



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal Case No: A371/2013

Trial Case No. 4673/2005

Before: The Hon. Mr Justice Le Grange

The Hon. Mr Binns-Ward

The Hon. Ms Acting Justice Magona

Dates of hearing: 20 September 2016

Date of judgment: 22 November 2016

In the matter between:

THE MINISTER OF SAFETY AND SECURITY

First Appellant

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second Appellant

and

CHRISTOPHER PATTERSON

Respondent

JUDGMENT

BINNS-WARD J (LE GRANGE J AND MAGONA AJ concurring):

[1] Delivery of this judgment has been delayed due an initial difference of opinion between us as to the result. Happily, unanimity has been reached.

[2] The appeal was against the dismissal by the court a quo of the first appellant's special defences of extinctive prescription. It is not known why the second appellant has been cited as a party to the appeal. As will appear, he has no interest in it.

[3] The respondent instituted action against the Ministers of Safety and Security and of Justice and Constitutional Development¹ in 2004 claiming compensation in damages in respect of his allegedly unlawful arrest and detention in 1998 and 2001, respectively, and for malicious prosecution. It was common cause on the pleadings that the first arrest of the respondent, which was on a charge of murder, had been effected on 2 October 1998, and that the charge had been withdrawn by the senior public prosecutor on 5 October 1998. The second arrest, apparently effected on 27 August 2001, was in respect of the same charge. It appears that the respondent was thereafter – apparently on 3 September 2001 - released on bail pending his subsequent trial, which ended on 12 September 2003 when he was discharged at the close of the state's case.

[4] The action was instituted under case no. 7595/2004 by service of the summons on 10 September 2004. The Ministers delivered a special plea in the action in which they alleged that the claim had prescribed by reason of the institution of the proceedings after the expiry of the period provided in terms of s 57(1) of the South African Police Service Act 68 of 1995 and also that the claim was in any event barred due to non-compliance by the respondent with the notice provisions in terms of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. (Section 57 of the Police Service Act was in fact repealed in terms of s 2(1) of the Institution of Legal Proceedings Act.) They also pleaded that the claim had been brought outside the three-year prescription period provided in terms of s 11(d) of the Prescription Act 68 of 1969.

[5] In response to the special plea the respondent applied to court in terms of s 3(4) of the Institution of Legal Proceedings Act² for condonation of his failure to have given notice in terms of that Act. He applied for the following substantive relief:

¹ The names of both portfolios have subsequently been changed.

² 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*

1. That non-compliance with Sections 3(2)(a), 3(2)(b)(i) and 3(2)(b)(ii) of Act 40 of 2002 be condoned and that the Applicant may proceed with the legal proceedings instituted on such terms and conditions regarding notice as the above Honourable Court may deem appropriate; alternatively:
2. That non-compliance with Sections 3(2)(a), 3(2)(b)(i) and 3(2)(b)(ii) of Act 40 of 2002 be condoned and that the Applicant is granted leave to institute fresh legal proceedings against the Respondents on such terms and conditions regarding notice as the above Honourable Court may deem appropriate.

[6] His application was not opposed. The Ministers filed a notice of intention to abide the judgment of the court on the condonation application, provided no costs were sought against them.

[7] Thereafter, on 17 May 2005, an order (without reasons) was taken before Traverso DJP in the following terms:

1. Non-compliance with Sections 3(2)(a), 3(2)(b)(i) and 3(2)(b)(ii) of Act No. 40 of 2002 is condoned in terms of Section 3(4)(a) and (b) of Act No. 40 of 2002.
2. Leave be granted to Applicant to withdraw the Summons issued in the aforementioned matter.
3. Leave be granted in terms of Section 3(4)(c) to institute fresh legal proceedings against First and Second Respondents in the abovementioned matter.³

[8] The respondent subsequently withdrew the action that he had instituted in 2004 and instituted proceedings afresh for the same relief by service of summons in a separate action under case no. 4673/05 on the Ministers on 8 June 2005. The Ministers again raised a plea that the claim had prescribed. The respondent replicated to the special defence and alleged, in effect, that by virtue of the aforementioned order made by Traverso DJP the issue of prescription was *res judicata*. The wording of the pertinent parts of the respondent's replication went as follows (in para.s 5.5, 9.4 and 14.4 (the second so numbered)):

[The plaintiff pleads that]

... by implied, alternatively tacit implication and interpretation of the Order of this Honourable Court dated 17 May 2005 ... the Plaintiff was granted leave to institute "fresh" legal proceedings against the

(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.*

³ It seems likely from the terms of paragraph 3 of the order that it was thought necessary that condonation precede the institution of proceedings. Any such perception was unfounded, as subsequently confirmed in *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA). There was therefore actually no need for the pending action to be withdrawn and for 'fresh proceedings' to be instituted. That does not, however, affect the reality and consequences of that having happened.

Defendants and that, such order was not granted to place the Plaintiff in prescription (sic) or have the claims of the Plaintiff upon the institution of timeous “fresh” proceedings against the Defendants prescribe as a consequence of the order’.

(The import of the phrase ‘institution of timeous “fresh” proceedings’ was never clarified.)

[9] The respondent’s replication also pleaded that his claim in respect of his allegedly unlawful arrest and detention in 1998 had not prescribed because ‘*the cause of action arose on 12 September 2003 when he was discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977, on the charge so referred to and in relation to “the first arrest” effected on 2 October 1998; alternatively ... that the “first arrest” constitutes a continuous event, commencing on 2 October 1998 and concluding on 12 September 2003, the latter date being the date upon which the criminal case was concluded in favour of the Plaintiff with the facts from which the cause of action arose and the debt became due*’. Those allegations, which went to the substance of the defence, were not dealt with by the court a quo.

[10] The learned judge at first instance aptly remarked that the replication was ‘*inelegantly drafted*’, but held in respect of that part of the pleading described in paragraph [8], above, that ‘*it [was] clear that what the plaintiff intended to convey was that it could never have been a consequence of the [aforementioned order made by Traverso DJP] that his claim would nonetheless, and at any later date, be found to have prescribed*’. The judge proceeded on this predicate: ‘*In effect this amounts to a plea of **res judicata**.*’ There has been no suggestion from any quarter that the learned judge’s characterisation was misplaced.

[11] The issue raised by the plea of prescription was separated from the other issues in the action. By the time the matter came before the court a quo it had been conceded that the claim for compensation in respect of the alleged malicious prosecution had not prescribed. The court’s judgment was therefore directed at the determination only of the question whether the claims against the first appellant for unlawful arrest and detention had been extinguished by prescription. The court a quo upheld the respondent’s reliance on the *exceptio rei judicatae vel litis finitae* and for that reason dismissed the first appellant’s special defence without going into its merits. That decision, made in a judgment delivered on 8 May 2013, was brought on appeal before us more than three years later, with leave from the court a quo granted on 3 June 2013.

[12] The judgment of the court a quo was founded squarely on its conclusion that the order made by Traverso DJP had conclusively determined the issue of extinctive prescription. In our judgment that conclusion was incorrect, with respect. In our view, the court a quo was

misdirected in two material respects. First, it failed to take account of the conceptual distinction between a court being ‘satisfied’ for the purposes of s 3(4)(b)(i) of the Institution of Legal Proceedings Act⁴ that a ‘debt has not been extinguished by prescription’ and a court determining conclusively for the purpose of dismissing a special defence that the defendant has not ‘proved’ that the debt has been extinguished by prescription. Second, it failed, in the context of the aforementioned institution of fresh proceedings by the respondent, to take into account the incidence of s 15 of the Prescription Act (to which it should in fairness be recorded the court’s attention was not drawn).

[13] As Olivier JA noted in *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA), [2001] 1 All SA 417, at para. 2 of the majority judgment:

‘The requirements for a successful reliance on the exceptio [rei judicatae vel litis finitae] were, and still are: idem actor, idem reus, eadem res and eadem causa petendi. This means that the exceptio can be raised by a defendant in a later suit against a plaintiff who is “demanding the same thing on the same ground” (per Steyn CJ in African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562A); or which comes to the same thing, “on the same cause for the same relief” (per Van Winsen AJA in Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472A - B; see also the discussion in Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995 (1) SA 653 (A) at 664C - E); or which also comes to the same thing, whether the “same issue” had been adjudicated upon (see Horowitz v Brock and Others 1988 (2) SA 160 (A) at 179A - H).’

In *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department Of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA), at para 22, Leach AJA added:

‘It has been recognised though that the strict requirements of the exceptio, especially those relating to eadem res or eadem petendi causa (the same relief and the same cause of action), may be relaxed where appropriate. Where a defendant raises as a defence that the same parties are bound by a previous judgment on the same issue (viz idem actor and eadem quaestio), it has become commonplace to refer to it as being a matter of so-called “issue estoppel”. But that is merely a phrase of convenience adopted from English law, the principles of which have not been subsumed into our law, and the defence remains one of res judicata. Importantly when dealing with issue estoppel, it is necessary to stress not only that the parties must be the same but that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment’ (footnote omitted, and underlining supplied for emphasis).

⁴ See note 2, above.

[14] The learned judge a quo considered that as Traverso DJP had to be ‘*satisfied*’ in terms of s 3(4)(b)(i) of the Institution of Legal Proceedings Act that the ‘*the debt [had] not been extinguished by prescription*’ in order to be able to make the order condoning the respondent’s non-compliance with the notice requirements under that Act, the Deputy Judge-President had therefore necessarily to be taken to have determined the question of extinctive prescription that had been raised in the then pending action in case no. 7595/2004. The judge held as follows in that respect, ‘*I disagree with the submission made by the defendants’ counsel that Traverso DJP “did not hand down a judgment on prescription”; by clear implication that is precisely what she did*’.

[15] A defendant who raises the defence of extinctive prescription attracts an *onus* to prove on a balance of probabilities that the debt has been extinguished. Extinctive prescription is a defence, not a cause of action. Furthermore, it is a matter that a court is not entitled to raise *suo motu* against a claimant.⁵ The party who invokes prescription, which invariably will be the party resisting enforcement of the debt, must do so in the relevant document filed of record in the proceedings. The defence can, however, with the court’s leave, be raised at any stage of the proceedings.⁶

[16] There is no basis for a defence of prescription to be raised before a court seized of an application for condonation in terms of s 3(4) of the Institution of Legal Proceedings Act. There might at most be an indication that such a defence has been, or will be, raised by the alleged debtor in the main proceedings that the applicant for condonation seeks leave to institute or continue. There is therefore no *onus* on a defendant or prospective defendant in the context of a condonation application in terms of s 3(4) to establish its defences in the pending main proceedings. On the contrary, there is a burden of persuasion on the applicant for condonation to ‘*satisfy*’ the court that its claim has *not* prescribed. If an intention to raise a defence of prescription in the pending principal proceedings is indicated by the respondent in the condonation application, the court, for the purposes of s 3(4)(b)(i), is required to do no more than form a view on the prospects of success of the indicated defence; it is not called upon to decide it; and would be venturing impermissibly outside its remit if it purported to do so. If the court were in the postulated circumstances to form the impression that the defence of prescription was unlikely to succeed, it would be ‘*satisfied*’ for the purposes of s 3(4)(b)(i)

⁵ See s 17(1) of the Prescription Act.

⁶ See s 17(2) of the Prescription Act.

that the claim had not prescribed and would incline to grant condonation; *aliter*, if it took the opposite view.

[17] Traverso DJP was therefore not seized of the determination of the Ministers' special pleas of prescription in the 2004 action, as the learned judge *a quo* implied in her judgment. Had the Deputy Judge President been seized of determining the special defences, the order she made would have had to either uphold or dismiss them. The fact that the order contained no such provision serves to illustrate that the defences were not before the learned judge. What was before the Deputy Judge President, as the papers and the resultant order confirm, was an application for the condonation of the respondent's non-compliance with a statutory requirement pertaining to the institution of the action. For the reasons explained in the previous paragraph, the burden of persuasion on an applicant seeking condonation in terms of s 3(4) of the Institution of Legal Proceedings Act to satisfy the court that the claim has not been extinguished is of a discrete legal character to the *onus*, in the true sense of that word, that burdens a defendant raising prescription as a special defence to the claim. This much was authoritatively confirmed in *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA), at para. 8, where Heher JA stated '*The phrase 'if [the court] is satisfied' in s 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See eg Die Afrikaanse Pers Beperk v Neser* 1948 (2) SA 295 (C) at 297.^[7] I see no reason to place a stricter construction on it in the present context.'

That also makes it clear that the impression in respect of prescription that the Deputy Judge President had to form to decide the condonation application was of a materially different nature to that required of a trial judge seized of having to determine a special defence of prescription. (It is unfortunate that the attention of the learned judge *a quo* does not appear to have been drawn to the appeal court's decision in *Madinda*.)

[18] The respondent's apparent invocation of the *exceptio rei judicatae* in response to the Minister's plea of prescription was accordingly misconceived, and the court *a quo* should not have dismissed the plea on the basis that it was *res judicata*.

⁷ In *Afrikaanse Pers* loc. cit. Newton Thompson J made the following pertinent remarks about the import of the word 'satisfy' in a closely analogous context:

'Under Rule 22 (4) it is for the defendant to satisfy the Court that he has a bona fide defence to the action. It is true, the authorities show that this is not a heavy onus. 'Satisfy' does not mean 'prove'. I take 'satisfy' to mean therefore that the Court must feel that there is a fair probability that the defendant's defence is a good one, at any rate that it is bona fide.'

[19] But there was also another reason why the special defence could not have been *res judicata*. The effect of the withdrawal of the action under case no. 7595/2004 was that the interrupting effect on prescription of service of the summons in that action was thereby negated. The order made by Traverso DJP expressly contemplated the withdrawal of the action proceedings that were pending when it was made, and the institution of ‘fresh proceedings’ thereafter at some undetermined time. It must be assumed that the court was astute in the given context to the effect of s 15 of the Prescription Act, but the effect would follow even if the court had overlooked the provision.

[20] The provisions of s 15 that are most pertinent in the circumstances are subsections (1), (2) and (6), which provide:

- (1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
- (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
- (6) For the purposes of this section, ‘process’ includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.

(Underling provided for emphasis.)

[21] The effect of withdrawing the action instituted in terms of the summons in case no. 7595/2004 meant that the respondent failed to prosecute his claim to success ‘under the process in question’, with the result that the interruption of prescription that had intervened when the summons was served thereupon lapsed, and the running of prescription was deemed not to have been interrupted. The effect was of a statutory character that was beyond the power of any court to moderate or avoid. Traverso DJP may have been ‘satisfied’ that the claims had not prescribed when she made the order of 17 May 2005, but she had no means of knowing whether that would still be the position when the ‘fresh proceedings’ that she authorised were instituted at a later undetermined date under different process. This affords a further indication that the Deputy Judge President could not, by making the order she granted on 17 May 2005, have intended to be determining any special plea of prescription that might be raised in fresh proceedings instituted on some undetermined date after the order was made. For her to have purported to do so would have been a legally impossible undertaking.

[22] The judgment of the court a quo makes no reference to s 15, presumably because the attention of the learned judge was not directed to it.

[23] For these reasons the appeal must be upheld. The court a quo did not determine the plea of extinctive prescription on a substantive basis because of its apprehension that the question had already been decided by Traverso DJP. We consider that it would be inappropriate for this court to deal with the substantive basis of the defence as if at first instance, especially as we did not hear argument on those issues. The substantive question must therefore be remitted for determination by the trial court.

[24] It seems to us that the appeal might well have been unnecessary had the attention of the court a quo been directed to the judgment in *Madinda* supra, and the pertinent provisions of s 15 of the Prescription Act. In the circumstances in which the substantive basis for the special defence remains undetermined, we consider that it would be appropriate not to award the costs of the appeal to the successful appellant, but rather to direct that they be costs in the cause in the determination by the court a quo on remittal in terms of paragraph 3 of the order to be made.

[25] The following order is made:

1. The appeal is upheld.
2. The order of the court a quo dismissing the pleas of prescription on the basis of *res judicata* is set aside.
3. The pleas of prescription are remitted to the court a quo for determination on their substance.
4. The costs of the appeal shall be costs in the cause in the proceedings contemplated in terms of paragraph 3, above.

A.G. BINNS-WARD
Judge of the High Court

A. LE GRANGE

Judge of the High Court

P. MAGONA

Acting Judge of the High Court