REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPORTABLE

CASE NO: 17720/10

DATE:07/04/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

XABA, VICKY MOSES Applicant/Plaintiff

and

EKURHULENI METROPOLITAN MUNICIPALITY Respondent/Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This matter demonstrates unambiguously how the applicant was consistently let down, to his detriment by his legal representatives. In the Notice of Motion the applicant seeks an order condoning the late service on the respondent of the Notice as contemplated by section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The application is based on section 3(4)(a) of the latter Act. The applicant also seeks an order for leave to institute legal proceedings against the respondent for damages for assault, arrest and detention arising from an incident on 17 February 2007. In the alternative, the applicant seeks condonation relief on terms and conditions in the discretion of the Court.

[2] The application is opposed strenuously by the respondent mainly on the ground that the applicant's claims have prescribed.

[3] It is common cause that the respondent is a state organ duly constituted in terms of the Local Government and Municipal Systems Act 32 of 2000, the Local Government Municipal Structures Act 117 of 1998, the Local Government Transitions Act 209 of 1993, and the Regulations and Proclamations issued in terms thereof.

[4] Prior to dealing with the facts of this matter, it is appropriate to first deal with the relevant legislation. Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, provides:

> "*(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 legal proceedings in question; or

(b) the organ of state has consented in writing to the institution of that legal proceedings –

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(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.

(3) For 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 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 it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and a debt referred to in section 2(2)(a), must be regarded as having been due on the fixed date.

(4) 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.

(a) …

(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."

In regard to prescription, section 11 of the Prescription Act 68 of 1969 ("*the Prescription Act*"), provides:

"*The periods of prescription of debts shall be the following:*

(a) (Not applicable).

(b) (Not applicable).

(c) (Not applicable).

(d) *Save where an Act of Parliament provides otherwise, three years in respect of any debt.*"

Section 12(3) of the Prescription Act provides:

"*A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have required it by exercising reasonable care.*"

[5] From the above provisions, it is clear that in proceedings such as envisaged by the applicant, written notice must be given to the respondent within six months from the date of the cause of action; or the respondent has waived such notice in writing; in the case of a notice, such notice must set out

the facts relied upon and within the knowledge of the applicant which give rise to the action; if the organ of state to be sued raises the question of no notice having been given, the applicant may apply to Court for condonation for such failure (as in the present matter); the Court in hearing such application may grant such condonation, if the Court is satisfied, firstly, that the intended claim has not become prescribed. Secondly, that good cause exists for the failure by the applicant, and thirdly, that the organ of state to be sued has not been unreasonably prejudiced by such failure to comply. In regard to prescription, it is equally plain that the intended proceedings must be brought within a period of three years from the date on which the cause of action arose.

[7] I turn to the facts of the present matter. These facts on the failure of the applicant to give the required notice in terms of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act, as well as the Prescription Act, are closely intertwined. These are the facts as set out by the applicant in the founding papers:

7.1 On or about 17 February 2007, the applicant left his employment at Springs at approximately 14h30 and proceeded to drop off two of his fellow employees in the town of Springs. He proceeded home on or along President Paul Kruger Highway heading in the direction of Benoni;

7.2 He was driving at the relevant speed limit in the left-hand lane at about 16h00 when he was pulled over by two male members of

the respondent's Metro Police who were flashing sirens at him. He was pulled over when approaching the bridge at Dersley Park. The two police officers, alighted from their motor vehicle, as did the applicant from his motor vehicle. The applicant immediately requested to know what he was pulled over for. One of the police officers walked behind him towards his car and the other officer came and stood directly in front of him. Both officers refused to provide him with details of what he had done wrong;

7.3 Within seconds he was pushed from behind by the police officer who went behind him and he fell into the police officer in front of him and both police officers started to assault him. He tried to shield himself from the attack. In the scuffle he was then forced towards the barrier of the bridge and was subdued by the officer who came from behind. The other officer proceeded to his Metro motor vehicle and fetched a nylon rope, tied his hands and then wrapped the rope around his neck and tried to strangle him. The rope was pulled so tightly around his neck that he could not breathe and was choking. Eventually, the police officer released his grip on the rope slightly for the applicant to breathe. The police officer with the rope eventually called for backup and two other Metro police officers arrived on the scene;

7.4 The applicant subsequently found out the name of the police officer calling for backup, namely Officer Nkuna. On arrival of the two further police officers whose names he did not know, one African and one Coloured male, Nkuna informed them that he had resisted arrest and had sworn at and assaulted them. The Coloured officer immediately began to assault the applicant by punching him all over and when he fell to the ground he kicked him in the ribs on the right-hand side of the body. The African male police officer who accompanied the Coloured officer advised his colleagues that they should stop beating the applicant as he was injured and bleeding profusely. The nylon rope was taken off and the applicant was handcuffed. In the process he was hit again by the Coloured officer in the face, saying, "*jy gaan kak*";

7.5 The applicant was then thrown into the back of the Metro Police vehicle with the Coloured officer driving and the African male police officer, who had initially pulled him over, accompanying them. The Coloured officer drove at high speed and would slam on the brakes regularly as he had placed a loose spare wheel into the back of the Metro vehicle. The applicant says that he was bashed and bruised by the wheel and was injured and traumatised severely by the incidents;

7.6 The applicant was taken to the South African Police Station at Springs and left in the motor vehicle only for the same Metro Police Officers to come out and took him to the offices of the respondent in Springs, which were approximately five minutes away from the South African Police Station at Springs;

7.7 On arrival at the respondent's offices in Springs, the applicant says that they passed what appeared to be a superior officer to Officer Nkuna who advised Nkuna to clean the blood from his face. Nkuna said he would assist but he failed to do this when his superior disappeared. He was taken into a room where there were several other individuals, apparently under arrest. A blood sample was taken from him without knowing the reason therefor. On the Saturday morning 18 February 2007, the applicant was taken out of the cells and brought to the charge office where he was charged with the offences of drunken driving, reckless, alternatively negligent driving, assaulting a police officer and resisting arrest. He was told to go home once he paid R500,00 bail and his fingerprints were taken;

7.8 Immediately after his release, the applicant proceeded to Glynnwood Hospital in Benoni for X-rays and medical treatment and was advised that he had fractured his ribs and had multiple contusions;

7.9 On 18 February 2007, the applicant attended the Springs Police Station to open a case of assault and theft against the police officers involved working for the respondent. He was referred to a Detective Mabulane to whom he explained his story and Mabulane indicated that he should return on 19 February 2007 so that he could take photographs of his injuries sustained in the arrest. The applicant also gave the police officer the serial number of his cellphone that had gone missing in the interim. On 19 February 2007, the applicant duly saw Detective Mabulane and was given the case number. He was told to appear in the Springs Magistrate's Court on 23 April to face the aforesaid charges. The charges were withdrawn and the matter ended there;

7.10 The applicant says that prior to his court appearance, he obtained the services of a lawyer by the name of Mr Mohammed Matwadia ("*Matwadia*"), who required funds to represent him, which he duly paid. He was advised by Matwadia at the time, that the charges were withdrawn because there was insufficient evidence to prosecute him. The bail money of R500,00 was refunded to him;

7.11 During the process the applicant had advised Matwadia about the case that he had opened against the respondent's Metro Police relating to the assault and Matwadia advised him of the

procedures that would be needed to bring a civil case of assault, unlawful detention and unlawful arrest against the respondent. Firstly, the applicant was advised that Matwadia had to write a letter to the Springs Magistrate's Court requesting copies of the docket and obtaining names of the police officers involved. As soon as he had done so, he advised the applicant that he would inform him telephonically as to what he had received with regard to the necessary documentation. As Matwadia did not phone the applicant after three months, the applicant contacted Matwadia with the view to finding out what he was doing in relation to the matter. The applicant was always under the impression that the criminal case he had laid against the officers had to be completed prior to bringing a civil claim. He went to see Matwadia several times and on most occasions was not able to see him but on one or two rare occasions when he was able to see him, Matwadia advised him that he had written several letters to the Springs Magistrate's Court to obtain the docket and that his letters had not been responded to;

7.12 Some time prior to January 2008, Matwadia advised the applicant that the docket had been transmitted back to the Director of Public Prosecutions in Pretoria and that he would attempt to obtain the necessary documentation;

7.13 Some time in February 2008, the applicant met Detective Lephoto to find out how the case was proceeding and was advised that the case had been referred to the Director of Public Prosecutions in Pretoria and all he could do was to wait. The applicant did so and continued to ask what was happening for months thereafter to be told that the process is lengthy. The applicant eventually became increasingly disillusioned with the slow progress of the criminal matter and the conduct of Matwadia and duly approached a senior manager of his employer namely, Mr Chris Alexiou, at Hichris Heat Treatment where he was employed at the time with a view to asking for his assistance in September/October 2008. Chris Alexiou duly attempted to telephone Matwadia on several occasions during October 2008 to find out what the status of the case indeed was. Matwadia never returned his calls despite the fact that Mr Alexiou left several messages for Matwadia to contact him;

7.14 A director at his place of employment, namely Mrs Gillian Preston, also attempted to get involved, and she did the same as Mr Alexiou from October 2008 and could not get hold of Matwadia. Mrs Gillian Preston telephoned the offices of Matwadia almost on a daily basis and eventually in November 2008, a lady by the name of Abeda phoned from the offices of Matwadia and confirmed that Matwadia had spoken to the Chief Prosecutor, the police and some others and that he had been

given the run around and was not able to get any information regarding the applicant's file and/or status of the charges against the Metro Police officers that had been laid;

7.15 Mrs Gillian Preston then set about trying to obtain the information herself and started to phone the offices of the South African Police Services and could not gain an answer. Eventually Ms Gillian Preston telephoned around to numerous Metro Police Stations and was able to obtain the number of a Hennie Erasmus who advised that the docket was with another prosecutor;

7.16 When the applicant did not hear anything from Matwadia, he eventually decided to leave the matters in the hands of his employers to see if they could assist him, thinking that this may be the correct approach. The applicant says that he had no knowledge of the legal requirements for the bringing of a civil matter against the respondent;

7.17 Eventually the applicant's employers could get no word in relation to finding out what was happening to the matter and was advised by them to seek the assistance of their attorney, namely, Mr Martin Gishen of Gishen-Gilchrest Inc, with regard to

the matter. The applicant says he duly proceeded to meet Mr Martin Gishen towards the end of May 2009 and Mr Gishen advised him that the civil claim was distinct from the criminal matter and that the finalisation of the criminal matter against the Metro Police Officers had nothing to do with the success of bringing a civil action for unlawful arrest, detention and assault. The applicant advised Mr Gishen of the events that pertained to the matter as well as the fact that he had retained an attorney by the name of Matwadia who was acting for him in the matter. Gishen advised that the applicant would have to terminate his mandate with Matwadia's officers in order for him to take on the matter and that he had to attend to Matwadia to get copies of his file in order for Gishen to make a proper assessment of the matter;

7.18 The applicant approached Matwadia's office on several occasions, could not speak to Matwadia, but requested copies of his file and requested that he contact Mr Martin Gishen with a view to dealing with the matter further in that the applicant had appointed Mr Gishen to take over from him with regard to the matter;

7.19 Gishen then sent a letter dated 28 May 2009 and addressed to Matwadia advising that he had been instructed by applicant to proceed against the respondent for damages, for unlawful arrest

and assault and that in order to comply with the terms of his instructions, he required a complete copy of Matwadia's file, including all papers with regard to the criminal case and the action for damages. Furthermore, Gishen advised Matwadia that the applicant had instructed him to proceed with a claim for damages for wrongful arrest and assault;

7.20 The applicant again met with Mr Gishen on 10 June 2009 and was advised that Matwadia had failed to answer Gishen's letter. Gishen advised that he had furthermore tried to contact Matwadia on several occasions and left messages and his calls were not returned. Gishen then advised the applicant to attend to Matwadia's offices to obtain the relevant documentation. The applicant attempted throughout June and July 2009 to make contact with Matwadia and to obtain the file, to no avail as messages were never responded to;

7.21 The applicant then received a summons in a criminal case in July/August 2009 and consulted Gishen with regard to the matter and was advised that he had to appear in Court on 18 August 2009 to face charges, which were not attached to the summons. Gishen duly represented the applicant and presumed the matter may have had some connection to the applicant's unlawful arrest on 17 February 2007, particularly as the applicant had complained about the laying of charges against the Metro Police concerned to the Independent

Complaints Directorate. Gishen then said that he would duly deal with the situation and obtain a copy of the docket, peruse them and then advise the applicant that accordingly once he had all the necessary facts. Gishen advised that the docket may contain the information required to bring the civil matter and that Matwadia clearly did not want to provide a copy of his file;

7.22 Mr Gishen duly attended the Springs Magistrate's Court on 18 August 2008 and requested a copy of the docket, wherein it appeared that the complaint launched with the Independent Complaints Directorate had caused a reaction in the Police Services by the police attempting to bring the charges of reckless, alternatively negligent driving, and drunken driving against the applicant based on the facts and circumstances of 17 February 2007. As there was no docket at court on the first appearance on 18 August 2009 the matter was postponed until September 2009 for trial;

7.23 Gishen duly briefed counsel to attend to the matter on the said day and to obtain the relevant docket. The applicant and counsel attended Court on 22 September 2009 as the State had failed to provide a docket by the aforesaid date. The docket was provided on 22 September 2009 and immediately counsel saw that the charges should be withdrawn as there was no basis for them and applied to the Senior Prosecutor in Springs therefor. The Senior Prosecutor in Springs advised that as the decision to

prosecute had come from the Director of Public Prosecutions in Pretoria, they were the only ones who could withdraw the said charges, and although the Senior Public prosecutor advised that there was no basis for the said charges;

7.24 The applicant made written representations to the Director of Public Prosecutions for the withdrawal of the charges, and ultimately on 19 April 2010 as a result of such representations, the criminal case against the applicant was withdrawn at the Springs Magistrate's Court;

7.25 The applicant states that he was advised by Mr Gishen that he could not attend to the civil matter as he did not know how far Matwadia had proceeded in relation to any paperwork or, the issuing of any summons in relation to the civil damages claim. Having obtained the docket, and reading through same, it became apparent to the applicant that the bringing of criminal charges against him had no merit and he was advised by Mr Gishen to proceed with the civil claim for assault, wrongful arrest and wrongful detention;

7.26 Mr Gishen advised the applicant that in order to proceed with the damages claim for assault, unlawful arrest and unlawful detention, a letter or notice as contemplated by section 3(1)(3) and section 3(2) of the Institution of Legal Proceedings Against

Certain Organs of State Act 40 of 2002 had to be sent and that this letter had not been sent within the period of six months from the date of the incident, namely 17 February 2007, alternatively, when the charges were withdrawn on 23 February 2007. The applicant was advised by Gishen that if he had to bring the present application for condonation from the Court in accordance with section 3(4)(a), (b) and (c) of the abovementioned Act;

7.27 On the applicant's behalf, Mr Gishen sent a letter in accordance with section 3(1) and section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 outside the time limit of six months as set out above to the respondent. The letter was served by facsimile transmission and by delivery on the Municipal Manager of the respondent in accordance with section 4 of the abovementioned Act, and who acknowledged receipt thereof. The applicant seeks to claim the sum of R200 000,00 representing damages for assault, unlawful arrest and unlawful detention, satisfaction, insult, loss of dignity and shock, pain and suffering and discomfort, loss of amenities of life, hospital and medical expenses, dental expenses and future medical and dental expenses and other related matters;

7.28 In the final analysis the applicant submits that it is in the interest of justice that condonation be granted to him for the late service

of the notice and his non-compliance with the notice requirements of section 3(1) and 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act for the following reasons:

(a) The cause of action with regard to his unlawful arrest, unlawful detention and assault had not been extinguished by prescription;

(b) That good cause exists for his failure to have sent the requisite notice in accordance with the provisions of the Act due to the facts and circumstances set out above;

(c) The respondent will not be unreasonably prejudiced by failure to submit the requisite notice;

(d) That the State had gone to such extremes to frustrate his claim for damages by no proceeding with the criminal case against the Metro Police officers for assault, which still is floating around somewhere, and by trying to scare him off by bringing unjustified and unwarranted charges against him as set out above; and

(e) That the applicant placed his trust and believed in Matwadia that he would bring a civil damages claim and that he knew what

> was going on with regard to such claims. It had become apparent subsequent to the applicant in his discussions and consultations with Mr Gishen that Matwadia did not fully understand the procedure and that he was obviously trying to deal with the situation where the charges of assault made against the Metro Police officers would be dealt with prior to making such claim and that he was clearly unaware of the time limits as prescribed by the Institution of Legal Proceedings Against Certain Organs of State Act.

[8] From the above, the applicant's counsel argued that the claim for damages based on unlawful arrest, assault and unlawful detention have not prescribed, that good cause existed for the failure to send the requisite notice, and that the respondent will not be unreasonably prejudiced if the application for condonation is granted. In addition, as stated above, it was submitted that the State had gone to extremes to frustrate the applicant's claim by not proceeding with the criminal charges against the applicant's assailants, the Metro Police, and also by intimidating the applicant by preferring baseless criminal charges against him. Furthermore, that the applicant relied entirely as he claims in the founding papers, on his first attorney, Matwadia, who he appointed to prosecute the claim. Further that the applicant, as a layperson did all in his powers to prosecute the claim in which he has reasonable prospects of success. In addition that the delay in dispatching the notice, when the applicant did, was not inordinately long in the circumstances.

[9] In the answering affidavit, the respondent stresses that the claims have prescribed, that the applicant delayed unduly, and that the blame was on his attorneys and consequently the applicant was not entitled to condonation. It was also argued on behalf of the applicant that with regard to the provisions of section 12(3) of the Prescription Act, quoted above, the applicant with limited education, a Standard 7, was not aware of the relevant circumstances forming the subject-matter of the causes of action. Further that during the consultation with his second attorney Mr Gishen, in May 2009, the applicant still did not know the identity of the Metro Police who assaulted, arrested, and detained him, all unlawfully. That it was only in September 2009 after the copies of the relevant police docket were obtained, that it became possible to ascertain the names of the culprits employed by the respondent.

[10] Several pertinent questions arise. The first is when did the debt, not the cause of action, arise as envisaged in section 12(1) of the Prescription Act. The second question is whether the applicant's claims have prescribed or not. The third question is whether the applicant has shown good cause entitling him to condonation. In *Truter v Deyzel* 2006 (4) SA 168 (SCA) it was held that everything must have happened which would entitle a creditor to institute action and pursue the claim, namely, that which would render the debt immediately claimable. That is when there is a complete cause of action on the facts. It was further held that for purposes of prescription "*cause of action*" meant every fact which was necessary for the plaintiff to prove in order to succeed in his claim. This did not comprise every piece of evidence which was necessary to prove those facts. A debt (which included a delictual debt)

begin running when the debt became due, and a debt became due when the creditor acquired knowledge of the facts from which the debt arose. The Court held that, in other words, the debt became due when the creditor acquired the complete cause of action for the recovery of the debt or when the entire set of facts upon which he relied to prove his claim were in place.

[11] The Courts have, in a series of cases, emphasised that the time begins to run against a creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights. See *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA). In *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA), section 12(3) of the Prescription Act was discussed. The Court concluded as follows:

> "*In dealing with the knowledge of a creditor 'of the identity of the debtor and of the facts from which the debt arises' does not refer to a 'cause of action' but to a 'debt', which in fact merely points to the plaintiff's 'claim', a narrower concept than 'cause of action'. What the Act strives for is a golden mean between the inequity, on the one hand, of a potential debtor suddenly being threatened with court proceedings an eternity after the occurrence of the events in question and the inequity, on the other hand, of a potential creditor forfeiting his claim for relief merely by reason of the passage of time where he, without any fault on his part, did not have the necessary information at his disposal to launch such court proceedings in the meantime. Bearing all this in mind, there is no compelling reason why a creditor should be fully informed about all the aspects of his contemplated litigation before prescription can begin to run against him. The debtors' interests should also be taken into account. What should be considered is not whether the plaintiff has sufficient facts at his disposal to prove his case at the end thereof, but whether he has the minimum facts at his disposal to begin with it.*"

(See paras [8] to [10] at 995E-996A-B and 996F-997A-B.) In *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA), the Court

held that the requirement in section 12(3) of the Prescription Act, that the creditor has to exercise reasonable care, requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge of a reasonable person in his position would have to deduce the identity of the debtor and the facts from which the debt arises. See also *Kruizenga and Another v MEC, Economic Affairs and Tourism* [2005] JOL 13909 (CK) where the Court held that the Central Government was also liable to be sued and that therefore the plaintiff's efforts to establish the exact government department prior to instituting action, were "*unnecessary and an act in futility*".

[12] In the present matter, the applicant contends that the Metro Police officers who accosted him declined to furnish him with the details of what he had done wrong, and they took a blood sample without him knowing the reason for his arrest. He only became aware of all the facts and circumstances relevant to his claim for assault, unlawful arrest and detention against the respondent at the end of May 2009 in consultation with his second attorney, Gishen. He however, knew that the police officers involved in the incident were Metro Police but had no idea what this precisely meant or how the officers were connected with the respondent. He knew the name of at least one of his assailants, namely, Nkuna. On arrest on 18 February 2007, the applicant was taken by his assailants to the Metro Police offices (the offices of the respondent). These offices are within five minutes drive from the South African Police Station at Springs. In the founding papers the

applicant never intimated that he did not know that the traffic officers involved were connected to the respondent. On 18 February 2007, the applicant went to hospital, and also laid criminal charges against the Metro Police officers simultaneously. In April 2007, the applicant consulted his first attorney Matwadia, furnishing instructions, *inter alia*, to institute civil proceedings against the respondent for assault, unlawful arrest, and unlawful detention. On his version, the applicant knew from inception that he had done nothing wrong and that he was a victim of unlawful conduct on the part of the Metro Police. In these circumstances, the version of the applicant that he only became aware of the facts and circumstances necessary to sustain a cause of action in May 2009, is untenable. He must have known of his intended proceedings as far back as either 18 February 2007 or the latest, during April 2007. In any event, as at May 2009, as shown below, the applicant's claims were still extant, prescription wise. Why the notice in terms of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act was only dispatched on 26 November 2009 has not been satisfactorily explained. Why summons was not immediately issued and served, has equally not been adequately explained. On 1 December 2009, the respondent merely acknowledged receipt of the notice. Why he took another year (from May 2009 to May 2010) to launch the present application for condonation has similarly not been adequately explained in order for the Court to exercise its discretion in favour of the applicant.

[13] In *Minister of Agriculture and Land Affairs v CJ Rance* 2010 (4) SA 109 (SCA) at para [33] the Court said:

> "*[33] In terms of s 3(4)(b)* [of the Institution of Legal Proceedings Against Certain Organs of State Act], *a court may grant condonation if it 'is satisfied' that the three requirements set out therein have been met. In practical terms this means the 'overall impression' made on a court by the facts set out by the parties.*" (my additions)

At para [39], the Court went on to say:

> "*[39] Condonation must be applied for as soon as the party concerned realises that it is required. The onus, to satisfy the court that all the requirements under s 4(b) of the Act have been met, is on an applicant, although a court would be hesitant 'to assume prejudice for which [a] respondent itself does not lay a basis'.*"

In *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA), at para [12], Lewis JA said:

> "*The very purpose of the provisions allowing condonation is to give a court a discretion to determine whether the Organ of State can rely on non-compliance, whatever form that may take. If this were not so, as was pointed out by Somyalio AJ in Moise, the requirement of written notice as a pre-condition to the institution of legal proceedings would be in itself an absolute bar to such proceedings and would constitute a real impediment to the claimant's access to court …*"

At para [13]:

> "*The discretion may only be exercised, however, if the three criteria in s 3(4)(b) are met: that a debt has not been extinguished by prescription (at issue in this case); that good cause exists for the creditor's failure; and that the organ of State has not been unduly prejudiced …*"

[14] In the present matter, the respondent argues that the debt became due on 17 February 2007, when the applicant was arrested, and/or when the criminal charges against him were withdrawn on 23 April 2007. It is not, as contended for by the applicant, that the debt instead became due only when he had knowledge of the identity of the organ of state and the facts giving rise to the debt in May 2009. Indeed, the *onus* is on the party that raises the defence of prescription to place facts before the Courts to prove that the claimant had knowledge of the identity of the debtor. In *Gericke v Sack* 1978 (1) SA 821 (A), the Court held:

> "*It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party. However the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held that "less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required". But the fact that less evidence may suffice does not alter the onus.*"

In the present matter, the applicant has failed dismally to discharge the *onus*. The credible evidence show that the incident occurred on 17 February 2007. The applicant opened a case on 18 February 2007 against the Metro Police who assaulted him, and who are employed by the respondent. At that stage he was aware or ought reasonably to have been aware of the debtor. Between the period 18 February 2007 and 23 April 2007, the applicant had instructed his first attorney, Matwadia, of Springs to prosecute a civil claim against his perpetrators for assault, unlawful arrest and unlawful detention (the subject-matter of the present intended action). By at most, 18 February

2007 or 23 April 2007, the applicant had calculated the quantum of his damages. Based on these facts, the applicant ought to have sent to the respondent the notice envisaged in section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, at least by October 2007. This was not done. As pointed out earlier in this judgment, such notice was only sent some two years later, namely on 26 November 2007. In the replying affidavit the applicant contends that he did not have knowledge of all the facts and circumstances relevant to his cause of action for unlawful arrest and unlawful detention until he consulted with his second attorney, Gishen, at the end of May 2009. This is simply not so. It also does not assist the applicant who by the exercise of reasonable care, should be deemed to have such knowledge. After all, he had already instructed an attorney to prosecute a civil claim. Furthermore, on his version, the applicant has failed to explain satisfactorily why he took from May 2009 (when he consulted with his second attorney, Gishen), to May 2010 when the present publication was launched. The application for condonation must fail.

[16] In terms of section 11(d) of the Prescription Act, quoted above, the intended action should have been instituted within three years from 18 February 2007, or on the applicant's version from April 2007. The claim was extinguished by prescription in April 2010, as envisaged in section 4(b)(i) of the Institution of Legal Proceedings Against Certain Organs of State Act. Indeed, in *Oscon Domestic Installations CC v Polokwane Local Municipality* 2007 JAR 0726 (T), Bosielo J (as he then was) held that it is clear from section 11(d) of the Prescription Act that the plaintiff was obliged to institute

his claim within three years of the debt becoming due. This is so since there is no other Act of Parliament which provides otherwise. In *Desai NO v Desai and Others* 1996 (1) SA 141 (A), the Court, in comparing the effect of the old Prescription Act (1943) to the new Prescription Act, at 147A said:

> "*One should also bear in mind that the Act now provides for a so-called strong prescriptive regime whereby the prescribed debt is in fact extinguished, as opposed to the so-called weak prescription under the old 1943 Prescription Act, which merely provided for the corresponding right to become unenforceable, while the debt itself was extinguished only after 30 years.*"

[17] In viewing the circumstances and history of this matter cumulatively, the Court develops intense sympathy for the applicant who timeously entrusted this matter to his first attorney, Matwadia. His claims have prescribed, and his potential debts extinguished. His attorney, Matwadia, who initially handled the matter, was clearly negligent and appears to have been at sea in matters of this nature. He truly disappointed the applicant in many ways. To make matters worse, when his mandate was terminated, he was uncooperative. The second attorney, Gishen, he too, was not beyond reproach in further prosecuting the applicant's claims. When the claim finally prescribed in April 2010, Gishen was the attorney with instructions. For the applicant, it was the proverbial: "*Out of the frying pan into the fire*". An attorney has certain obligations towards a client upon acceptance of instructions. See, for example, *Anirudh v Sunase* 2010 (6) SA 531 (N). The

Court however, trusts that the applicant will be assisted in some manner hereafter.

[18] Having found that the applicant's claims have in fact been extinguished by prescription, and that the condonation application is without merit, it is unnecessary for me to fully determine the third issue prescribed in section 4(b)(iii) of the Institution of Legal Proceedings Against Certain Organs of State Act. This is the issue whether the respondent will not be unreasonably prejudiced by the failure of the applicant to give the prescribed notice. It is however clear that to expect a litigant to defend a claim that has prescribed, would be unjust. Once a claim has prescribed, it cannot be revived. See *Lipschitz v Dechamps Textile GMBH and Another* 1978 (4) SA 427 (C) at 430F. The three requirements contained in section 4(b) of the above Act, and the respect in which the Court must be satisfied before granting condonation, are clearly conjunctive.

[19] For all the above reasons, I find that the applicant's claims have prescribed. I also find that the applicant has failed dismally to comply with section 3(1) of the Act (Institution of Legal Proceedings Against Certain Organs of State Act), and consequently failed to show good cause for condonation of his non-compliance with section 3(4)(b) of that Act.

[20] In the result the following order is made:

1. The application for condonation in terms of section 3(4)(b) of the Institution of Legal Proceedings Act Against Certain Organs of State 40 of 2002, is dismissed.

2. The applicant is ordered to pay the costs of the application.

_____

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT	L C LEYSATH
INSTRUCTED BY	GISHEN-GILCHREST INC
COUNSEL FOR THE RESPONDENT	D L WILLIAMS
INSTRUCTED BY	IVAN DAVIES-HAMMERSCHLAG
DATE OF HEARING	9 DECEMBER 2010
DATE OF JUDGMENT	7 APRIL 2011