 20 December 2020. He further alleges that the defendant's officers assaulted him and stole an amount of R4 000 from him in the process. The plaintiff gave notice in terms of the Institution of Legal Proceedings

against certain Organs of State Act 40 of 2002 (the Act) of his intention to sue the defendant. Upon institution of the action the defendant filed a special plea, contending that the plaintiff had failed to comply with sections 3 and 5 of the Act. Insofar as non-compliance with s 3 is concerned, this section requires notice be given to an 'organ of state'. This is defined in s 1 of the Act as, inter alia, 'any national or provincial department'. It is not in dispute that the plaintiff gave notice to the National Commissioner of the South African Police Service by letter dated 19 January 2021. It is also common cause that the letter was received by the National Commissioner on 18 February 2021. *Ex facie*, it is not in dispute that notice was given to the National Commissioner within six months of the 'debt becoming due', in other words, within a period of six months from the incident giving rise to the claim.

[2] It is however in regard to the provisions of s 5 of the Act that this judgment is concerned. While s 3 does not provide any details as to who must be served in the event of an action being instituted against the Minister of Police, sections 4 and 5 are instructive in this respect. Section 4 provides for the serving of the notice referred to in s 3, and reads as follows:

'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—

(a) a national or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department: Provided that in the case of the Department of Police, the notice must be sent to the National Commissioner and the Provincial Commissioner of the province in which the cause of action arose, as defined in section 1 of the South African Police Service Act, 1995;

(my emphasis)

[3] It is not in dispute that the plaintiff only partially complied with the requirement in s 4(1)(a) in that the notice was dispatched timeously, but only addressed to the National Commissioner. It is not disputed that as at the time when the matter was argued there had been no service of the notice on the Provincial Commissioner. Counsel for the plaintiff submitted that it is not prejudicial to the defendant that no

notice was served on the Provincial Commissioner, as the acknowledgment from the National Commissioner confirms that the notice was indeed forwarded to the offices of the Provincial Commissioner.

[4] The question which arises is whether service only on one of the parties referred to in s 4(1)(a) of the Act could be said to constitute compliance with the statutory requirement contained in the section. Counsel for the defendant submitted that issues of prejudice do not arise at this stage of the enquiry. All that the court is concerned with at this point, it was submitted, is a factual enquiry to establish whether there has been compliance with the provisions of the Act. If no service in accordance with the Act can be proved, the special plea must be upheld. It was contended that it was then up to the plaintiff to decide whether it wished to bring an application for condonation in order to serve the notice on the Provincial Commissioner. It is only at this stage that the court enters the arena to consider the explanation for the delay on the part of the plaintiff. At this stage, issues of prejudice or otherwise to the parties may enter the equation. The court considering the special plea raised by the defendant is obliged to consider whether the plaintiff has complied with the prescripts of s 4(1)(a) of the Act.

[5] In *Gcam-Gcam v Minister of Safety and Security* (187/11) [2017] ZAECMHC 31 (12 September 2017), Mbenenge ADJP was confronted with a similar situation to the matter before me and rejected the contention that an enquiry into whether there has been compliance with s 4(1)(a) of the Act must delve into whether prejudice was occasioned by the non-compliance. The court said the following in paragraphs 18 to 20, which are in my view, dispositive of the enquiry before me:

[18] Regrettably, I find myself being in disagreement with the approach adopted in *Bahle* in so far as the National Commissioner was left out in a consideration of what constitutes substantial compliance with section 4 (1)(a) of the Act. The wording of the section is plain, simple and uses direct language. Nothing from a reading of the section points to any form of ambiguity or difficulty of interpretation. It makes it imperative (and not merely directory) for a claimant to serve the notice on the head of a department. In the case of the SAPS such head is the National Commissioner. The reason for the requirement that notice to institute proceedings against a department be served on the department's head at that early stage is not far to seek. In terms of section 36 of the Public Finance Management Act 1 of 1999 (the PFMA) the head of a department must be the accounting officer for the department. The responsibilities

of accounting officers are set out in section 38 of the PFMA. Section 38(1)(d) renders accounting officers responsible for the management of the liabilities of the department. It is also significant that the National Commissioner exercises control over and manages the SAPS in accordance with section 207 (2) of the Constitution of the Republic of South Africa, 1996 and is obliged to perform any legal act or to act in any legal capacity on behalf of the SAPS. As far as I could have discerned argument predicated on the pivotal role of the head of department does not seem to have been advanced in *Bahle*, both before the court *a quo* and the full court.

[19] In terms of section 4(1)(a) the notice must be addressed to and received by the National Commissioner. I am mindful of the pronouncement in *Maharaj and Others v Rampersad* wherein the then AD held that in deciding whether there has been compliance with an inju[n]ction the object sought to be achieved by the inju[n]ction and the question of whether this object has been achieved are of importance. However, substantial compliance which eschews the head of a department, whose responsibility includes the management of the department's liabilities, does not pass muster. The head must be involved in the relevant process and in deciding whether the claim should be resisted or settled. Were the section to be interpreted otherwise, the managerial role of the accounting officer would be subverted. A door to all manner of possibilities leading to unnecessary uncertainties would also be opened.

[20] Moreover, in my view, the question whether or not the appropriate functionary has been served ought merely to hinge on the facts of each case, the enquiry being purely factual and requiring no exercise of a discretion; considerations of fairness and prejudice should not come into play during this enquiry. Only when condonation is sought in terms of section 3 (4)(b) should a discretion, hinging on, *inter alia*, whether the organ of State was not unreasonably prejudiced by the failure to serve the notice on the proper functionary, be exercised. (footnotes omitted)

[6] While the Court in *Gcam-Gcam* was dealing with the unamended version of s 4 of the Act (prior to the introduction of the provisio regarding the Department of Police), this Court agrees with the finding in *Gcam-Gcam* regarding the peremptory nature of the provisions of s 4. As counsel for the defendant submitted, and correctly in my view, the plaintiff had been alerted by way of the special plea, as to the deficiency in the service of the necessary notice in terms of s 4(1)(a) of the Act. It took no steps to remedy the situation. Instead, it has elected to proceed to trial on the basis that there has been 'substantial compliance', further contending that no prejudice has been occasioned by non-service on the Provincial Commissioner. The wording of the Act makes it clear that a notice alerting the State functionaries to a pending claim must be

served on both the National *and* Provincial Commissioners of Police. It matters not that the National Commissioner may have forwarded the notice to his or her counterpart at the provincial level.

[7] Despite the peremptory wording of the section, a non-compliant litigant is not non-suited as they are permitted to apply for condonation for non-compliance. It is at that stage of the matter that an enquiry may focus of the reasons why the notice was not served on the Provincial Commissioner. See *Ethekwini Municipality v Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel* (280/2020) [2021] ZASCA 96 (1 July 2021) where the court at paragraph 10 stated that:

‘. . . the factors set out in s 3(4), must be considered in light of the well-settled principles on condonation. In *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd* this Court restated the factors which need to be taken into account when considering an application for condonation as follows:

“A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.” (footnotes omitted)

[8] Despite counsel for the defendant urging me to dismiss the plaintiff’s action, I am satisfied that the proper outcome where there has been non-compliance with s 4(1)(a) of the Act, is that the plaintiff is barred from proceeding with the action until condonation is obtained in terms of s 3(4) of the Act.

[9] I am satisfied that the plaintiff had adequate opportunity to consider its approach once the special plea had been raised. It chose not to proceed in terms of s 3(4), as it ought to have. For that reason, costs should follow the result.

[10] The following order is made:

The special plea raised by the defendant is upheld, with costs.



M R CHETTY

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Judgment reserved:

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Judgment Delivery:

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