IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 187/11

In the matter between:

MFUNDISI GCAM-GCAM **Plaintiff**

and

MINISTER OF SAFETY & SECURITY **Defendant**

JUDGMENT

MBENENGE ADJP:

[1] The plaintiff seeks payment of damages for alleged wrongful arrest, detention and assault, all of which are said to have taken place during September 2010. The defendant is cited on the basis that he is, in terms of the State Liability Act 20 of 1957, liable for delicts committed by members of the South African Police Service (the SAPS) whilst acting in their capacity and in the scope of their authority as such members. The conduct complained of is, according to the plaintiff's particulars of claim, alleged to have been perpetrated by members of the SAPS attached to the Organised Crime Unit, Mthatha.

[2] The summons was duly served on the Mthatha State Attorney's office on the same day the action was launched (26 January 2011). Through that office, the defendant entered an appearance to defend the action. At some point, a notice of bar was served on the defendant. It is not clear from the papers as to what became of that

notice, delivered during May 2011. The defendant eventually pleaded to the particulars of claim during November 2011.

[3] In pursuit of the action the plaintiff has alleged, *inter alia,* that "[*he*] *has complied with the provisions of Section 3 of Act 40 of 2002."* Implicit in this bald allegation is the notion that the notice contemplated in section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Act) was issued before the action was launched.[1]

[4] According to the defendant's special plea, delivered together with the defendant's plea-over, it is contended that the plaintiff is barred from proceeding with the action "*due to his failure to comply with the provisions of Section[s] 3 and 4 of [the Act]*." The same stance is adopted in the relevant paragraph of the plea-over, *albeit* that reference is made to the plaintiff as only having not complied with section 3 of the Act.[2] No specificity is provided in the special plea as to the respects in which sections 3 and 4 were not complied with.

[5] There having not been any replication delivered, the pleadings closed, with the result that an application for a trial date was lodged with the Registrar of this Court.

[6] In the course of time, the parties' legal representatives converged for a pre-trial conference at which it was, *inter alia,* agreed that the preliminary issue for determination at trial would be whether the plaintiff complied with the provisions of sections 3 and 4 of the Act prior to the launch of the action.

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[1] The section, in so far as relevant hereto, provides:

"**3. 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 –

(2) the creditor has given the organ of state in question notice in writing of his or her or its intention the legal proceedings in question; or

(3) 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).

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." (Emphasis supplied).

[2] No reference is made to section 4 of Act 40 of 2002.

[7] When the matter served before me at trial stage the parties had, despite their exchange of correspondence relative to the issue at hand, not resolved their differences in relation to whether notice to institute the proceedings had been duly and properly served. They had braced themselves for pursuing their respective contentions. I was advised, from the bar on behalf of the defendant who is *dominis litis* in relation to the special plea, that argument would be advanced on the strength of correspondence that would be handed up from the bar. I found that procedure unconventional, and thereupon urged the parties to draw a stated case for adjudication, as it was clear that the issues raised in the special plea did not give rise to a dispute of fact. I further urged the parties to ensure that all documents and correspondence necessary to enable the court to decide the question (s) were annexed to the relevant statement of facts. The matter was adjourned to enable the parties to draw and file the statement and to deliver their heads of argument on the issues raised in the statement.

[8] The relevant portion of the statement reads:

> "It is alleged by the plaintiff:
>
> 4.1 that per letter dated 27 October 2010 he has substantially complied with the provisions of **sections 3** and **4** of **the Act** even though his notice was served on the Minister of Police instead of the National Commissioner of Police as required by **the Act**; and
>
> 4.2 that the acknowledgement of the notice by the defendant's Provincial Head, Legal Services, Eastern Cape dated 13 January 2011 confirms his alleged substantial compliance referred to in 4.1 above.
>
> 5. Attached hereto as Annexures **"A"** and **"B"** are copies of letters referred to in paragraph 4 above.
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> 6. The defendant on the other side alleges:
>
> 6.1 that the plaintiff's admitted allegation of substantial compliance presupposes admission of non-compliance as set out in paragraph 4 and that by itself it necessitated that he applies for condonation as envisaged in **section 3 (4)** of **the Act;**
>
> 6.2 that the acknowledgement of receipt of the plaintiff's impugned notice ought and should not be treated as compliance with **the Act**, and
>
> 6.3 that by non-compliance with **the Act**, the plaintiff denied the defendant his opportunity to investigate the claim as set out in his notice in the manner envisaged by the spirit of **the Act.**"

[9] Annexure "A" is infact a letter penned by the plaintiff's attorneys of record dated 27 October 2010 addressed to the Minister of Safety and Security, Pretoria. The letter purports to be the requisite statutory notice in terms of section 3 of the Act. Annexure "B" is a letter dated 13 January 2011 emanating from the office of the Provincial Head, Legal Services (Loss Management), King Williams Town, acknowledging receipt of the plaintiff's purported notice.

[10] It is clear from a reading of the statement that the purported notice (annexure A) initially sent to the Minister (of Safety and Security)[3] was transmitted to and thereafter received by the Provincial Commissioner of the Service. The latter thereupon responded to the notice on a "*without prejudice and acceptance of liability basis*". An undertaking was made that the "*[Provincial Commissioner's] office [would] handle the claim in collaboration with the SAPS Legal Services and the State Attorney, Mthatha* and that the plaintiff's attorneys of record would be "*notified of the [State Attorney's] reference [number] in due course*."

[11] Upon its proper reading, the letter (annexure A) does constitute proper notice and, but for what is stated hereinafter in this judgment, was received by the intended addressee within the six months period stipulated in section 3 (2)(a) of the Act. That much was, correctly so in my view, conceded by Mr *Sishuba*, the defendant's Counsel, when the matter was being heard.

[12] The issue crystalized into whether the defendant had been served with the notice in the manner contemplated in section 4 (1)(a) of the Act).[4] The section provides:

> "**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 –
>
> (a) A national provincial department mentioned in the first column of

[3] The appellation has now been changed to "*Minister of Police.*"

[4] Paragraph 7 of the statement is couched as follows:

> "In the premises, the honourable court is requested to adjudicate on the question of whether defendant's special plea is good in law or not and to make such an order as to costs as seems just under the circumstances."

> 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." (Emphasis supplied)

[13] The service of the notice in the circumstances of this case, argued the plaintiff, constituted substantial compliance with section 4 (1)(a) of the Act. On the other hand, it was contended, on behalf of the defendant, that an acknowledgement of receipt of the notice by the Provincial Commissioner coupled with the undertaking that the claim would be handled "*in collaboration with the SAPS Legal Services and the State Attorney, Mthatha*" constituted not substantial compliance with the section; absent an application for condonation in terms of section 3 (4), the plaintiff is barred from proceeding with the action.

[14] Mr *Matotie*, counsel for the plaintiff, placed reliance on *Minister of Safety and Security v Mphangeli Bahle*[5] wherein it was stated that the ultimate receipt of a notice addressed to the Minister by the Provincial Commissioner in circumstances where the Provincial Commissioner forwarded the notice to the Mthatha police station for investigation of the relevant claim constituted substantial compliance with section 4 (1). In that case it was held that requiring the launch of an application for condonation would, in those circumstances, be to sacrifice substance on the altar of formalism.

[15] In arriving at the conclusion that there had been substantial compliance with the provisions of section 4 (1), the court reasoned:

> "[The appellant's Counsel] was unable to show how, in the circumstances of this case, the object of the Act was frustrated or undermined or how the appellant was prejudiced. In my view since the Provincial Commissioner forwarded the notice to the Mthatha Police Station for the respondent's claim to be investigated, which happened within three months from the date when the cause of action arose and since the Provincial Commissioner assisted the respondent to bring the respondent's claim to the attention of the Mthatha Police Station for investigation thereof, the respondent has substantially

[5] Unreported decision of the full court of the Eastern Cape Division delivered on 19 March 2015 under Case No 362/09

> complied with section 3 (2)(a) which requires that the notice be served on the South African Police Service in accordance with section 4 (1)."[6]

[16] It should be pointed out, however, that the court in *Bahle* cautioned that its judgment "*should not be read to mean that, if a notice is sent to or served on a person or entity other than the officer referred to in Section 4 (1), such defective service will be treated as compliance with the Act,*" and that "*[e]ach case must be considered on its own peculiar facts.*"[7]

[17] On a reading of *Bahle,* and as Mr *Sishuba* submitted, the distinction between the facts in *Bahle* and those in the instant matter becomes plain. The court became satisfied that the notice had timeously reached the Mthatha Police Station whose officials were implicated in causing the plaintiff therein harm for investigation and that, therefore, the object of the Act requiring that the notice be served on the Service had not been frustrated. The picture is quite different in this matter. Following the rational in *Bahle* to its logical conclusion, the notice did not reach the Organized Crime Unit Police, Mthatha for investigation. I do not see how "*the handling of the matter*" by the Provincial Commissioner in collaboration with the SAPS Legal Services and the Mthatha State Attorney translates to the investigation of the claim by the relevant section of the SAPS whose conduct is the subject of the claim.

[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)[8] 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.[9] The reason for the requirement that notice to institute proceedings against a

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[6] *Bahle, supra* at para [11]
[7] Para [15]
[8] *The Minister of Environmental Affairs and Tourism and Another vs Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Another vs Smith* 2004 (1) SA 308 (SCA) para [32]; compare *Standard Bank SA Ltd vs Fobb and Others* 2003 (2) SA 692LC and *Chiliza vs Govender* (20837/14) (2016) ZASCA 47 (31 March 2016)
[9] Column 1 of Schedule 1 to the Public Service Act, 1994 (Proclamation 103 of 1994)

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.[10] 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*[11] wherein the then AD held that in deciding whether there has been compliance with an injuction the object sought to be achieved by the injuction 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)[12] should a discretion, hinging on, *inter alia*,

[10] Section 11 (1) and (2)(g) of the South African Police Service Act 68 of 1995
[11] 1964 (4) SA 638A at 646D
[12] The section accords the court a discretion to condone non-compliance with section 3 (2)(a) if satisfied that-

"(i) the debt has not been extinguished by prescription;

whether the organ of State was not unreasonably prejudiced by the failure to serve the notice on the proper functionary, be exercised.

[21] Courts should also be wary of the danger of relying, without further ado, on case law interpreting the relevant sections of predecessors to the Act. For instance, the written notice that had to be given under section 32 of the Police Act 7 of 1958 was peremptory.[13] The limitation imposed by the section was draconian because in default of the notice no valid claim would come into existence. No condonation ameliorating the harshness brought about by the limitation could be applied for. The current position is different. Much as sections 3 and 4 of the Act are couched in peremptory terms, the harshness resulting therefrom is ameliorated by a litigant's ability to apply for condonation.

[22] I am therefore of the view that before legal proceedings can be launched against an organ of state service of the relevant notice on the head of the department concerned is imperative. In the case of the SAPS service of the notice on some other functionary of the Service may constitute substantial compliance with section 4 (1) (a) only in circumstances where it can be shown that the National Commissioner has been made aware of the existence of the notice. To the extent that *Bahle* is binding on me, the facts in that case are, for the reasons already mentioned, distinguishable from those in the instant matter; in *hoc casu* the notice was not transmitted to and did not reach the affected section of the SAPS (Organised Crime Unit, Mthatha) for investigation.

[23] The special plea, to the extent that the plaintiff's notice was not served in accordance with section 4 (1)(a) of the Act, ought to succeed with the result that the plaintiff is barred from proceeding with the action without first seeking and obtaining condonation in terms of section 3 (4) of the Act. There is no reason why costs should not follow the result.

[24] The following order is made:

(ii) good cause exists for the failure by the Creditor; and
(iii) the organ of State was not unreasonably prejudice by the failure."

[13] *Minister of Police v Mount Currie Motels (Pty) Ltd* 1971 (3) SA 410E

(a) *The defendant's special plea is upheld.*

(b) *The plaintiff shall pay the costs of the action incurred thus far.*

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S M MBENENGE
ACTING DEPUTY PRESIDENT JUDGE
OF THE HGH COURT, MTHATHA

Counsel for the plaintiff	*L Matotie*
Instructed by:	SR Mhlawuli & Associates MTHATHA
Counsel for the defendant:	*M H Sishuba*
Instructed by:	The State Attorney MTHATHA
Heard on:	01 September 2017
Delivered on:	12 September 2017