Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 3159/2021

In the matter between:

LYDIA MATHAPELO MOKOENA o.b.o Applicant

R L M

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR Respondent

HEALTH OF THE FREE STATE PROVINCE

HEARD ON: 11 MAY 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 16h00 on 30 May 2023.

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[1] The central feature in this matter is whether a notice of intended legal proceedings to be given to an organ of state complies with the Act[1] if it contains sparse information.

[2] The applicant approached the court requesting an order in the following terms:

> *"1. Confirming that Applicant's notice of her intention to institute legal proceedings in terms of Section 3 of the Institution of Legal Proceedings Against Certain organs of State Act 40 of 2022 was timeously filed, alternatively granting the applicant condonation for late service of her notice of her intention to institute legal proceedings in terms of Section 3 of the Institution of Legal Proceedings Against Certain organs of State Act 40 of 2022;*
>
> *2. Costs of this application to be costs in the cause;*
>
> *3. Further and/or alternative relief."*

[3] The application was opposed on the basis that the notice dated 10 April 2017 which was sent via registered post to the defendant, did not comply with the provisions of the Act in that it did not set out the facts giving rise to the debt.[2]

Brief background

[4] The applicant (as plaintiff in her representative capacity as the mother of the minor child) issued summons against the respondent (the defendant in the action) based on medical negligence of the provincial health facilities which resulted in the minor child suffering from cerebral palsy. A plea on the merits was delivered by the respondent (defendant) wherein it was, amongst others, denied that the requisite notice was given and the applicant (plaintiff) was required to seek the requisite condonation.[3]

[5] On 19 July 2015, the applicant was admitted to the Elizabeth Ross Hospital having complained of low abdominal pains but was discharged on 20 July 2015 as it was recorded that she had false labour or UTI. She was re-admitted on 21

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[1] Section 3(2)(b)(i) & (ii) Act 40/2022
[2] Para 5.4 of the Answering Affidavit.
[3] Para 30 of the Plea on page 40 of the Indexed Papers.

July 2015 but was transferred to the Mofumahadi Manapo Mopeli Hospital where she later gave birth to a baby with cerebral palsy.

[6] Having consulted with her lawyers, a statutory notice dated 31 October 2016 was served on the respondent by registered mail on 24 November 2016. However, the notice was addressed to the Member of the Executive Council for Health, Gauteng Province but bore the respondent's correct address in Bloemfontein. The respondent pointed out to the applicant that the notice did not comply with the Act and could not be regarded as proper notice.

[7] A second notice dated 10 April 2017 was dispatched to the respondent and, according to the applicant, no objection was raised. Save for the erroneous address and the incorrect particulars of the claimant, the contents of the second notice are similar to the first. The contents of the second notice read as follows:

"Dear Sir/Madam

Re: LETTER OF DEMAND/NOTICE IN TERMS OF ACT 40 OF 2002 OUR CLIENT: MATHAPELO LYDIA MOKOENA obo R L M

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1. *We refer to the above matter and act on behalf of our* ***MATHAPELO LYDIA MOOENA obo R L M.***
2. *Our client has instructed us to institute legal action against Member of the Executive Council for the Health of the Free State Provincial Government for recovery of damages in the amount of* ***R 15 000 000.00 (Fifteen Million Rand).***
3. *The above mentioned damages suffered are as a result of contractual and delictual breach which caused serious injury and harm to the minor due to the M.E.C medical and nursing staff's conduct when rendering medical services at* ***MANAPO HOSPITAL*** *on or about the* ***22 JULY 2015.***
4. *The Member of the Executive Council as a representative of Free State Provincial Government is liable for the act/or omission of the employees of Free State Provincial Government therefore they are liable for the debt and/or damages due to our client.*
5. *This letter serves as a demand and Notice in terms of the Institution of Legal Proceedings against Certain State Organs, Act 40 of 2002.*
6. *Your urgent response is awaited.*

Yours faithfully"

[8] On 19 August 2022, a third notice was served on the respondent. This notice contained more details and information than the previous two notices. It therefore enlarged or expatiated on the information contained in the previous two notices. It is this notice that is the bone of contention and that Mr Soni, who represented the respondent, submitted was central to the dispute. The first notice, he submitted, was not one contemplated in section 3 of the Act as it was not addressed to the respondent but to the MEC of Health, Gauteng Province. The second notice, he contended, did not comply with what was required in terms of section 3(2)(b) of the Act especially because the third notice contained the information that was required and that was within the knowledge of the applicant and her attorneys from 30 October 2016. He argued further that there was no explanation tendered in the notices for the absence of that information.

[9] It is common cause that the applicant was advised of her claim and the legal requirements on 30 October 2016 when she consulted with her attorneys who had obtained the hospital records on 29 October 2016. That being the case, the requisite notice should have been served by 30 April 2017. The third notice served on 19 August 2022 was out of time by more than five (5) years from the time the applicant became aware of the identity of the organ of state and the facts giving rise to the debt and the particulars of the debt, argued Mr Soni. He contended that the applicant failed to show that good cause existed to satisfy the requirements set out in section 3(4)(b)(ii) of the Act for the failure to comply with section 3(2)(a)(i) of the Act, namely, to serve the notice within six (6) months of acquiring the requisite notice. Accordingly, no case for condonation had been made out and the application for condonation in respect of that notice fell to be dismissed with costs.

[10] The applicant seeks an order that is declaratory in nature confirming that her notice of intended legal proceedings given to the organ of state was in compliance with the provisions of the Act and that it was timeously filed. In the alternative, she seeks condonation for the late service of such notice. The question that arises is whether the second notice is valid and complies with the provisions of the Act.

[11] According to Mr Soni, two questions arise in this case, namely, whether the first two notices comply with the requirements of section 3(2)(b) and does good cause exist for the long delay in respect of the third notice. According to him, the second notice did not meet the requirements of section 3(2)(b) of the Act. However, no authorities were advanced for this standpoint. The only authority he relied on was the *Minister of Agriculture and Land Affairs v SJ Rance (Pty) Ltd*[4] which was quoted in support of the respondent's submission that the applicant filed the third notice way out of time. This authority as per Majiedt JA, as he then was, had to do with condonation in circumstances relevant to section 3(4) of the Act.

[12] In this case, and on a proper consideration of the respondent's contentions, it is not disputed that a notice was given to the respondent in compliance with both sections 3(2)(a) and 4(1) of the Act, i.e., that the respondent served on the organ of state by certified mail a notice within six (6) months from the date on which the debt became due. What is in issue is whether the applicant complied with sections (3)(2)(b)(i) and (ii). In his written heads of argument, Mr Soni stated that *"if the organ of state relies on a creditor's failure to serve the notice within the six (6) month period, the creditor may apply to court for condonation. 22. In this case, the respondent relies on the applicant's failure to serve a notice that complies with section (3)(2)(a) of the Act, and the applicant is required to apply for condonation."*[5] He argued that the third notice was central to his argument and that there was no information whatsoever on why there was a five (5) year delay in serving the third notice on the defendant.

[13] 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*

[4] 2010 (4) SA 109 (SCA).
[5] Paras 20 and 21 of the respondent's heads of argument.

(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-"

[14] A debt is defined in the Act as:

***"'debt'** means any debt arising from any cause of action-*

(a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-

(i) act performed under or in terms of any law; or

(ii) omission to do anything which should have been done under or in terms of any law; and

(b) for which an organ of state is liable for payment of damages,

whether such debt became due before or after the fixed date;"

[15] 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. From time to time there have been judicial pronouncements about how such provisions restrict the rights of its potential litigants. However, their legitimacy and constitutionality are not in issue.[6]

[16] 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*[7] 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.

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[6] Minister of Agriculture and Land affairs, supra.
[7] 1978(2) SA 430 (A); *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

[17] In that case,[8] it was claimed that the claim forms were not completed in the prescribed manner but the court held that each MVA form, including its medical report, read as a whole, amounted to substantial compliance with the requirement of s 25 (1), that the contents of the claim were set out in the manner prescribed by the regulation, in that it set out a claim for compensation under section 21 against the respondent as the authorized insurer of the vehicle concerned in the accident. It afforded the respondent sufficient information to enable it to decide whether to resist each claim for compensation or settle it before being sued.

[18] In *Unlawful Occupiers, School Site v City of Johannesburg*[9] the grounds for the application for eviction stated in the notice were too sparse to meet the requirements of section 4(5)*(c)* of the Pie Act. The court held that:

"*[24] The question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) should still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the s 4(2) notice they F therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5).*"

[8] Nkisimane, supra.
[9] 2005 (4) SA 199 (SCA).

[19] Turning to the facts: the respondent objected to the first notice but did not raise any objection to the second one, which the respondent did not deny having received. It is only in the plea which was filed in November 2021 that the defendant denied having received the requisite notice and recorded that she required the applicant (plaintiff) to seek the requisite condonation[10]. It is evident from the plea that the merits of the case were investigated by the respondent. The respondent (defendant) in its plea made certain admissions, such as that the applicant (plaintiff) did furnish the respondent (defendant) with the hospital records, that the applicant was admitted to the hospitals where she was examined and attended to by the nursing staff. It is indeed so that the applicant did not explain why the third notice was served, but in view of the plea filed, it appears to be *res ipsa loquitur* or that the notice was served out of extreme caution.

[20] Does the second notice comply with the Act? The Act requires that the facts giving rise to the debt and such particulars of such debt as are within the knowledge of the creditor must be briefly set out[11]. How these facts are to be briefly set out is not defined in the Act. In *Weenen Transitional Local Authority Council v Van Dyk*,[12] it was held that :

"[13] "It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A)at 434A B).Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or

[10] Para 30 of the Plea.
[11] Section 3(2)(b)(i) and (ii).
[12] 2002 (4) SA 653 (SCA).

administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '. . . a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138D E, seems to be the correct one and does away with debates of secondary importance only."

[21] It is noteworthy that the respondent reacted to the first notice and pointed out the defects therein to the applicant but did not point out any defects in the second notice. It was only in the Plea, which was a response to the allegations and particulars contained in the summons, that it was pleaded that the requisite notice was not received. At that stage the respondent had investigated the claim. The second notice is clear and briefly stated the nature of the claim and against whom it would be made. The fact that the respondent corrected and pointed out deficiencies in the first notice, and the subsequent silence after the receipt of the second notice, which is not denied, confirms that the second notice achieved its purpose as required by the Act.

[22] Despite the reliance on the *Minister of Land Affairs v SJ Rance*,[13] and the denial of having received the requisite notice, the respondents failed to file a special plea to the summons to indicate that no notice was ever sent out as required by the Act. I therefore disagree with the notion that the applicant should have applied for condonation as the applicant had duly given the respondent written notice of her intention to institute legal proceedings against the respondent. Had the applicant failed to issue the notice, it would have been imperative for her to apply for condonation as suggested. It is not in issue that the second notice was duly despatched as required by s 4 (1) of the Act. In the premises, the defences raised by the respondent are without substance. The application must therefore succeed.

[13] Supra.

[23] I make the following order:

ORDER:

1. The applicant's notice of her intention to institute legal proceedings in terms of section 3 of the Legal Proceedings Against Certain Organs of State, Act 40 of 2002 is confirmed.
2. Costs will be costs in the cause.

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MHLAMBI, J

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