CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/00

SIAS MOISE — Plaintiff

versus

TRANSITIONAL LOCAL COUNCIL OF GREATER GERMISTON — Defendant

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Intervenor

and

THE WOMEN'S LEGAL CENTRE — Amicus curiae

Heard on : 16 May 2001

Decided on : 4 July 2001

JUDGMENT

SOMYALO AJ:

[1] The plaintiff instituted action in his personal capacity, as well as in his representative capacity on behalf of his minor daughter, Faith Moise, against the defendant for recovery of delictual damages arising out of injuries sustained on 28 April 1998. She was injured while attempting to board a bus, driven at the time by an employee of the defendant acting in the

course and within the scope of his employment. At the time the plaintiff's daughter was 8 years old.

[2] In the Witwatersrand High Court (the High Court), the defendant raised a special plea to the effect that the plaintiff's action was time-barred by reason of his failure to comply with the provisions of section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act[1] (the Act). The plaintiff's replication included an attack on the constitutionality of section 2(1)(a) of the Act as being inconsistent with the provisions of section 34 of the Constitution. After some preliminary skirmishes, the case finally resolved itself into a determination of the constitutionality of section 2(1)(a) of the Act.

[3] At the conclusion of the hearing, the High Court made the following order:

> "(1) The special plea is dismissed with costs, on the basis that the provisions of Section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act No. 94 of 1970 are unconstitutional.
> (2) The finding in paragraph 1 above is referred to the Constitutional Court for confirmation in terms of the provisions of Section 167(5) of the Constitution of the Republic of South Africa Act No. 108 of 1996.
> (3) The Defendant is to pay the costs occasioned by the argument of the special plea.."

1 Act 94 of 1970.

[4] The order declaring the provisions of section 2(1)(a) of the Act invalid was submitted to this Court for confirmation in terms of section 172 of the Constitution and directions for its disposal were given by the President of the Court. However, the plaintiff and the defendant reached an agreement and had no further interest in the matter. Amended directions were then given, notifying the Minister of Provincial and Local Government, the Minister of Justice and Constitutional Affairs (the Minister) as well as the South African Local Government Association of the matter and inviting other interested parties to make representations as to confirmation or otherwise. An amicus curiae, the Women's Legal Centre, supported confirmation and at the request of the Court the Minister appointed counsel to present argument on the question.[2] The Court is indebted to counsel for both the amicus and the Minister for their helpful submissions.

[5] Section 2(1)(a) of the Act provides as follows:

> "Subject to the provisions of this Act, no legal proceedings in respect of any debt shall be instituted against an administration, local authority or officer (hereinafter referred to as the debtor)—
> (a) unless the creditor has within ninety days as from the day on which the debt became due, served a written notice of such proceedings, in which are set out the facts from which the debt arose and such particulars of such debt as are within the knowledge of the creditor, on the debtor by delivering it to him or by sending it to him by registered post . . .".

---

2 Section 8(2) of the Constitutional Court Complementary Act 13 of 1995 makes provision for the Minister to appoint counsel in response to such a request.

[6] The basis of the plaintiff's attack on section 2(1)(a) of the Act and the basis on which the High Court held it to be invalid is that (a) it limits the right under section 34 of the Constitution and (b) this limitation cannot be justified. Section 34 provides as follows:

> "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."

[7] This entails a two-stage enquiry: first whether or not section 2(1)(a) limits the right of access to a court thus protected by section 34 of the Constitution. If it does not, that is the end of the matter. However, if it does, a second enquiry has to be undertaken. That is whether the limitation of the right of access is reasonable and justifiable within the meaning of section 36 of the Constitution. This latter provision and the limitations analysis it requires will be discussed later.

[8] Obviously the question whether or not section 2(1)(a) of the Act limits the constitutional right of access to court and, if so to what extent, depends primarily on the meaning and effect of the section. It is important to examine the Act as a whole as the section "forms part and parcel of a composite scheme . . .".[3] Section 2(1)(b), sometimes referred to as providing an 'investigation or negotiation period', stipulates that after service of the section 2(1)(a) notice, no legal proceedings may be instituted against the debtor before the expiration of a period of ninety days,

---

[3] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at para 10, where this Court had to consider section 113(1) of the Defence Act 44 of 1957.

unless the debtor has in writing denied liability for the debt before the expiration of such period. Section 2(1)(c) places a bar on the institution of proceedings 24 months after the date when the debt became due, while section 2(2)(c) provides that a debt shall not be regarded as due before the first day on which the creditor has knowledge of the identity of the debtor and the facts from which the debt arose.[4]

[9] Section 4 then permits a claimant (styled a creditor) to apply to a court of competent jurisdiction for leave to serve the section 2(1)(a) notice after the prescribed period, on such conditions as the court may deem fit, but subject to the 90 day investigation/negotiation period and the 24-month cut off. The court considering such an application must satisfy itself that—

[4] Section 2(2)(b) makes provision for cases where the debtor intentionally prevents the creditor from coming to know of the existence of the debt and section 2(2)(d) provides for the postponement of the due date by agreement between the creditor and the debtor. Section 3 provides for various exceptions in respect of which the provisions of section 2 do not apply and section 4 permits a debtor to waive its right in the case of non-compliance by a claimant with section 2(1)(a).

(a) the debtor is not prejudiced by the failure;[5] or

(b) by reason of special circumstances, the creditor could not reasonably have been expected to serve the notice within the prescribed period.

[5] For an interpretation of this provision see *Mendelson and Frost (Pty) Ltd v Pretoria City Council* 1977 (3) SA 693 (T) where the court refused to grant leave and *Van Niekerk v Verwoerdburgse Stadsraad* 1987 (4) SA 962 (T) where the court did grant leave.

[10] Special time limits within which litigation has to be instituted and requirements as to notice are a common feature of statutes relating to claims against organs of state, so much so that they were the subject of a special report by the South African Law Commission in October 1985.[6] We are not concerned here with rules as to time limits and extinctive prescription, which have their own well-known rationale. Nor are we concerned with rules relating to the manner or form in which proceedings are to be instituted in particular courts. Here the focus is on special statutory provisions that single out particular kinds of proceedings against specific kinds of defendants and attach special extraneous preconditions to their institution. The object is not to regulate judicial proceedings but to protect the interests of the defendants. The reasons for this category of legislation were conveniently collated in the following terms by the South African Law Commission in its October 1985 report:[7]

> "The circumstances under which the State can incur liability are legion. Because of the State's large and fluctuating work force and the extent of its activities, it is impossible to investigate an incident properly long after it has taken place. . . . The State is obliged by law to follow cautious and sometimes cumbersome procedures. Government bodies operate on an annual budget and must be notified of possible claims as soon as possible. . . . The State needs time to deliberate and consider questions of policy and the possibility of settlements. . . . The State acts in the public interest and not for gain . . . Because public funds are involved the State must guard against unfounded claims. . . . [T]he State

---

6 Report: Project 42: *Investigation into time limits for the institution of actions against the State.* The report lists some twenty statutes making special provision for shorter time periods and/or notice requirements relating to a wide variety of governmental and other public institutions. See also n 8 below.

7 Id para 4.

is an attractive target for unfounded claims."

[11] This kind of provision is quite common[8] and its justification has not changed much in the years since the Law Commission made these comments. The position was summarised by Marais JA in *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse*:[9]

> "The purpose of legislation like this is plain and has been set forth in so many cases that their citation yet again seems unnecessary. In this instance it is to protect a local authority against precipitate citation of it in a lawsuit by a litigant seeking to obtain payment of a debt allegedly due by the local authority. It is aimed at providing a local authority with an opportunity of investigating the matter sooner rather than later when investigations might prove more difficult, of considering its position, and, if so advised, of paying or compromising the debt before becoming embroiled in costly litigation."

[12] However, as this Court pointed out in *Mohlomi*, provisions of this kind requiring notice prior to the institution of legal proceedings have over the years been subject to considerable judicial criticism because they interfere with the right of access to the courts. Didcott J, writing

---

8 Instances cited in para 9 of *Mohlomi* above n 3 were section 343(1) of the Merchant Shipping Act, 57 of 1951; section 90(2) of the Correctional Services Act, 8 of 1959; section 96(1) of the Customs and Excise Act, 91 of 1964; section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 94 of 1970; section 25(1)(a) of the National Roads Act, 54 of 1971; and section 57(2) of the South African Police Service Act, 68 of 1995.

for the Court, drew attention to instances of judicial concern in the following terms:[10]

---

9 1997 (4) SA 613 (SCA) at 624D─E.

10 Above n 3 para 9.

"Over the years some Judges have drawn attention, even so, to the adverse effect on claimants of requirements like those. Innes JA described them in *Benning v Union Government (Minister of Finance)*[11] as '(c)onditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law'. One was thought by Watermeyer J in *Gibbons v Cape Divisional Council*[12] to be 'a very drastic provision and 'a very serious infringement of the rights of individuals'.[13] In *Avex Air (Pty) Ltd v Borough of Vryheid*[14] Botha JA spoke in the selfsame vein of another '(h)ampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts'. And Corbett CJ echoed that comment in *Administrator, Transvaal, and Others v Traub and Others*[15] when he observed that the provision then in question 'undoubtedly hampers the ordinary rights of an aggrieved person to seek the assistance of the courts.'"

To these concerns should be added the comment on the specific provision with which we are concerned here by Harms JA in the majority judgment in *Abrahamse*:

---

11 1914 AD 180 at 185.

12 1928 CPD 198 at 200. There the notice had to be given within the exceptionally short period of seven days after the incident from which the claim arose. One month before suing was the time legislatively specified in the other cases cited in this paragraph.

13 That second passage was quoted with approval by Van Winsen J in the case of *Stokes* (cited in footnote 5) at 425H and by Eksteen J in the one of *Sarrahwitz* (also cited there) at 288G.

14 1973 (1) SA 617 (A) at 621F–G.

"The Act deals with competing interests: those of plaintiffs and those of local authorities. It limits the right of the plaintiff to institute action by requiring notice within a very limited time period after the relevant event. A plaintiff who requires more time may make an application for relief in terms of s 4. The Court has then to weigh up the competing interests . . .".[16]

---

15 1989 (4) SA 731 (A) at 764E.

16 Above n 9 at 633I–J.

[13] The requirement of written notice as a precondition to the institution of legal proceedings is in itself an obstacle to such legal proceedings. If it is considered in conjunction with the "very limited period" of 90 days after the due date,[17] "as part and parcel of a composite scheme", it is apparent that it amounts to a real impediment to the prospective claimant's access to a court. The time period is very short, the notice has to be served on the prospective debtor and it has to contain significant information regarding the occurrence and of the damages allegedly suffered. And, of course, failure to comply with the notice requirement vitiates the claim unless, under section 4 of the Act, a court can be satisfied as to the absence of prejudice to the debtor or the existence of special circumstances exculpating timeous non-compliance.

17 As to which see section 2(2)(b) outlined in n 4 above.

[14] Moreover, the condonation opportunity afforded to a prospective claimant by section 4 does not render the impediment immaterial. The obstacle remains regardless of this potential amelioration of its harshness. This is particularly so if one takes into account that many potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. Many are not even aware of their rights and it takes time for them to obtain legal advice. Some come by such advice only fortuitously. For them a mere 90 days from the commission of the delict within which to serve formal notice on the debtor(s) is, in the words of Didcott J in *Mohlomi*,[18] not a "real and fair" "initial opportunity" to approach the courts for relief.

[15] It should also be noted that section 4 does not afford a defaulting creditor *carte blanche*. The power of a court under the section is confined to extending the period for notice and is by no means open-ended. The jurisdictional criteria for the grant of the indulgence are quite clearly circumscribed and are not mere formalities. As the plaintiff in *Abrahamse*[19] found to his cost, condonation may well be refused despite a hard-luck tale.

[16] Viewing section 2(1)(a) of the Act in the context of the composite scheme consisting of (i) specific notice (ii) within a short period and (iii) with limited scope for condonation for non-compliance, it does constitute a material limitation of an individual's right of access to a court of law under section 34 of the Constitution.

---

18 Above n 3 para 12.

19 Above n 9.

[17] The enquiry must then turn to possible justification. Can the limitation be justified under section 36(1) of the Constitution? That section reads as follows:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[18] It is by now settled law what a limitation exercise under section 36 of the Constitution requires. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[20] the nature, purpose and process of the exercise were explained thus:

> "[33] Although s 36(1) of the 1996 Constitution differs in various respects from s 33 of the interim Constitution its application still involves a process, described in *S v Makwanyane and Another* as the '. . . weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests'.
>
> [34] In *Makwanyane* the relevant considerations in the balancing process were stated to

---

[20] 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 33—5.

include

> '. . . the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question'.

The relevant considerations in the balancing process are now expressly stated in s 36(1) of the 1996 Constitution to include those itemised in paras *(a) – (e)* thereof. In my view, this does not in any material respect alter the approach expounded in *Makwanyane*, save that para *(e)* requires that account be taken in each limitation evaluation of 'less restrictive means to achieve the purpose (of the limitation)'. Although s 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation.

[35] The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose." (Footnotes omitted.)

[19] It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court. It is for this reason that the government functionary responsible for

legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity ― indeed an obligation ― to do so. The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment. Indeed, this is such a case.

[20] The absence of evidence or argument in support of the limitation has a profound bearing on the weighing up exercise, the more so as the parties who chose to remain silent have special knowledge of provincial and local government administration. The local government body directly involved in the litigation opted to make no representations in support of the constitutional validity of the special statutory protection on which it relied on at the trial. Despite the Court's invitation, neither the national government department responsible for provincial and local government, the spheres of government for whose benefit the Act is on the statute book, nor the national association of local government bodies entered the lists on behalf of the impugned provision. Perhaps their conduct ― or inaction ― is due to the facts that were disclosed in affidavits deposed to by the Minister and the Director General in his department when the Minister was asked by the Court to instruct counsel to submit argument on the validity of section 2(1)(a) of the Act. They revealed that the Act as a whole is likely to be repealed shortly. Indeed, had it not been for the current litigation, a Bill[21] which aims to replace the Act and has already been approved by the National Assembly, would probably have become law by now.

---

[21] The Institution of Legal Proceedings Against Organs of State Bill [B 65B―99].

[21] That Bill is based substantially on a draft annexed to the South African Law Commission's report[22] dating from 1985. Several features of the report and of the Bill were alluded to in argument before us, the most significant being that the Law Commission found (and the House of Assembly accepted) that instead of a notice period of 90 days after the relevant occurrence, prospective claimants should be afforded a breathing space of six months to lodge notice of their claims. In addition the Bill expands the scope of and relaxes the requirements for condonation for non-compliance with the notice requirement and is uniformly applicable to all government institutions. In the circumstances the reticence on the part of the governmental invitees when afforded an opportunity to defend such a moribund statute is understandable.

[22] The Bill is not before this Court for evaluation, and it would not be appropriate to express any view on the reasonableness or otherwise of the notice period of six months and the criteria for condonation for which it provides. But we cannot close our eyes to the circumstance that no cogent defence of the existing notice period has been forthcoming. We are moreover entitled, if not obliged, to have regard to the fact that the Minister's affidavit contains an extract from his speech in Parliament when introducing the Bill in which he expressed criticism of the Act and of the notice period. Government does not seriously contend for the validity of section 2(1)(a) and has in the Bill opted for a substantially different scheme than that in issue here. This is an indication that government and the experts advising it believe that a limitation as to the time for

22 Referred to in para 10 above.

giving notice and the criteria for condonation could be less restrictive than that contained in section 2(1)(a) of the Act.

[23] The practical and general policy considerations in support of prior notice of intended delictual claims against provincial or local government bodies also support the notice being sufficiently proximate to the precipitating incident to enable the government body effectively to investigate the claim and evaluate its validity and extent. However, untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom. In the absence of such right the justiciability of the rights enshrined in the Bill of Rights would be defective; and absent true justiciability, individual rights may become illusory. In *Beinash and Another v Ernst & Young and Others*[23] Mokgoro J, on behalf of a unanimous Court said:

> "The right of access to courts protected under s 34 is of cardinal importance for the adjudication of justiciable disputes. When regard is had to the nature of the right in terms of s 36(1)(a), there can surely be no dispute that the right of access to court is by nature a right that requires active protection."

[24] Applying the primary criteria enumerated in section 36 of the Constitution, the active protection of the right of this particular category of prospective litigants to approach a court for adjudication of their claims without the limitation contained in section 2(1)(a) of the Act

---

[23] 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at para 17.

outweighs the governmental interest concerned. The section is not reasonably justifiable and the order of invalidation made by Hoffman AJ should be confirmed.

[25] It is unnecessary to consider an alternative line of argument, based on the equality provisions in section 9 of the Constitution, that was pursued on behalf of the amicus.

Order

[26] The order made by Hoffman AJ in the Witwatersrand High Court on 25 October 2000 declaring constitutionally invalid section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 is confirmed.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J and Madlanga AJ concur in the judgment of Somyalo AJ.

For the intervenor: LT Sibeko, instructed by the State Attorney, Johannesburg.

For the amicus curiae: AM Breitenbach and ML Norton, instructed by the Women's Legal Centre, Cape Town.