



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: ☒ YES ☐ NO

(3) REVISED

DATE: 21 December 2016

SIGNATURE: *Hansen*

CASE NO.: 59500/2010

In the matter between:

THE NATIONAL COMMISSIONER

SOUTH AFRICAN POLICE SERVICES

1st Applicant

PROVINCIAL COMMISSIONER

SOUTH AFRICAN POLICE SERVICES

2nd Applicant

and

TSOGILE FOUNDATION SECURITY

SERVICES & TRAINING (PTY) LTD

Respondent

In re:

29/12/2016

TSOGILE FOUNDATION SECURITY

SERVICES & TRAINING (PTY) LTD

Respondent

and

THE NATIONAL COMMISSIONER

SOUTH AFRICAN POLICE SERVICES

First Defendant

PROVINCIAL COMMISSIONER

SOUTH AFRICAN POLICE SERVICES

Second Defendant

JUDGMENT

Jansen J

- [1] I refer to the parties in this application in the manner in which they are referred to in the pleadings.
- [2] This application for leave to appeal relates specifically to the interpretation to be placed upon, and the manner in which the Institution of Legal Proceedings against Organs of State Act 40 of 2002 ("**The Act**"), should be interpreted.
- [3] The facts of this matter are unique in that the alleged non-compliance with the Act was never raised by the defendants when an urgent application was launched against them in 2010; when the matter was referred to evidence; when, on 13 August 2013, Tuchten J rescinded the order referring the matter to evidence and referred the matter to trial and when one of the special pleas was argued (namely non-joinder of the Police). (In fact, the special plea relating to non-compliance with the Act was only introduced in an amended plea after a declaration had been filed as ordered by Tuchten J.)

[4] When Tuchten J on 13 August 2013 referred the matter to trial and lay down the procedure to be followed, the defendants were similarly mum about the provisions of the Act which prescribes a certain procedure to be followed when instituting any legal proceedings. When questioned about this omission, neither the plaintiff nor the defendants' counsel were in a position to contribute to the debate. It was put to them that a court order, which had never been sought to be rescinded, and which prescribes a procedure contrary to the provisions of the Act, for the institution of court proceedings, bound the court hearing this matter. Once again, the parties were at a loss to state what a court should do when faced with such a scenario.

[5] It was as a result of these facts that the court held that the defendants could no longer rely on a special plea (pertaining to non-compliance with the Act) given the defendants' failure to rely on this point for a period of more than three and a half years. The court held that the special plea had become academic.

[6] The further grounds relied upon by the court for not upholding the special plea of non-compliance with the Act, was merely set out for the sake of completeness, as stated in the judgment. ("Lest I err in my analysis above, I turn to the merits of the special plea.")

Requirements for leave to appeal to be granted

[7] An applicant for leave to appeal, as set out by counsel for the defendants, must demonstrate that: -

- *The appeal "would" have a reasonable prospect of success; or*
- *There is another compelling reason why the appeal should be heard.*
(Section 17(1)(a) of the Superior Courts Act 10 of 2013)
- *The decision sought to be appealed against is not one that would have no practical effect or result. (Section 16(2)(a) of the Superior Courts Act 10 of 2013)*

Section 3 of the Act

[8] The plaintiff argued as follows: -

In terms of s. 3 of the Act “no legal proceedings” may be instituted against an organ of state if it is for the recovery of a “debt” unless certain things are in place.

- *First, absent consent given by the organ of state, the creditor must have given the organ of state “notice in writing”. (emphasis added)*
- *Secondly, the notice must contain certain information:*
 - *It must record the intention of the creditor “to institute the legal proceedings in question”.*
 - *It must briefly set out the facts giving rise to the debt and such particulars of the debt as are within the knowledge of the creditor.*
- *Thirdly, the notice must have been given within 6 months from the date on which the debt became due.*

[9] It is inaccurate to state, as counsel for the defendants do, that the court held against the defendants on two bases. The court held against the defendants on three bases. The main ground was that the issue appealed against had become academic. It only referred to the two further issues mentioned in the judgment regarding the merits of the special plea “lest it err(ed)” in holding that the issue appealed against had become academic. (Hence, the main reason why the court held against the plaintiff was because the special plea had become academic.)

[10] In argument, during the hearing of the application for leave to appeal, Mr Hulley SC fairly conceded that at the stage when the special plea regarding non-compliance with the Act was heard by this court, all parties, particularly the defendants, knew which case it had to meet (save to state that the Particulars of Claim were expiable). He thus fairly conceded, on behalf of the defendants, that the appeal had become academic.

[11] For this reason, the court asked the parties to file heads of argument based on section 17(1) of the Superior Courts Act 10 of 2013 which clearly stipulates that when the issue sought to be appealed against will not have any practical effect or result, then leave to appeal should not be granted. The parties were given the opportunity, as prescribed by section 16 of the Act, to make submissions to the Courts on this points in terms of section 16(2)(b) of the Superior Courts Act which reads as follows¹: -

(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

(b) If, at any time prior to the hearing of an appeal, the President of the Supreme Courts of Appeal or the Judge President or the judge presiding, as the case may be, is prima facie of the view that it would be appropriate to dismiss the appeal on the ground set out in paragraph (a), he or she must call for written representations from the respective parties as to why the appeal should not be so dismissed.

(c) Upon receipt of the representations or, failing which, at the expiry of the time determined for their lodging, the President of the Supreme Courts of Appeal or the Judge President, as the case may be, must refer the matter to three judges for their consideration.

(d) The judges considering the matter may order that the question whether the appeal should be dismissed on the ground set out in paragraph (a) be argued before them at a place and time appointed, and may, whether or not they have so ordered—

(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the Courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or

(ii) order that the appeal proceed in the ordinary course.

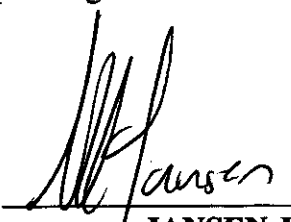
¹ The whole section 16(2) is quoted for ease of reference

- [12] Nothing has been placed before me in the written submissions which persuaded me that my finding that the issue of whether the proceedings should have been preceded by a letter in terms of the Act had become academic, is erroneous.
- [13] In the instant case, the appeal was against the entire judgment. As stated, more issues were dealt with in the judgment than the issue whether the special plea had become academic. It was during argument before me, and as a result of the concession made by the advocate for the defendants, that written submission were called for in terms of section 16(2)(b) of the Superior Courts Act 10 of 2013.
- [14] The further question to be asked is whether there are other compelling reasons why leave to appeal should be granted. The answer to this is in the affirmative for the reasons set out below.
- [15] A puzzling aspect of this matter is that the plaintiff never sought condonation for its non-compliance with the Act (even if it were only in an excess of caution as it contended that it had complied with the Act). That would have done away with the special plea given that the defendants conceded that they were fully appraised of which case they had to meet. The fact that the Act clearly stipulates that non-compliance therewith can be condoned, would indicate that absent an application for condonation, non-compliance with the Act would be fatal.
- [16] Another aspect which requires careful scrutiny, is whether compliance with the Act is still obligatory when a defendant has, by its conduct, indicated that it does not seek to rely on the Act. Non-reliance on the Act for a considerable period of time coupled with setting out its defence in full, would indicate that a defendant has given its tacit consent to non-compliance with the Act (as envisaged by the Act). This question is intertwined with the Constitutional prescript of access to the Courts for litigants.
- [17] Further, it is also important to establish, as a legal concept, whether the word "debt" is used in the Act merely to refer to damages in the ordinary sense of the word or whether, by now, the jurisprudence has developed to a point where the term has a wider connotation (particularly in a case where the doors of a court may be shut on a litigant as a result of a strict interpretation of the term).

[18] Because of the vast number of cases brought against organs of the State on a daily basis, it is in the interests of justice that clarity be obtained on these issues.

[19] For these reasons, I further hold that there are compelling reasons why a full court should pronounce on these issues.

[20] Taking into considerations that submissions have already been called for in terms of section 16(2)(a) read with section 17(1)(b), leave to appeal is granted and the matter is referred to a full court of this division.



JANSEN J
JUDGE OF THE HIGH COURTS

For the Plaintiff Advocate JGW Basson (083 272 7899)
Instructed by Maluleke Msimang & Associates (012 323 3832) (Ref. No. Mr Matlala/RJ/CIV.1584)

For the Defendants Advocate G I Hulley SC and Advocate T Hutamo (083 558 0823 / 011 282 3700)
Instructed by The State Attorney (012 309 1579) (Ref No. 6519/2010/Z23)