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: 4 March 2016

SIGNATURE: .....

CASE NO.: **59500/2010**

In the matter between:

4/3/2016

TSOGILE FOUNDATION SECURITY SERVICES Plaintiff

and

THE NATIONAL COMMISSIONER
SOUTH AFRICAN POLICE SERVICES First Defendant

PROVINCIAL COMMISSIONER
SOUTH AFRICAN POLICE SERVICES Second Defendant

JUDGMENT IN RESPECT OF THE SPECIAL PLEA RAISED BY THE DEFENDANTS

JANSEN J

1. In this trial, the defendants plead that the plaintiff's claim relates to a debt as envisaged in terms of the provisions of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 ("**the Act**").

2. It was pleaded as a special plea that in terms of section 3(1) of the Act, no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question notice in writing of his or her intention to institute the legal proceedings in question.

3. It was further pleaded that in terms of section 3(2)(a) a notice must be served on the organ of state within six months from the date upon which the debt became due.

4. It was pleaded that the incident took place in 2009, no letter of demand was sent to the first defendant within six months as required by the Act, and that the time for service of such a letter of demand had lapsed.

5. It was further pleaded that the plaintiff did not request consent from the first defendant nor sought condonation from a court for non-compliance with this provision of the Act.

6. Hence it was pleaded that the plaintiff was barred from instituting legal proceedings.

The history of the matter

7. It is emphasised that this matter, or peripheral matters such as an application to compel discovery, served before this court on five previous occasions.

8. The matter commenced by way of an urgent application. The founding affidavit was served on 19 October 2010. The answering affidavit was deposed to on 2 November 2010. As long ago as 2 November 2010 Makgoba J referred the matter to evidence.

9. On 30 April 2013 Kubushi J dismissed a point *in limine* which was argued relating to non-joinder of the Minister of Police.

10. On 13 August 2013 Tuchten J rescinded the order made by Makgoba J and referred the matter to trial.

11. The declaration was served on 13 September 2014 and the defendants' amended plea was served on or about 25 April 2014.

12. What is evident from what is set out above is that since receipt of the application on 19 October 2010 and the filing of its answering affidavit on 2 November 2010, the defendants knew exactly what the plaintiff's cause of action was and never argued *in limine* that the requisite notice period prescribed by the Ac had not been served.

13. Even when the point *in limine* regarding non-joinder was argued before Kubushi J, (and dismissed) the point *in limine* regarding non-compliance with the Act was never raised.

14. Given the rationale for the Act, namely to give the State, an entity with a plethora of divisions and arms, the time to investigate a claim for a debt (which is interpreted to mean "damages") the respondent can hardly be heard to say that it does not know which case it has to meet. By its conduct, it waived any reliance on section 3(1) and (2) of the Act.

15. It had full knowledge of its right to rely on the provisions of the Act, but refrained from doing so for close on three and a half years, when the urgent application instituted. Instead, it filed its answering affidavit and plea to the declaration.

16. In the premises, the defendants can no longer rely on this point, which has become academic at this point in time. They could have raised the point at any stage on the previous occasions when the matter was before court. It failed to do so. In any event preparations for the trial proceeded, discovery was made and pre-trials were held, which demonstrates that the defendants knew full well which case it had to meet.

17. For this reason alone, the special plea should be dismissed.

18. Lest I err in my analysis above, I turn to the merits of the special plea as argued.

The plaintiff's plea to the special plea of the defendants

19. The plaintiff's reply to the special plea was that it received a letter of termination of services and instructions from the defendants on 12 May 2009. This letter read as follows: —

- ***Following conversation between Directors Ngobeni and Marais about the security guards on 2009-05-12 bears reference.***

- ***You are hereby informed to remove all the guards from all police stations gates under Phalaborwa cluster with immediate effect.***

- ***This office has realised that the deployment of the guards at various police stations did not receive a prior blessing from the provincial management and therefore the removal of such staff becomes imminent.***

20. On 5 August 2009, the plaintiff addressed a letter of demand to the Legal Services at the Head Office of the South African Police. Receipt of the letter of demand was confirmed on 5 August 2009 by way of a letter.

21. The plaintiff's letter of demand, dated 5 August 2009, reads as follows: —

- ***My client successfully tendered for the rendering of Security Services for the SAPS for a period of 3 years in respect of the Roodepoort and Phalaborwa areas. This was confirmed on 31 March 2009 by your Director F. Mashika under your reference number 19/1/9/1/143TP(07).***

- *As requested, Mr J. Modiba (representing my client) approached all the station commissioners within the said areas and agreed on their specific requirements in terms of the accepted tender.*

- *Thereafter, specified quotations were handed to the station commissioners for their final acceptance and that was done by each of them, in terms whereof, my client had to commence with the rendering of the agreed services on 1 May 2009 and do so for a period of 3 years.*

- *My client duly complied with its obligations as contractually agreed upon and is still doing so in respect of the Roodepoort area.*

- *However, my client was informed by the station commissioners of Phalaborwa Snr Supt MD Selepe, to terminate the rendering of services at the end of May 2009, the reason being that no funds are available.*

- *This lead to the situation where my client was compelled to cease the rendering of services in the Phalaborwa area on 31 May 2009.*

- *In view of the aforesaid, the following is put on record:*
- *My client has a valid and legally binding contract with the SAPS to render security services on an agreed basis in the Phalaborwa area.*

- ***In fact, it did that for the month of May 2009 and is entitled to compensation as is reflected in the invoices forwarded to the station commissioners in question.***

- ***Furthermore, my client is entitled to have the contract enforced for the remainder of the 3 years period as agreed upon.***

- ***Therefore, should my client not immediately be compensated for the services rendered during May 2009 and its position be restored based upon the existing contract referred to above, the High Court will be approached on an urgent basis for the necessary relief to protect my client's rights and interests in this regard. This will obviously lead to substantial legal costs which will also be recovered from you.***

- ***Should my Client's demands not be complied with by 16:00 on 6 August 2009, I will have no alternative than to approach the court on the basis referred to. I trust, however, that litigation can be avoided and look forward to your URGENT response.***

22. From the letter of demand it is clear that the plaintiff insisted on specific performance of the agreement.

23. Two further special pleas relating to the alleged prescription of the plaintiff's action and non-joinder of the Minister of Police were also included in the defendants' plea.

24. The second special plea was met by the plaintiff stating that the current proceedings were initiated through an urgent application during December 2010, where both

defendants were represented by counsel. The claim had therefore clearly not prescribed. Regarding the third special plea (non-joinder), the plaintiff replicated that on 29 April 2013 the defendants raised the self-same plea as a point *in limine* which was dismissed by the court on 30 April 2013, and that this point had thus been finally adjudicated upon.

25. During the hearing before me, the first special plea relating to non-compliance with the Act was argued at length.

26. It is correct to state that the plaintiff's declaration, as currently formulated, indicates that the plaintiff was paid for the security services rendered to the defendant(s) for the month of May 2009 only (in the amount of R221 285.99) which amount was paid in November 2009.

27. The declaration reads as follows: —

> ***"Due to the wrongful cancellation and termination of the security services agreement the Plaintiff suffered damages for wages not paid due to breach of an employment contract with the security personnel employed by the Plaintiff to perform the services at the various police stations in Phalaborwa for a period of one year."***

28. Amounts are then sent out which are awards which were made by the CCMA.

29. It is also pleaded that the plaintiff suffered a loss of income or profit due to the cancellation of the security services agreement in the amount of R 4 320 983.55.

30. It is clear that the latter amounts are damages, calculated in a certain way.

31. The rationale for the provision of the Act is, as stated, to provide for the State to be forewarned of actions or applications to be brought against it timeously in order to assess its position because the State consists of so many entities, and has so many arms. This was pertinently held in the Constitutional Court case of ***Mohlami v Minister of Defence*** **1997 (1) SA 124 (CC).**

32. The definition of ***"debt"*** in the Act, which came into operation on 28 November 2002, reads as follows: —

> **'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;***
>
> **'fixed date'** ***means the date of commencement of this Act;***

33. Thus "a debt" is simply the liability on the part of an organ of state to pay damages, as was held on ***Thabani Zulu and Co (Pty) Ltd v Minister of Water Affairs and Another*** **2012 (4) SA 91 KED at 94 H – 97 A.**

34. This rationale can readily be understood. It is easy for the State to ascertain the facts where, for example, the amount claimed is a specific amount payable in terms of a

contract, as was held in ***Nicor IT Consulting (Pty) Ltd v North West Housing Corporation*** **2010 (3) SA 90 (NWM).**

35. However, when damages are claimed arising from any cause whatsoever, the State must rely on the evidence of witnesses, documents and the like and has to be pre-warned in order to garner and preserve evidence and identify witnesses.

36. It was emphasised in written submissions to the court that the plaintiff's counsel had, from the inception of the case and during his opening address, submitted that the special plea relating to the Act could not be adjudicated upon in *vacuo* without vital evidence being advanced.

37. On the merits, the plaintiff pleaded that the tender contract, which was not in issue, required an official order to be placed on the plaintiff for the condition of specific security services before it could perform such services. This fact was denied by the defendants. It was argued by the plaintiff that, in any event, the special plea meant that the defendants bore the onus in respect thereof. This submission is clearly accurate.

38. In argument, the defendants' counsel did not respond to these submissions but simply argued that there had been no compliance with the Act.

39. The plaintiff's counsel took the court through the correspondence which was exchanged between the parties from May to November 2009. It was submitted that the court would be in a position to ascertain whether the letter of 4 August 2009 constituted the requisite notice required by the Act (and not a letter of demand as contended by the defendants' counsel) by way of oral evidence.

40. The defendants' argument that "the letter of demand" cannot constitute a notice of indented legal proceedings as envisaged in section 3(1)(a) is without merit. The letter of 4 August 2009 complies with the provisions of section 3(2)(b) in that it sets out the facts giving rise to the debt and such particulars of the debt as were within the plaintiff's knowledge. The plaintiff also states that it will institute legal proceedings if its demands are not met.

41. The point was taken by the defendants' counsel that in its reply, the plaintiff did not specifically plead that the Act is not applicable, and merely referred to its letter dated 4 August 2009. It is trite that where issues are denied it is not necessary to file a reply because joinder of issue operates as a denial of every material allegation of fact in the pleading upon which issues are joined as contemplated by Rule 25 of the Uniform Rules.

42. One must also keep in mind the provisions of section 34 of the Constitution, namely the need to protect the right of access to the court.

43. Hence, where an organ of state in fact knows precisely what the cause of action is, the State's right to be warned of contemplated legal proceedings, has to be weighed carefully *vis-à-vis* a plaintiff's right to access to courts. In the case of ***Zulu*** referred to above, the court held that notice in terms of section 3 was not called for where the cause of action related to agreed fees payable to the plaintiff by the erstwhile Department of Water Affairs. A claim for arrear rental and other charges was similarly held not to be a "debt" as defined in the Act in the case ***of Director-General, Department of Public Works v Kovacs Investments 289 (Pty) Ltd*** **2010 (6) SA 646 (GNP) at [10] to [12].**

44. It was argued by the plaintiff that it would be clear from oral evidence that the damages now claimed by the plaintiff are in lieu of specific performance, which fact could not be proved without evidence relating to both the special plea and the merits of the case. It was argued that the letter of 4 August 2009 complies with the provisions of section 3 of the Act.

45. The plaintiff's reasoning is in line with the case law of the Supreme Court of Appeal such as ***Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*** **2014 (2) SA 494 (SCA)** which requires a written document to be read within context. It would also address the thorny issue of whether the damages claimed are actually in lieu of specific performance in the case of a breach of contract.

46. In ***Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*** **1915 AD 1 22**, it was stated:

> ***The agreement was not one for the sale of goods or for a commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact – the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party.*** (emphasis added.)

47. It was also held in the case of ***Nkata v First Rand Bank Limited and Others*** **2014 (2) SA 412 (WCC)** at paragraph [39] that: —

> ***"In the case of the loan of money, there may not be a material difference between the monetary amount claimable by the lender upon cancellation on the one hand, and by way of specific performance of the accelerated debt on the other, but conceptually there is a distinction between the two cases."***

48. Thus, it was argued that the damages now claimed by the Plaintiff was his "expectation interest" in terms of the law of contract. In ***Trotman v Edwick 1951 (1) SA 443 (J) at 449 B – C*** it was held that: —

> ***"A litigant who sues on contract sues to have his bargain or its equivalent in money or in kind."***

49. The plaintiff argued that it was not claiming reliance interest (to be placed in a position in which it would have been if it need never entered into a contract) nor restitution interest (which may overlap with reliance interest). It was claiming damages in lieu of specific performance.

50. These contractual issues are difficult to resolve without oral evidence.

51. The following was stated in the defendants' heads of argument:

> ***"The plaintiff's claims are not for payment of certain sums of money in respect of which the defendants undertook to pay in terms of a contract. If***

this was the case, which is not, it would not have been unnecessary for the plaintiff to have served the defendants with a notice in terms of the Act. It is apparent and unambiguous from the reading of the plaintiff's particulars of claim that the plaintiff did not plead specific performance for payment pursuant to a written contract in respect of which the defendants undertook to make such payments. Clearly, the plaintiff's claims are for damages within the meaning of debt as defined in section 1 of the Act."

52. This submission by the defendants disregards the tortuous history of the matter and that an urgent application was brought in 2010 after the letter of 4 August 2010 had been sent to the defendants. It also disregards the Supreme Court of Appeal's dictate to the effect that a written document must be construed purposively and must be contextualised.

53. The defendants pleaded that in terms of the contract it owed the plaintiff nothing as it had not placed official orders on the plaintiff. The plaintiff avers in its pleadings that the final quotation prepared by the plaintiff and signed by the defendants served as an official order, for a three-year period from May 2009. The plaintiff further pleaded that in order to perform the services required from it, it had to employ personnel, purchase equipment and obtain obligatory personal liability insurance.

54. According to the plaintiff, the parties entered into the agreement on the basis of the following facts: —

- ***"The Plaintiff would deliver the security services for a period of 3 years to the Phalaborwa Police clusters.***

- ***The Plaintiff had to enter into employment contracts with employees to render the security service to the Defendants and these employees would have a claim for dismissal in terms of a contract should the employment contract end prior to the period of employment.***

- ***The Plaintiff would earn a profit each year from the 3 year contract, and the Plaintiff would suffer a loss of profit should the contract be terminated prior to the expiry of the 3 year contract period.***

- ***The parties were aware that the security contract in Phalaborwa was exactly the same and on the same measure as the security contract entered into between the parties for the Roodepoort police clusters in terms of the same bid and was in fact a back to back contract."***

55. The defendants, very importantly, stated the following in their heads of argument: —

> ***"The plaintiff's claim, if any, would be for damages arising from the alleged breach of contract. In any event, the defendants deny that there was such termination of the contract.***
>
> ***The defendants' case is that there was no official order issued to the plaintiff which would have required it to render the services. The defendants are therefore not liable for any damages alleged to have been suffered by the plaintiff."***

56. From the defendants' own heads of argument it is clear that there is a dispute regarding the nature of the contract entered into and whether it had even been breached.

57. If this is the case, as is very clear from the defendants' heads of argument, the defendants cannot state whether there was or had to be compliance with section 3 of the Act, without traversing the terms of the contract by way of oral evidence.

58. This supports the plaintiff's argument that the special plea is inextricably intertwined with the merits of the case.

59. It was also argued on behalf of the defendants that there was no notice to the second defendant and that the case against it should be withdrawn.

60. It is unclear from the declaration why the second defendant was joined.

61. Although, *prima facie,* there may be merit in the defendants' argument that the plaintiff is claiming damages, there may, *prima facie,* also be merit in the plaintiff's argument that, in effect, it is claiming "expectation interest". This depends entirely on the terms of the contract and the circumstances in which the 4 August 2009 letter was written.

62. Most importantly, the court cannot lose sight of section 34 of the Constitution. The letter of 4 August 2009 indicates what the plaintiff's cause of action is. As stated, section 3 of the Act was clearly never relied upon by the defendants, otherwise the plaintiff would have pleaded that this issue has finally been adjudicated upon as it did in relation to the point *in limine* regarding the non-joinder. There can no longer be any

prejudice to the defendants whatsoever if there were, indeed, no compliance with the Act.

63. It is also significant that the court may condone non-compliance with section 3 on application if it is satisfied in respect of certain issues. Section 3(4) provides as follows: —

> ***"(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."***

64. It also bears mention that it is clear from the pre-trial issues that the defendants sought to have the matter referred to oral evidence and not the plaintiff.

65. In view of what has been set out above, it is held that the letter of 4 August 2009 constitutes compliance with section 3 of the Act.

66. Given the fact that the onus in respect of the special plea rests on the defendants, and that the court invited the defendants to lead evidence regarding the circumstances surrounding it, which invitation was summarily declined by counsel for the defendants, they have failed to prove their special plea.

67. In the premises, the following order is made: —

Order

The defendants' first special plea regarding the non-compliance with the provisions of the Institution of Legal Proceedings against Certain Organs of the State Act, No. 40 of 2002, is dismissed with costs.

MM JANSEN J

JUDGE OF THE HIGH COURT

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 Hutamo** (083 558 0823 / 011 282 3700)

Instructed by **The State Attorney** (012 309 1579) (Ref No. 6519/2010/Z23)