**IN THE HIGH COURT OF SOUTH AFRICA**
**MPUMALANGA DIVISION, MIDDELBURG**
**(LOCAL SEAT)**

**Case No: A02/23**

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|---|---|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |
| [redacted] | 30/05/2024 |
| ... | …….. |
| SIGNATURE | DATE |

**In the matter between:**

**DR JS MOROKA LOCAL MUNICIPALITY** **APPELLANT**

**And**

**REVERENCE BAPHELILE JOHANN SIBIYA** **RESPONDENT**

*Coram:* **Phahlamohlaka AJ *et* Ratshibvumo ADJP**
*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 30 May 2024.*

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**JUDGMENT**

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**PHAHLAMOHLAKA AJ**

**INTRODUCTION**

1. This is an appeal against the judgment and order of the Siyabuswa magistrate's court (court *a quo*) handed down on 15 December 2022. The appellant was cited as the respondent in the court *a quo* and the respondent was the applicant.

2. The court *a quo* made the following order against the appellant:

    *1.1 that the applicant's noncompliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002(the Act) as amended is condoned.*

    *1.2 the applicant is granted leave to proceed with the main action.*

    *1.3 the respondent's special plea of prescription is dismissed.*

    *1.4 costs to stand over.*

3. The respondent issued summons in the magistrate's court for a claim for damages against the appellant. The appellant raised two special pleas, namely the first being that of prescription and the second being that the respondent failed to comply with the provisions of section 3 of Act 40 of 2002.

4. In order to deal with the special plea of noncompliance with section 3 of Act 40 of 2002, the respondent filed an application for condonation for noncompliance and for leave to proceed with the action to be granted. The appellant opposed the application and ultimately the court *a quo* granted it.

5. However, in the court *a quo*, the parties only dealt with and argued the application for condonation in respect of noncompliance with the provisions of section 3 of Act 40 of 2002.

**BACKGROUND**

6. According to the summons, on or about 24 October 2014, the appellant awarded the respondent the right to occupy Stand 1036/2 Siyabuswa “B”. During 2014 the respondent commenced with the construction of a church on that land. On 17 April 2015, while the construction was in progress, the appellant, wrote a letter instructing the respondent to stop the construction. The reason furnished was that the nearby Primary school claimed ownership of the stand. Later on, the appellant caused the development on the property to be demolished.

7. During 2015 the respondent claimed compensation from the appellant for the damages suffered as a result of loss resulting from the demolition. On 19 April 2019 the respondent received correspondence from the appellant stating that the matter was receiving attention, and it has been referred to Council and the feedback would be given to the plaintiff during July of 2018. The appellant never came back to the respondent in July 2018 as promised. On 17 January 2019, the respondent re-notified the appellant for its claim for damages in the amount of R 250 000.00(Two hundred and fifty thousand Rand) for the losses incurred as a result of the demolition.

8. The respondent issued summons against the appellant on 14 April 2021. As alluded to earlier, the appellant raised a special plea which is the subject of the current proceedings.

**GROUNDS OF APPEAL**

9. The appellant raised the following grounds of appeal:

6.1. The learned magistrate erred in dismissing the special plea of prescription, as this special plea was not before the Court for adjudication and the learned magistrate had no power to dismiss it.

6.2 Insofar as the learned magistrate found himself to be satisfied, for the purpose of section 3(4)(b) of Act 40 of 2002:

6.3 that the debt had not been extinguished by prescription, he erred, as there was no evidence before the court that could militate against a finding that the debt had been extinguished by prescription.

6.4 that good cause existed for the respondent failure to give notice in terms of Act 40 of 2002, timeously or at all, the learned magistrate erred, since:

6.5 the respondent gave no explanation for his failure; and/or

6.6 the explanation given by the respondent did not deal with facts, but rather with incorrect legal conclusions; and / or;

6.7 the legal conclusions stated by the respondent were vitiated by material errors of law and could not negative a finding that the debt had prescribed.

6.8 the appellant had not been unreasonably prejudiced by the respondent failure to give notice timeously, the learned magistrate erred, since the only facts before the court dealing with prejudice were those stated by the appellant, and the respondent did not contest these facts.

6.9 Insofar as the learned magistrate purported to exercise a discretion to grant condonation without being satisfied of the three facts in subsections 3(4)(b)(i), (ii), and (iii) of Act 40 of 2002, he erred.

10. The appellant raised further supplementary grounds of appeal after receiving reasons from the learned magistrate. I am not intending to list those because it is a long list, but I will deal with them.

**EVALUATION**

11. It is now settled law that the court of appeal can only interfere with the findings of the court *a quo* if there is a misdirection and those findings were wrong.

12. Although the respondent initially raised two special pleas, what ultimately served before the court *a quo* was only one special plea, that of noncompliance with section 3 of Act 40 of 2002. In dealing with the special plea of prescription and ultimately making an order in respect thereto, the court *a quo* clearly misdirected itself.

13. Section 3 of Act 40 of 2002 makes it a requirement that before legal proceedings for the recovery of a debt may be instituted against an organ of the state, the creditor ought to give the organ of the state in question notice of the creditor' s intended action.

14. Section 3(2) of Act 40 of 2002 is relevant for the purposes of this judgment because the appellant argued that the respondent's claim has prescribed. The subsection provides as follows: "*A notice must-*

*(a) within six months from the date on which the debt became due, be served on the organ of the 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) For the purposes of subsection (2) (a)-

*(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of the state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired in by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge;"*

15. In **Sello v Minister of Police N.O and Another**[1] Sardiwala J correctly said that; "*it is clear from the wording of the section that these requirements must be shown to exist cumulatively and in conjunction with each other. It is also trite law that the applicant bears the overall onus of proving their existence on a preponderance of probabilities."*

16. In *casu,* the appellant had promised to come back to the respondent by July 2018 and thereby, in my view, preventing the respondent from acquiring the knowledge that the debt became due. The respondent could not have anticipated that the appellant would declare a dispute that would require immediate action.

17. The meaning of the term "due" was explicitly defined by Mbha JA in **The Standard Bank of South Africa Limited v Miracle Mile Investments 67 (Pty) Ltd and Another**[2], when he said the following:

"*In terms of the current Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal cause of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the creditor. Thus, in Deloitte Harskins 7 Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutcsh (Pty) Ltd [1990]*

[1] 89077/160 [2022] ZAGPPH 233(13 April 2022) at para 10
[2] (187/2015) [2016] ZASCA 91; 2016 ALL SA 487 (SCA); 2017(1) SA 185 9sca0 (1 June 2016)

*ZASCA 136; 1991 (1) SA 525 (A) at 532 G-H, the court held that for prescription to start running.*

'*There has to be a debt immediately claimable by the creditor or stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately.'*

18. In **Minister of Public Works v Roux Property Fund (Pty) Ltd**[3], the Supreme Court of Appeal said the following regarding the requirements in section 3(4):

" [*17] This court in Madinda v Minister of Safety and Security [2008] ZASCA 34; 2008(4) SA 312 (SCA) para 8, has held that the test for the court being satisfied that the requirements mentioned in section 3(4) are present involves, not proof on a balance of probabilities but, 'the overall impression made on a court which brings a fair mind to the facts set up by the parties. According to the judgment the first of this requires 'an extant cause of action'. Prescription is a mixed question of fact and law. It is not a matter of impression, unlike the questions of good cause and prejudice in other subsections. The court must therefore be satisfied that the claim has not prescribed in order to grant condonation."*

19. The appellant contended that the respondent's claim had prescribed and therefore the court *a quo* misdirected itself by condoning the late filing of the notice in terms of section 3(1) in the circumstances where the claim had prescribed. According to the appellant, neither the respondent's papers nor the court *a quo's* judgment indicates which facts giving rise to the debt were not within the respondent's knowledge on 17 April 2015 and therefore prevented him from giving the notice. In my view, this argument is negated by the fact that fast-forward to 2018 April, the appellant wrote a letter to the respondent advising the respondent that

[3] (779/2019) ZASCA 119 (1 October 2020) at par 17

the matter was receiving attention as it has been referred to Council and that the feedback would be given to the respondent during July of 2018.

20. Interruption of prescription was dealt with in **Public Investment Corporation SOC Ltd v Madibeng Local Municipality**[4], where Sardiwala J, said the following, dealing with the interruption of prescription where the debtor makes a 'without prejudice statement': "[*19] the South African Supreme Court of Appeal has created a new exception to without prejudice rule. In KLD Residential v Empire Eart Investments (1135/2016) 2017 ZASCA 98, the court held that admissions of liability, made without prejudice negotiations, are now admissible for the purposes of interrupting the prescription period in terms of section 14 of the Prescription Act, 1969."*

21. The court *a quo* also dealt with the aspects of good cause and prejudice, as is required by section 3(4)(b) of Act 40 of 2002. The court *a quo*, in my view, correctly found that the respondent had shown good cause for the delay in prosecuting its claim by furnishing an explanation of default sufficiently. The court *a quo* further found that the appellant would not suffer any prejudice because it would still have the opportunity to defend the matter. I respectfully find no fault in this conclusion.

**CONCLUSION**

22. In my view, by making a commitment that the matter was receiving attention, the appellant was acknowledging the debt and by not reverting to the respondent as promised the appellant made the debt to become due. The debt, therefore, became due in July 2018.

23. The court *a quo* correctly found that "... *the clear indication is that this matter of the plaintiff was receiving attention from the defendant. The*

[4] (16611/2010) [2019] ZAGPPHC 213 (4 June 2019) at para 19

*defendant by not immediately giving feedback was buying time or delaying this matter so that this claim might lapse. The defendant contributed a lot in the delay so to raise prescription as a technicality…"*

24. Indeed, the appellant is correct that the special plea of prescription did not serve before the court *a quo*. The court *a quo* should have dealt with prescription in the context of section 3(4), to determine whether the respondent has made out a good case for condonation for the late filing of the notice in terms of section 3(1).

25. However, I cannot find any misdirection by the court *a quo* to grant the respondent condonation for the late filing of the notice in terms of section 3(1). The special plea of prescription will be dealt with at the right time whenever it may be raised and argued properly.

26. Consequently, in my view, the appeal should fail insofar as the granting of condonation for the late filing of the notice in terms of section 3(4). The appeal must succeed in as far as the court *a quo* dealt with and decided on the issue that was not placed before it, namely the special plea of prescription.

27. This brings me to the issue of costs. It is now trite that the award of costs is in the discretion of the court. However, it has been an accepted principle that the successful party must be awarded costs. In *casu*, the respondent is not wholly unsuccessful and therefore, in my view, each party should pay its own costs.

28. For the aforementioned reasons I propose the following order:

(a) The appeal in respect of the granting of condonation for the late filing of notice in terms of section 3(4) is dismissed.

(b) The appeal in respect of the dismissal of the special plea of prescription succeeds.

(c) The order of the court a quo is set aside and replaced with the following:

"(i) The applicant's non-compliance with the provisions of section 3 of Act 40 of 2002 as amended is condoned.

(ii) The applicant is granted leave to proceed with the main action.

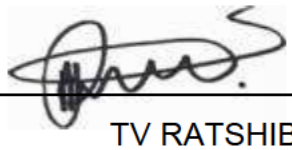
(iii) Costs to be costs in the cause."

(d) Each party to pay its own costs of appeal.

[redacted]

KF PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA

I agree. It is ordered



TV RATSHIBVUMO
ACTING DEPUTY JUDGE PRESIDENT
MPUMALANGA

Judgment reserved on: 01 March 2024
Judgment delivered on: 30 May 2024
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