IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 54164/2021

Date of hearing: 14 February 2024

Date delivered: 4 March 2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

4/3/24 .....
DATE SIGNATURE

In the application between:

CHUENE, LEBOGANG RINAH	**First Applicant**
NGOASHENG, LEBOGANG RUTH	**Second Applicant**
KGOMOESOANA, RAISIBE CYNTHIA	**Third Applicant**
CHABALALA, NTWANANO OLGA	**Fourth Applicant**
and	
COMMISSIONER OF COMPENSATION FUND	**First Respondent**
MINISTER OF EMPLOYMENT AND LABOUR	**Second Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Third Respondent**

JUDGMENT

SWANEPOEL J:

[1] The applicants were employed as intern claim processors by the first defendant until 19 April 2017 when the first, second and fourth applicants were charged with fraud and money laundering, and publicly suspended in front of their colleagues. The third applicant was similarly charged and suspended in May 2017. Their suspensions were lifted on 19 June 2017, but they remain the subjects of a criminal investigation relating to irregular payments running into the tens of millions of rand.

[2] On 27 October 2021 the applicants issued a summons against first and second respondents claiming damages resulting from defamation. In response, the first and second respondents raised three special pleas:

[2.1] That the applicants had not complied with the provisions of section 3 of the Legal Proceedings against Certain Organs of State Act, 40 of 2002 ("the Proceedings Act"), by failing to deliver a notice setting out the facts giving rise to the debt, and such particulars of the debt as were known to the applicants within 6 months of the debt falling due;

[2.2] That the debt had become prescribed as summons was served more than three years after the debt fell due;

[2.3] That the applicants had failed to comply with section 2 (2) of the State Liability Act, 20 of 1957 in that the applicants had failed to serve a copy of the summons on the State Attorney within 5 days of its service on the first and second respondents.

[3] The applicants apply for the following order:

[3.1] That section 3 (1) (a) and (b) and 3 (2) (a) and (b) of the Legal Proceedings Against Certain Organs of State Act, 40 of 2002

("the Legal Proceedings Act"), and section 2 (2) of the State Liability Act ("the Liability Act"), 20 of 1957 be declared to be unconstitutional and therefore invalid;

[3.2] In the alternative, and in the event that the aforesaid sections are not held to be unconstitutional, then the applicants seek condonation in terms of section 3 (4) (a) of the Legal Proceedings Act, alternatively in terms of the common law.

[3.3] That the special plea of prescription be set aside.

[3.4] That first and second respondents pay the costs of the application.

[4] The provisions of section 3 of the Legal Proceedings Act which the applicants attack read as follows:

> "(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless –
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> (a) The creditor has given the organ of state in question notice of his or her 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
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> (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."

[5] Section 2 (2) of the Liability Act provides for the service of process in the event of proceedings being commenced against the state. It reads:

"(2) The plaintiff or applicant, as the case may be, or his or her legal representative must –

(a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of department concerned at the head office of the department; and

(b) within 5 days after the service of the process contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued."

[6] It is common cause that the applicants did not deliver a notice to the first and second respondents timeously as required by section 3 of the Legal Proceedings Act, nor did they serve a copy of the process issued against first and second respondents on the State Attorney. The notice in terms of section 3 of the Legal proceedings Act was delivered 4 years and 4 months after the debt fell due. There is no explanation for the applicants' failure to serve the process on the State Attorney, save to state that it was an "oversight".

UNCONSTITUTIONALITY OF THE PROVISIONS

[7] There can be no argument that the provisions under attack place a heavier burden on a party seeking to sue the state, than on a party seeking to sue any other person. To that extent the state has an advantage over other parties, in that it receives notice of the pending proceedings earlier than other parties might. Parties other than the state

may be served with a summons one day before the three-year prescription period lapses, and no prior notice is required. The plaintiff is also expected to serve the process not only on the departmental head, but also on the State Attorney.

[8] It is this difference in the manner in which the state is sued, as opposed to other parties, that is said to be in conflict with section 9 of the Constitution which provides that everyone is equal before the law. The applicants argue that the sections under attack unfairly and unreasonably violate the right to equality before the law. Furthermore, section 34 of the Constitution emphasizes the right of all persons to have any dispute resolved in a Court or other appropriate forum through the application of law. The sections sought to be impugned may prevent a party from putting its case before a Court, applicants argue.

[9] Section 9 (1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 8 of the Constitution makes it clear that the Bill of Rights is applicable to all, including the executive, the legislature and other organs of state equally. All persons seeking access to a court should therefore, in principle, be treated equally.

[10] An enquiry into the constitutionality of sections 3 (1) and (3) 2 of the Legal Proceedings Act, and section 2 (2) of the Liability Act, starts with the question whether they discriminate between different litigants, and whether they limit certain persons' access to a court. Once it is determined that the statutory provision limits equal access to a court, then the next step in the enquiry is to determine whether the limitation can be justified in terms of section 36 of the Constitution.

[11] In *Moise v Greater Germiston Transitional Local Council*[1] the Court said that statutory provisions that limit the time within which litigation must be instituted are a common feature of statutes relating to

[1] 2001 (4) SA 491 (CC)

claims against the State. It said that such provisions are *"special statutory provisions that single out particular kinds of proceedings against specific kinds of defendants and attach special extraneous preconditions to their institution. The object is not to regulate judicial proceedings but to protect the interests of the defendants."*

[12] It was pointed out in *Moise* that courts have over many years spoken about the limitations that such provisions impose on a litigant against the State. Those criticisms were referred to also in *Mohlomi v Minister of Defence*[2] where Didcott J said:

> "Over the years some judges have drawn attention, even so, to the adverse effect on claimants of requirements like those. Innes JA described them in Benning v Union Government (Minister of Finance)[3] as (c)onditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law. One was thought by Watermeyer J in Gibbons v Cape Divisional Council[4] to be 'a very drastic provision' and 'a very serious infringement of the rights of individuals'. In Avex Air (Pty) Ltd v Borough of Vryheid[5] Botha AJ spoke in the selfsame vein of another (h)ampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts. And Corbett CJ echoed that comment in Administrator, Transvaal and Others v Traub and Others[6] when he observed that the provision in question 'undoubtedly hampers the ordinary rights of an aggrieved person to seek the assistance of the courts."

[13] It is therefore clear that the strictures imposed by such time and notice provisions on those who litigate against the State have been recognized for many years. They do impose a more onerous burden upon

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[2] 1997 (1) SA 124 (CC)
[3] 1914 AD 180 at 185
[4] 1928 CPD 198 at 200
[5] 1973 (1) SA 617 (A)
[6] 1998 (4) SA 731(A) at 764 E

such litigants. The question is though, whether the limitation is justified in terms of section 36(1), which provides:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into consideration all relevant factors, including –
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> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose;
>
> (e) less restrictive means to achieve the purpose."

[14] The purpose of these type of provisions have been explained on numerous occasions. In *Mohlomi*[7] the Court referred to the extensive activities undertaken by the State, its large staff which "*tends to shift*", and the need for an opportunity to investigate claims laid against the State so that they can be responsibly considered. The Court went on to say that delays in litigating damages the interests of justice, and that such provisions prevent procrastination and its "*harmful consequences*". In *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse*[8] the Court pointed out that such provisions provided a local authority with an opportunity to investigate sooner rather than later when investigations may prove to be more difficult.

[15] Ultimately our Courts have recognized the need for provisions such as section 3 (1) and (2) of the Legal Proceedings Act. In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*[9] the Court said:

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[7] At para 9
[8] 1997 (4) SA 613 (SCA)
[9] 2010 (4) SA 109 (SCA)

"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 is not in issue."

[16] In my view the limitations caused by sections 3 (1) and (2) are based upon a legitimate need: that the State, with its vast number of employees and the broad scope of its affairs, must be given an opportunity to timeously investigate any potential claims, to gather whatever information that may be available, and to make an informed decision whether to oppose the claim or not. The Constitutional attack on sections 3 (1) and (2) must therefore fail.

[17] As far as the claim is concerned that section 2 (2) of the Liability Act is unconstitutional, and that it places an onerous burden on a litigant, my view is the same as expressed above. Section 2 (2) does place a litigant who litigates against the State on a different footing as it would have been if it litigated against a private person. However, the purpose of section 2 (2) is to ensure that the State is aware of the litigation, and that its attorney is able to take proper instructions whether to oppose the litigation or not.

[18] The requirement that service must also be effected on the State Attorney is not overly burdensome, and, in any event, where there has been substantial compliance with the provisions of section 2 (1) by service on the heads of department, and the State has opposed the matter and has not been prejudiced by non-service on the State Attorney (as in this case), the summons would not be a nullity.[10] In my view the limitation brought about by section 2 (2) is justifiable in the circumstances.

[19] The applicants sought, in the alternative, that condonation be granted for the late delivery of their notice in terms of section 3 of the Legal Proceedings Act, and also for non-service on the State Attorney.

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[10] Minister of Police and Others v Molokwane [2022] ZASCA 111 (15 July 2022)

[20] As far as condonation for non-compliance with section 2 (2) of the Liability Act is concerned, a Court cannot condone non-compliance with a statutory provision. However, as I have said above, it seems to me that the summons is not a nullity as there has been substantial compliance with the service provisions contained in section 3.

[21] As far as condonation for the late delivery of the section 3 notice is concerned, I am not convinced that the applicants have made out a proper case for condonation. As I have said, the notice was sent four years and four months after the cause of action arose. Applicants have not explained the long delay in taking action, save to say that they thought they were still entitled to pursue their claim. However, applicants have a more fundamental problem. The applicants initially sued for defamation, and they gave notice to first and second respondents of that claim, and when the issue of prescription was raised, they argued in their papers that theft, the offence of which they had been accused, was an ongoing offence, and that the claim for damages had not yet prescribed. That argument was off course a spurious one. The applicant's cause of action against the respondents was not theft, but the alleged defamation of which they have known since 2017. They only served the summons more than four years later. The claim for defamation had clearly prescribed, as the applicants' counsel correctly conceded in argument. Therefore, I am precluded by the provisions of sub-section 4 (b) (1) from granting condonation in respect of the claim for defamation. I am also unable to grant the relief sought setting aside the special plea of prescription.

[22] In order to escape the consequences of prescription, the applicants amended their particulars of claim to include a claim for malicious prosecution. The argument is that the malicious prosecution claim only falls due when the prosecution against the applicants fails due to their acquittal or discharge. The criminal proceedings are still ongoing, and consequently, the applicants say, the claim for malicious prosecution has not yet prescribed. The applicants' difficulty is that they have not yet been discharged or acquitted, and the claim for malicious prosecution has

not even arisen. If the claim for malicious prosecution has not become due, then applicants could not yet have delivered a notice in terms of section 3, and I cannot condone the late filing of something which has yet to happen.

[23] In my view, therefore, the application for condonation should also fail. There is no reason why the costs should not follow the result.

[24] I make the following order:

The application is dismissed with costs.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR APPLICANTS:	**Mr. T Ramabokela**
ATTORNEY FOR APPLICANTS:	**Ramabokela Inc**
COUNSEL FOR RESPONDENTS:	**Adv O. Mokoka**
ATTORNEY FOR RESPONDENTS:	**The State `Attorney**
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