**THE HIGH COURT OF SOUTH AFRICA**
**MPUMALANGA DIVISION, MBOMBELA M AIN SEAT**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

**07 December 2021**
DATE

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SIGNATURE

**CASE NO: A21 / 2021**

In the matter between:

**MINISTER OF POLICE** **APPELLANT**

and

**VELLAR MTUNGWA** **RESPONDENT**

**Coram:** RATSHIBVUMO J & GREYLING-COETZER AJ

**Heard**: 26 NOVEMBER 2021

**Delivered**: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10H00 on 07 December 2021.

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# JUDGMENT

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**RATSHIBVUMO J**

*Background.*

[1]. This is an appeal against the dismissal of a special plea by the Bushbuckridge Magistrate Court (court *a quo*). In a delictual claim brought against the Appellant by the Respondent, the Appellant raised a special plea citing non-compliance with section 4(1) of the Institution of Legal Proceedings Against Certain Organs of State Act, no. 40 of 2002 (the Act).

[2]. It was common cause that the Respondent served a notice of its intention to institute an action against the Appellant on the office of the National Commissioner and not the Provincial Commissioner of Police. Before the court *a quo*, the Appellant (then the Defendant) argued that the claim against it should be dismissed with costs in that the Respondent (then the Plaintiff) did not serve a notice of its intention to institute legal proceedings against him on the offices of the Provincial and the National Commissioner of Police as required by the Act. The argument presented before the court *a quo* by the Respondent was to the effect that there was no legal provision in the Act that requires service on both offices. According to the Respondent, the legal provision in the Act was to the effect that such notice should be served on the office of the Provincial or the National Commissioner of Police.

[3]. The court *a quo* handed down its judgment without expressing what it found to be the exact provisions in the Act although it indicated that it looked into the statutory provisions "at length." This I find peculiar especially because the legal representative for the Respondent had accused Mr. Mashego who appeared for the Appellant to be deliberately misleading the court as he lied about what the statutory provision was. He so believed in his argument that he even informed the court that he was too emotional to proceed with the argument. It took the court to beg him with emotional healing words that easily wipe the teary eyes dry, for him to find courage to proceed, albeit still grumbling about how the court was being misled.

[4]. On appeal, the statutory provisions were no longer contentious as the legal representative for the Respondent conceded in the heads of argument filed, that when he argued before the court *a quo*, he had not familiarised himself with the latest provisions of the Act. His argument, so he says, was based on the old legal provision. Strangely, that is how far his concessions went. One would have expected him to make a remark on why then should the appeal be dismissed with such a strong concession that forms the backbone of his opposition to the special plea and thereby, the appeal. Lastly, one would have expected of him to have apologised or withdrawn the demeaning words he levelled against his learned friend whose only crime was to be up to date with the law.

*The law.*

[5]. The relevant sections of the Act provide as follows:

> "**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-

(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

(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) …

(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-

(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;

(b) …" [My emphasis].

[6]. The provisions for the service of the notice on the Commissioner of Police was introduced by section 32 of Act no. 8 of 2017 and was operative with effect from 02 August 2017. The alleged incident on which the claim by the Respondent emanates, took place on 20 March 2018. There is no doubt that that the Respondent was obliged to follow the above statutory provisions. The Respondent was well within its rights to bring an application for condonation for failure to fully comply with the requirement to serve a notice on both the provincial and national office of the Commissioner of Police. The Respondent did not do so most probably because her legal representative did not even know that it was not in

compliance. There is however no justification for that as the special plea was properly pleaded before the matter was set down for hearing, allowing the legal representatives enough time to consider and research the issue.

*Before the court a quo.*

[7]. The court *a quo* was also mindful that there was no application for condonation before it. Notwithstanding aforesaid, the court *a quo* proceeded to adjudicate the matter on the basis of a condonation, asking questions relevant to a condonation application, such as whether anyone would suffer prejudice if the special plea was dismissed and whether there was a good cause for not fully complying with the Act. [1] This court finds that the court *a quo* misdirected itself in applying the test for condonation while none was before it.

[8]. It was a further misdirection to hold that since the Appellant was represented in court, it meant that it was notified or that the notice served its intended purpose. Surely the Appellant, like any other defendant was represented in court because summons was issued against it. The notice issued in terms of the Act is not a substitute for the summons. The declared purpose of the Act, as stated in its preamble, is to regulate and harmonise periods of time within which to institute legal proceedings against certain organs of State and to give notice of such proceedings.[2] This process allows the particular organ of State time to investigate the claim and decide on whether to settle, without incurring legal costs. Just because both parties are before court does not entitle one party to ignore the prescripts of an act especially where the non-compliance has formally been pleaded.

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[1] See *Madinda v Minister of Safety & Security* 2008 (4) SA 312 (SCA) and *Minister of Police and Another v Yekiso* 2019 (2) SA 281 (WCC).
[2] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 176.

[9]. The court *a quo* also appeared not to be alive to its limited jurisdiction when it introduced the "access to court" principle as a reason to dismiss the special plea. As indicated already, there was no condonation application before the court. Further to this, the court *a quo*, suggested that it would ignore any legislative provision that is not in line with the constitution on access to courts.[3] In so doing it seemed to be oblivious of the fact that it lacked the inherent jurisdiction and that as a creature of the statute, its powers are limited to those provided by the empowering statute. In assuming such powers, it ignored the constitutional provision that bars it from inquiring into the constitutionality of a legislation. The Constitution provides,

> "Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President."[4]

[10]. Presuming that the court *a quo* had the jurisdiction to inquire into the constitutionality of the legislation as it envisaged; to require full compliance with the prescripts of the law cannot be debarment to access to the courts. This is so especially when a provision exists for those who fail to comply, to apply for condonation.

[11]. The last misdirection by the court *a quo* was when it held that "the courts were not made for the laws, but the laws for the court." This may have been a confusion with the principle to the effect that "rules exist for

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[3] Section 34 of the Constitution of the Republic of South Africa provides,
"**Access to courts.**
Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."
[4] Section 170 of the Constitution of the Republic of South Africa.

the court, not the court for the rules."[5] The Court *a quo*'s approach suggests that the courts can ignore a law for all practical purposes. Courts are to interpret and uphold the law, and not to ignore it.

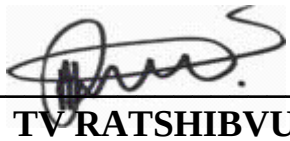
[12]. It follows from the above that the wrong test was applied when the special plea was dismissed. With the concessions made by the Respondent, all that remain in the heads of argument are reasons why a condonation should be allowed. But this is not a condonation but an appeal on whether special plea on non-compliance should have been upheld or not.

[13]. It follows therefore that in light of the above, I propose the following order:

[13.1] Appeal is upheld with costs.

[13.2] The order of the court *a quo* is set aside and replaced with the following:

[13.3] The Plaintiff's claim is dismissed with costs.



**TV RATSHIBVUMO**
**JUDGE OF THE HIGH COURT**

I agree

**D GREYLING-COETZER**
**ACTING JUDGE OF THE HIGH COURT**

[5] *Eke v Parsons* 2016 (3) SA 37 (CC) at 53A–D.

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| **DATE HEARD** | **: 26 NOVEMBER 2021** |
| **DATE OF JUDGMENT:** | **: 07 DECEMBER 2021** |
| **FOR THE APPELLANT** | **: ADV P NONYANE** |
| **INSTRUCTED BY** | **: STATE ATTORNEYS - PRETORIA**<br>**C/O MASHEGO ATTORNEYS**<br>**NELSPRUIT** |
| **FOR THE RESPONDENT** | **: MR. EE SITHOLE** |
| **INSTRUCTED BY** | **: EE SITHOLE ATTORNEYS**<br>**C/O NM MABUNDA ATTORNEYS**<br>**NELSPRUIT** |