

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 122/2008

In the case between:

LEBOGANG GODFREY MOGOPODI

Applicant

and

THE MEMBE OF THE EXECUTIVE COUNCIL
OF THE FREE STATE

Respondent

JUDGMENT: EBRAHIM, J

HEARD ON: 8 FEBRUARY 2008

DELIVERED ON: 13 MARCH 2008

[1] At the heart of this opposed application for condonation for non compliance with the provisions of section 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Acts 2002, (Act 40 of 2002) lies the controversy surrounding the question of the employment of the applicant by the respondent at Adult Based Education Training Centres known as Remogo 2 and Remogo 3. The applicant has instituted an action in this

court for payment of remuneration which he claims is owed to him by the respondent in terms of an alleged agreement of employment which he entered into with the respondent in or about February 2003 to perform management and administrative functions at the said training centres.

- [2] Respondent in its plea in the main action has resisted the applicant's claims for remuneration on the ground, *inter alia*, that it has not received proper notice in terms of the applicable statute, namely section 3 of Act 40 of 2002. Central to this application is the applicant's contention that on the 12 September 2005 a notice of the applicant's intention to commence legal proceedings for the recovery of remuneration due to it by the respondent was sent by the applicant to the Director General, Department of Education, Free State Province. Condonation was sought in that letter for failure to comply with the provisions of section 3(2)(a) of Act 40 of 2002, in that the notice was not sent within 6 months of the debt becoming due. Having failed to received a positive response to this letter,

the applicant's attorneys addressed a further letter on the 2 August 2006 to the respondent wherein they advised that they would accept that condonation had been agreed to unless they were informed to the contrary by the 8 August 2006. No such communication was made and on the 19 September 2006 summons was issued against the respondent wherein the allegation was made that the plaintiff (the applicant) has complied with the provisions of section 3 of Act 40 of 2002. In its plea on the 10 November 2006, the defendant (the respondent) pleaded a bare denial in respect of this allegation. Further communication between the parties in respect of this denial ensued during the exchange of further particulars for the purposes of trial as well as during the Rule 37 Conference and on the 21 December 2007 the respondent's attorney addressed a letter to the applicant's attorney advising that he has been unable to obtain instructions regarding condonation and inviting the applicant's attorney to take such steps as he deemed necessary to protect his client's interest.

The present application was then launched by way of urgency on 10 January 2008, for declaratory relief that the applicant has complied with the provisions of section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 2002 (Act 40/2002).

[3] Section 3 of Act 40 of 2002 deals with the giving of Notice of Intended Legal Proceedings against an Organ of State and as follows:

“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 ..

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.”

Section 3(4) provides:

(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.”

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 probability. See PILLAY v KRISHNA 1946 AD 946 at 952 – 953; SOUTH CAPE CORPORATION PTY LTD v ENGINEERING MANAGEMENT SERVICES PTY LTD 1977 (3) SA 534 A at 534 at 548.

- [4] Two issues arise for decision in this application. The first is whether the notice in terms of section 3(1)(a) was actually given. I did not understand there to be any dispute about the fact that the giving of such Notice was peremptory rather than directory and, that being the case, should this court find that no notice was given by the applicant, that would be the end of the matter and the application falls to be dismissed.

Secondly, should notice in fact have been given then, the question arises: Did the applicant satisfy this court of the existence of all three requirements contained in section 3(4)(b) of Act 40 of 2002.

[5] In deciding this first issue it is necessary to have regard to the purported written notice dated 12 September 2005 (annexure F) to the papers in order to establish whether it complies with the requirements contained in section 3(2)(a) and (b) so as to constitute proper notice in terms of section 3(1) of Act 40 of 2002. The letter reads as follows:

“We refer to the above and confirm that we act herein on behalf of Mr Mogopodi. It is our instructions that Mr Mogopodi was employed by yourselves for the period 27 February 2003 to 30 November 2004 at the centre RE MMOGO District of Motheo as a casual.

It is further our instructions that our client for the work that was done by himself filled in the necessary claim forms for payment by yourselves and that dispute demand thereto you refuse to make payment to our client.

Therefor is it our instructions to claim from yourselves payment in the amount of R230 731-03 which is due and owe by yourselves to our client.

Kindly take note that this letter is addressed to yourselves in terms of Section 3 Act 40 of 2002 and should the said amount not be paid to the offices of Kramer Weihmann & Joubert in a

period of 30 (THIRTY) days from this letter of demand the we will continue with action against yourself.

Kindly take note that we are aware of the fact that this letter does not comply with Section 2(A) of the said Act and request as to whether you will agree to condonation thereof seeing in the light of the correspondence between our offices.”

The respondent contends that this letter is not a notice in compliance with section 3 of Act 40 of 2002 in view of the fact that the letter relates to a debt being claimed in respect of the REMOGO Centre and not, as was claimed in the preceding correspondence between the parties and in the subsequent summons, in respect of the Remogo 2 and Remogo 3 Centres, which were separate and distinct from the Remogo Centre. It is apposite at this stage to examine relevant previous correspondence.

Annexure “A” – Letter of Kramer Weihmann & Joubert attorneys addressed to the Department of Education dated 9 December 2004. The letter reads as follows:

“Ons verwys na die bogenoemde aangeleentheid en heg hierby aan afskrifte van ons kliënt se eis dokumente vir u dringende aandag en kennisname.

Dit is ons instruksies dat ons kliënt in beheer is van die Re Mmogo Centre sedert Januarie 2003 en dat hy sedert laasgemelde datum nog geen betaling ontvang het vir dienste gelewer nie. Ons versoek u vriendelik hiermee om dringend aan ons 'n aanduiding te gee op welke datum ons kliënt betaling sal ontvang.

Ons verneem graag vriendelik dog dringend van u in hierdie verband.”

Annexure “B” – Letter from Free State Province to Kramer Weihmann & Joubert Inc dated 20 December 2004. In terms of this letter the receipt of annexure “A” is confirmed:

“Receipt of your letter dated 09 December 2004, regarding the matter referred above, is hereby acknowledge.

Kindly be informed that the Directorate: Legal Services and Labour Relations has referred this matter to the District Office of Education, that is Motheo District, for consideration.

You will be informed of the outcome in the due course.”

Annexure “C” – Letter from Free State Province to Kramer Weihmann & Joubert Inc dated 15 February 2005:

“Receipt of your letter dated 31 January 2005, regarding the above matter, is herewith acknowledged.

Please be informed that according to the report from the District Office of Education: Motheo District, the Department of Education does not owe Mr Mogopodi any salary for the period 2003 and 2004 (**see the report attached**).”

Annexure “D” – Letter from Kramer Weihmann & Joubert Inc to Respondent dated 13 April 2005. The relevant part of this letter reads as follows:

“We refer to the abovementioned matter as well as to your letter dated 15 February 2005 which contents have been noted.

We apologize for the delay herein, but confirm that we have been experiencing difficulties to obtain proper instructions from our client regarding the contents of your letter.

We herewith wish to clarify our client’s position herein and confirm that our client was employed during 2003 and 2004 as centre manager of Remogo Centre.

It is our instructions that our client has completed proper claim forms regarding last-mentioned and was also fully paid regarding his claims for last-mentioned centre as indicated in the annexures of your letter dated 15 February 2005.

It is further our instructions that our client was also centre manager of Remogo 2 as well as Remogo 3 which centres had their own extensions. Last-mentioned is where the dispute arose seeing that our client was never paid for the services he rendered to the last two centres although he rendered his services.

It is further our instructions that our client has properly completed the claim forms for Remogo 2 and Remogo 3, but Khama refused the aforesaid claims forms seeing that it was her view that our client was not entitled to any payment regarding the services he rendered for Remogo 2 and Remogo 3 Centres.

Due to last-mentioned our client has taken up this matter with Mr. Seqebo who indicated to our client that he must submit a full report to Mrs. Khama where after Mr. Seqebo will revert back to our client concerning payment of claims for Remogo 2 and Remogo 3 Centres for the time period 2003 and 2004.

Up until date our client has not received any response and therefore it was his view that his claims were in processing,

seeing that last-mentioned indicated that if there is any problems h would revert back to our client.

We therefore request you to urgently do the necessary investigation regarding our client's claims.

We attach hereto copies of our client's claims forms properly completed by our client.

Your urgent response in this regard will be highly appreciated."

Annexure "E" – Letter from Respondent to Kramer Weihmann & Joubert Inc dated 20 June 2005:

We refer to the above-mentioned matter as well as your letter dated 13 April 2005.

The Directorate: Legal Services and Labour Relations has investigated the matter and we have established that Motheo District does not have any ABET centres that are called Remogo 2 and Remogo 3. The Department of Education confirms that Motheo District has an ABET centre that is called Re Mmogo where your client was employed as centre manager during 2003 and 2004. We deny your client's claim that the Department of Education employed him in other centres besides Re Mmogo.

We submit further that Mr Seqebo denies ever indicating to your client that there was any consideration by him to pay your client for the services your client claims to have rendered at the ABET centres in question. To the contrary, Mr Seqebo informed your client that according to the policy of the Department of Education no one was permitted to open any public centre, satellite centre or extension class without permission from the Head of Department.”

Annexure “F” – Letter from Kramer Weihmann & Joubert to Respondent dated 12 September 2005:

“We refer to the above and confirm that we act herein on behalf of Mr Mogopodi. It is our instructions that Mr Mogopodi was employed by yourselves for the period 27 February 2003 to 30 November 2004 at the centre RE MMOGO District of Motheo as a casual.

It is further our instruction that our client for the work that was done by himself filled in the necessary claim forms for payment by yourselves and that despite demand thereto you refuse to make payment to our client.

Therefor is it our instructions to claim form yourselves payment in the amount of R230 731-03 which is due and owe by yourselves to our client.

Kindly take note that this letter is addressed to yourselves in terms of Section 3 of Act 40 of 2002 and should the said amount not be paid to the offices of Kramer Weihmann & Joubert in a period of 30 (THIRTY) days from this letter of demand the we will continue with action against yourself. Kindly take note that we are aware of the fact that this letter does not comply with Section 2(A) of the said Act and request as to whether you will agree to condonation thereof seeing in the light of the correspondence between our offices.”

- [5] It is common cause between the parties that no debt is owed to the applicant by the respondent in respect of the Remogo Centre, such monies which were due having been paid to applicant by the respondent.

The question is therefore was the Notice dated the 12 September 2005 sufficiently clear so as to identify the particulars of the debt and the facts giving rise to the debt concerned. It is apparent from the letter dated the 12 September 2005 that no mention whatsoever is made of a debt owed in respect of the Remogo 2 and Remogo 3

Centres and no particularity whatsoever of such debt is given contrary to the allegations set out in the particulars of claim at paragraph 7, 8 and 9. I quote from the particulars of claim:

“7.

During **Februarie 2003** Plaintiff was requested by **Seqebo** to perform similar duties at two other adult centers of the Defendant [hereinafter referred to as “**Re Mmogo 2**” and “**Re Mmogo 3**”] on the same terms of the contract.

8.

Plaintiff accepted **Seqebo’s** offer and rendered services to Defendant in respect of **Re Mmogo 2** and **Re Mmogo 3** for the period **February 2003** to **November 2004**.

9.

9.1 Plaintiff rendered the following services in respect of **Re Mmogo 2** and **Re Mmogo 3** from **1 February** to end **June 2003** (agreed hourly rate – **R108.25**):

9.1.1	February 2003	84 hours	R9093.00
9.1.2	March 2003	77 hours	R8335.25

9.1.3	April 2003	94 hours	R10,175.50
9.1.4	May 2003	104 hours	R11,258.00
9.1.5	June 2003	84 hours	R9093.00

9.2 From **August to November 2003** (agreed hourly tariff – **R117.45**):

9.2.1	August 2003	94 hours	R11,040.30
9.2.2	September 2003	101 hours	R11,862.45
9.2.3	October 2003	70 hours	R8221.50
9.2.4	November 2003	84 hours	R9865.80

9.3 From **January to August 2004** (agreed hourly tariff – **R117.45**):

9.3.1	January 2004	84 hours	R9865.80
9.3.2	February 2004	112 hours	R13,154.40
9.3.3	March 2004	112 hours	R13,154.40
9.3.4	May 2004	77 hours	R9043.65
9.3.5	June 2004	189 hours	R22,198.05
9.3.6	August 2004	105 hours	R12,332.25

9.4 From **September to November 2004** (agreed hourly tariff – **R124.70**):

9.4.1	September 2004	168 hours	R20,949.60
9.4.2	October 2004	105 hours	R13,093.50
9.4.3	November 2004	119 hours	R14,839.30
		Total	R217,575.75

[6] The purported notice dated the 12 September 2005, accordingly refers to a cause of action completely at odds and different to that referred to in previous correspondence and in the summons such that it cannot be said that the debt claimed in the purported notice was identifiable by the respondent. In **MATYOBENI v MINISTER OF POLICE** 1979 (1) SA 241 D, Howard J (as he then was) dealt with the question of whether the requirement of the giving of notice in terms of section 32(1) of the Police Act 7 of 1958 was peremptory or not. In deciding the issue he had reason to question the underlying rationale for the requirement of giving of notice to organs of the state of intended legal proceedings and

came to the conclusion that considerations of convenience were the paramount object of the injunction relative to the giving of notice. At p. 244 of his judgment he quotes with approval the dictum of Marais J (as he then was) in **DEASE v MINISTER VAN JUSTISIE** 1962 (2) SA 302 T at 305:

“Dit is m.i. voor die hand liggend dat die kennisgewing voorafgaande aan die dagvaarding ‘n tweeledige doel dien: eerstens, om die verweerder ‘n kans te gee om tydig met die ondersoek aan eie kant van die feite van die geval te begin; tweedens, om die verweerder in staat te stel om vóór die bestelling van die dagvaarding en die aangaan van die regs-koste te besluit of hy die eis sal betaal of ‘n aanbod ter skikking sal maak of die saak sal verdedig. (Sien *Osler V Johannesburg City Council*, 1948 (1) S.A. 1027 (W) op bl. 1031). Indien tydige ondersoek ‘n oorweging agter hierdie bepaling is, sluit dit uiteraard aan by die eerste deel van art. 32 van die Polisie-wet, wat die verjaringstydperk op ses maande stel. Die uitwerking van die voorskrif vir kennisgewing is dat die verweerder nie later as vyf maande na die gebeure wat die skuldoorsaak ten grondslag lê, met sy insameling van inligting en getuienis kan begin nie.”

He goes on to quote Wessels JA in **LABUSCHAGNE v LABUSCHAGNE; LABUSCHAGNE v MINISTER VAN JUSTISIE** 1967 (2) SA 575 A at 588:

“Die rede vir hierdie bepaling – hoewel dit nie noodwendig die enigste rede mag wees nie – skyn te wees dat die verweerder minstens ‘n maand gegun moet word om te besluit wat hom te doen staan waar hy onder die bedreiging van die instelling van ‘n geding staan. Die verweerder moet die geleentheid gegee word om op die in die kennisgewing gestelde eisoorzaak in te gaan, getuienis te probeer bekom, regsadvies in te win en, veral waar die Staat betrokke is, kwessies rakende beleid te oorweeg. Dit is ook voor die hand liggend dat ‘n verweerder gedurende die tydperk van minstens ‘n maand van standpunt kan verander na gelang van veranderde omstandighede. Dit mag ‘n bykomende rede wees waarom die Wetgewer dit goed gedink het om ‘n eiser te belet om sy geding in te stel voor ten minste een maand na die kennisgewing gegee is.”

[7] I am of the view that no reason exists to find that the underlying purpose for the giving of notice in terms of section 3 of Act 40 of 2002 is any different to the reasons

enumerated in these decisions, namely one of convenience in order to assist the particular organ of state to conduct proper investigations into the claim and then to decide whether to make payment or defend the intended action. In the present case the notice given, even on a benevolent construction thereof, was so utterly defective that it cannot be said to have constituted any notice at all of the intended legal suit. In the result the giving of such notice being peremptory, the application must fail on that ground alone. In light of this, it is not necessary for me to consider and decide the issue of condonation in terms of the provisions of section 3(4)(a)(b) of Act 40 of 2002.

[8] Miss Eloff who appeared on behalf of the respondent requested me to grant a punitive cost order against the applicant. In my view no grounds exist in this matter for such an order being made. The delay in bringing proceedings is not one of the grounds for the making of such an order unless accompanied by *mala fides* nor is the failure to comply with the statutory requirements in the

giving of notice of intended legal proceedings to, an organ of state one of those grounds.

[9] The application is dismissed with costs.

S. EBRAHIM, J

On behalf of the applicant: Adv. H. J. Cilliers
Instructed by:
Kramer Weihmann & Joubert
BLOEMFONTEIN

On behalf of the respondent: Adv. Z. Eloff
Instructed by:
State Attorney
BLOEMFONTEIN

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