

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 3372/2018

In the matter between:

SINETHEMBA NTLANJENI

Applicant

and

MINISTER OF POLICE

First Respondent

MR NTSHINKOSE

Second Respondent

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Third Respondent

JUDGMENT

Rugunanan J

[1] The applicant has instituted action against the respondents in which he claims damages for an alleged unlawful arrest, unlawful detention and malicious prosecution.

[2] He approaches this Court for seeking condonation of the late service of the notice of his intention to institute legal proceedings against the respondents in accordance with section 3(2)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Proceedings Act).

[3] In seeking condonation he contends that the claims constituted a continuous cause of action or transaction that arose on 4 May 2009 being the date of his arrest and detention which could not be regarded as complete until 2 June 2016 when the Full Court of this Division upheld his appeal and set aside his conviction and sentence of 22 years' imprisonment on two counts of rape including one count of kidnapping.

[4] The appeal judgment is cited as *Poni and Others v The State*¹ in which the applicant featured as third appellant.

[5] There are several factors which are common cause, alternatively not in dispute, namely:

- 5.1 that the requisite 'jurisdictional facts to launch action based on malicious prosecution, unlawful arrest and detention arose [on 2 June 2016] upon the setting aside of the conviction and sentence' (this being conceded in the applicant's heads of argument);
- 5.2 that the applicant's statutory notices were not served within six months of the date on which the appeal was upheld; and
- 5.3 relevant to the second respondent, Mr Ntshinkose, that he is an organ of state as defined in section 1 of the Proceedings Act. It is asserted in answer that he was never served with a statutory notice or summons – this not being countered in reply.

[6] The application is opposed, the respondents contending that the requirements in section 3(4)(b) of the Proceedings Act have not been met.

Background

[7] The applicant was arrested on 4 May 2009 in Port Elizabeth (now Gqeberha) by members of the South African Police Service (SAPS), among them the second

¹ [2016] ZAECHGHC 39.

respondent, Mr Ntshinkose. He also alleges that his detention commenced on that date and terminated on 2 June 2016 when his convictions for rape and kidnapping – for which the respondents’ employees allegedly maliciously charged and prosecuted him and for which he was sentenced on 19 January 2011 to an effective 22 years’ imprisonment in the High Court – were overturned by the Full Court on appeal.

[8] In all, from date of his arrest until the date on which the appeal was finalised the applicant had been detained in custody for 7 years.

[9] The applicant issued summons out of this Court on 13 November 2018. Although claiming that summons was served on the respondents on 19 December 2018, 6 April 2019 and 17 May 2019, he does not identify the date of service applicable to each respondent.

[10] In answer, the respondents identify service effected on 19 December 2018 and 5 August 2019 respectively on the Minister and the Provincial Commissioner of the South African Police Service, and on the NDPP on 16 April 2019. These assertions are not countered by the applicant in reply.

[11] The applicant’s pleaded compliance with the notice requirements of the Proceedings Act, was met with an objection by the respondents. Regarding the claims based on the arrest and detention the Minister objected by way of a special plea to the effect that the notice was not served within the six months stipulated in terms of section 3(2)(a) and that these claims have become prescribed under the Prescription Act 68 of 1969² (the Prescription Act).

[12] The objection in the special plea taken by the Minister was also taken on behalf of Ntshinkose.

[13] Regarding the claim for malicious prosecution the respondents’ objection to service of the statutory notice was taken in a notice under Uniform rule 30, and in so far as the applicant alleged compliance with the notice requirement, this was denied

² Per section 11(d).

in the respondents' plea. Prescription not being in issue, respondents contending instead for prejudice and the absence of good cause.

The legislative context

[14] Section 3(4)(b) circumscribes a court's power to grant condonation by requiring that it be satisfied that –

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for the failure by the creditor (to serve the statutory notice in terms of section 3(2)(a) or to serve a notice that complies with the requirements of section 3(2)(b)); and
- (iii) the organ of state was not unreasonably prejudiced by the failure.

[15] The party seeking condonation (an indulgence) bears the onus to satisfy the court in respect of each of these requirements. They are cumulative and a court may only exercise its discretion to condone non-compliance if all three requirements are met.³ If any of the requirements are absent, the court may not exercise its discretion in favour of the defaulting party.⁴

[16] Approaching the matter according to the legislative construct I turn to address these requirements hereunder.

Prescription

[17] The applicant's approach to the prescription issue is two pronged.

[18] In the first instance he disputes that his claims have prescribed and argues that the claims for unlawful arrest, subsequent detention and malicious prosecution constitute a continuous transaction or single cause of action which could not be

³ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) para 16; *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) para 11; *Makhatholela v Minister of Police and Another* [2022] ZAGPJHC 193 para 24.

⁴ Compare *Minister of Police and Another v Yekiso* 2019 (2) SA 281 (WCC) para 35.

regarded as complete until the outcome of the appeal to the Full Court, its judgment signifying the successful termination of the criminal proceedings in his favour.

[19] In the second instance the applicant relies on sections 12(3) and 12(4) of the Prescription Act. Common to the arguments founded on these prescripts is the applicant's acknowledgment that the jurisdictional facts for instituting an action based on each of the abovementioned claims arose upon the successful outcome of the appeal process. Relying however on section 12(3), he asserts that it was only during July 2018 that he acquired knowledge of the statutory notice requirement as also the identity of the respondents and the facts giving rise to the cause of action. As for reliance on section 12(4), he contends that his claim is for a debt based on the commission of an alleged sexual offence and is unaffected by extinctive prescription.

[20] The applicant's purported reliance on sections 12(3) and 12(4) of the Prescription Act is dealt with later in this judgment. I proceed at the outset to deal with the first part of his argument.

A continuous transaction/single cause of action

[21] The notion of a continuous transaction relied on by the applicant suggests that his arrest and detention by Ntshinkose constituted the factual and legal cause (the former being sufficiently closely linked to the harm suffered by the applicant), for attributing liability to the Minister. For that reason the applicant seeks to hold the Minister liable for the entire period of detention based on the anterior arrest. The fulcrum of this argument appears to be the majority decision of the Constitutional Court in *De Klerk v Minister of Police*⁵.

[22] In my view the argument does not pass muster given that the facts in the present matter are not on par with those in *De Klerk*.

[23] *De Klerk* dealt with a specific factual scenario pertaining to the liability of the Minister for the detention of the claimant after his first appearance in court. A significant distinguishing attribute in *De Klerk* was that the Minister in that matter was

⁵ *De Klerk v Minister of Police* [2019] ZACC 32 paras 24-25.

held liable because the arresting officer had the requisite knowledge and foresight to appreciate that the question of the release of the claimant on bail would not be considered by the reception court in which the claimant made a first appearance.⁶ My observation is that the applicant's founding affidavit does not come anywhere close to suggesting that Ntshinkose had the requisite knowledge and foresight in circumstances similar to those in *De Klerk*.

[24] Moreover, there is an absence of averments indicating that Ntshinkose's conduct influenced the decision of the presiding officer (or even the attitude of the prosecutor) at first appearance to remand the applicant in custody.

[25] Another distinguishing factor is that the offence pertaining to an assault for which the claimant in *De Klerk* was arrested bears no relation to the offence of rape for which the applicant was arrested. The latter offence is implicated by section 60(11)(a) of the Criminal Procedure Act 51 of 1977 regarding the onus provisions which place the burden on an accused to adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release.

[26] The distinguishing features and paucity of facts in the present case renders applicant's reliance on *De Klerk* misguided. *De Klerk* did not, on my understanding, deal with the question whether a claim for unlawful arrest, subsequent detention and malicious prosecution was a continuous transaction or cause of action. I am therefore of the view that the proposition which the applicant contends for is insupportable for the following reasons.

[27] An unlawful arrest is not a continuing wrong, nor is it inextricably linked to an alleged unlawful detention that may follow.⁷ The consequence is that the arrest, detention and prosecution of the applicant are discrete causes of action with their own prescriptive periods.

⁶ *De Klerk* supra paras 76-81.

⁷ See *Makhatholela* supra para 29 and the authorities cited in the footnotes thereto.

[28] While there appears to be a dispute of fact regarding the applicant's arrest, which on the version of the Minister occurred on 5 June 2009, this makes no difference to the question of extinctive prescription. The applicant's claim for unlawful arrest accrues on the date of his arrest. By all accounts his claim against the Minister and Ntshinkose for his alleged unlawful arrest prescribed on 3 May 2012 (or 4 June 2012) well before action was instituted.

[29] In relation to the claim for the alleged unlawful detention, the approach with a continuous wrong is that it results in a series of debts arising from moment to moment or day to day as long as the wrongful conduct endures. The applicant's claim is for separate debts arising on each day of his detention. The continued detention gave rise to a separate cause of action for each day of the period he was detained in custody.⁸ On the facts, his unlawful detention occurred on 4 May 2009 upon his arrest, with further claims arising on each subsequent date of his detention until 2 June 2016. Summons was served on the Minister on 19 December 2018. Although the portion of the applicant's claim for 4 May 2009 to 18 December 2015 has prescribed, the same cannot be concluded for his entire claim for the period 19 December 2015 to 2 June 2016 as against the Minister. However, as against Ntshinkose, the claim for the entire period 4 May 2009 to 2 June 2016 has prescribed because no summons was served on him.

[30] In relation to the claim for malicious prosecution, that claim has not prescribed considering that prescription begins to run when the prosecution fails⁹ which in this instance occurred once the Full Court had handed down its judgment.

The section 12(3) and 12(4) argument

[31] Section 12(3) of the Prescription Act stipulates that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt. The section is subject to the proviso that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

⁸ See *Makhatholela supra* para 29 and the authorities cited in the footnotes thereto.

⁹ *Human v Minister of Safety and Security* 2013 JDR 2302 (GNP) para 15.

[32] In argument the respondents correctly contended that the applicant's reliance on section 12(3) is misplaced. The section imposes a duty on a creditor to exercise reasonable care to obtain knowledge of the identity of the debtor and the facts from which the debt arises. As will be shown below, it is impermissible for a creditor, as with the applicant in this case, to postpone the commencement of the running of prescription by his failure to take necessary steps.¹⁰

[33] In *Drennan Maud & Partners v Pennington Town Board*¹¹ it is stated that:

'Section 12 (3) of the Act provides that a creditor shall be deemed to have the required knowledge "if he could have acquired it by exercising reasonable care." In my view, the requirement "exercising 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 if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.'

[34] The adverse operation of the section does not depend upon a creditor's subjective evaluation of the presence or absence of 'knowledge'.

[35] The standard is not subjective – it is objective.¹²

[36] The applicant's stance is that it was only during July 2018 that he acquired the requisite knowledge. This occurred consequent to initial consultation with his present attorneys Ayabonga Koswana on 12 May 2018 whereafter they initiated investigations on his behalf. Although the relevant statutory notices were only dispatched on 24 August 2018 more than 6 months after 2 June 2016, the applicant, on his reckoning, maintains that by the time he acquired such knowledge, the three year period for extinctive prescription in respect of his claims had not interceded.

¹⁰ *Gunase v Anirudth* 2012 (2) 398 (SCA) para 14.

¹¹ 1998 (3) SA 200 (SCA) at 209F-G.

¹² *Leketi v Tladi NO & Others* [2010] 3 All SA 519 (SCA) para 18.

[37] Indications in the applicant's founding affidavit are that prior to 12 May 2018 he was aware of the respondents' identities as debtors in this matter and the facts from which the debts arose.¹³ Even if he had not been aware of the identities of the debtors and the facts giving rise to the debts, there is no evidence indicating that he could not have acquired them by exercising reasonable care.

[38] It brooks of no doubt that the applicant was legally represented during the conduct of his criminal trial considering that he does not assert the contrary. Nor is there any doubt that he was represented by Legal Aid South Africa during the prosecution of his appeal. Moreover, in their answering affidavit the respondents have attached a letter dated 12 January 2016 from attorneys Faltein in which notice of intended legal proceedings is directed at the NDPP in respect of the applicant's claim for malicious prosecution.

[39] What the letter signifies is that the applicant had access to legal representation during his period of incarceration. His protestation that the attorneys were instructed by his former co-accused in the impugned criminal case who inadvertently included his name, lacks credulity. So too is his assertion that Legal Aid did not advise him of his right to institute a civil action. In this regard he does not contend that he was precluded from seeking their advice.

[40] The upshot of these observations is that the applicant's incarceration did not on its own prevent him from giving instructions to an attorney to investigate or institute civil proceedings on his behalf.¹⁴ The applicant does not contend that he was prevented from having access to an attorney or vice versa while incarcerated.¹⁵ His assertions of the knowledge requirement being satisfied in July 2018 amounts to a manufactured attempt to postpone the commencement of the running of prescription in circumstances where his founding affidavit, objectively considered, indicates a manifest failure to take reasonable steps for the enforcement or preservation of his own interests – and on its own, indicates that his incarceration did not prevent the running of prescription.

¹³ Founding affidavit, paras 18-23.

¹⁴ Compare *Minister of Police and Another v Yekiso supra* para 24.

¹⁵ Compare *Skom v Minister of Police and Others, In Re: Singatha v Minister of Police and Another* [2014] ZAECHC 6 para 7.

[41] Turning to address the applicant's reliance on section 12(4) of the Prescription Act, the section, quoted in relevant part, reads:

'Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in ... the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.'

[42] The provision makes it clear that it is meant to operate in circumstances where a debt has arisen following the commission of a sexual offence by a debtor against a creditor and resulting in the creditor suffering mental or psychological impairment that prevents the creditor from instituting proceedings to claim the debt.

[43] The applicant was not the victim of a sexual offence. Where he states in his founding affidavit that he was 'not in a good psychological state' upon his release from incarceration and that he experienced difficulty reintegrating within his community, he does not lay a sufficiently candid basis for postponing or interrupting prescription. His failure to do so must be considered in the context of the views expressed in the preceding paragraphs indicating that he had reasonable opportunity, notwithstanding incarceration, for seeking legal advice and assistance prior to his release.

Good cause

[44] The claims based on malicious prosecution and for that portion of the applicant's incarceration from 19 December 2015 to 2 June 2016 have not prescribed. This situation requires an examination as to whether the applicant has discharged the obligation to satisfy the court that good cause exists for his failure to comply with the provisions of the Proceedings Act.

[45] The applicant attempts to satisfy this requirement by putting forward a version in his founding affidavit to the effect that after his release from incarceration, and during May 2018, he met an old friend to whom he narrated his story. Moved by the

applicant's plight, the friend facilitated contact with attorneys Ayabonga Koswana. Following consultation with them on 12 May 2018 and their follow up with the applicant during July 2018 the applicant, on the strength of their investigations, became aware of the statutory notice requirement and the identity of the respondents and the facts giving rise to his cause of action. On his instructions the attorneys dispatched by registered mail notices in accordance with section 3 of the Proceedings Act to the Minister c/o the National Commissioner of the South African Police, and to the NDPP. The notices are dated 24 August 2018.

[46] In a notice under Uniform rule 30 dated 29 July 2019 the NDPP communicated its objection to the applicant's alleged compliance with the provisions of section 3(2)(a) of the Proceedings Act.

[47] On 14 July 2020 the Minister filed a special plea of non-compliance with the provisions of section 3(2)(a) of the Act. For its part the NDPP merely denied the applicant's allegation that he complied with the statutory notice requirement.

[48] The application for condonation was only launched on 5 October 2020 some 2½ months later.

[49] No explanation is provided for this delay.

[50] In the light thereof the applicant's prospects of success as an element of good cause must be addressed.

[51] The concept of good cause was examined in *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*¹⁶. The prospects of success relevant to good cause was explained as follows:

'The prospects of success of the intended claim play a significant role – strong merits may mitigate fault; no merits may render mitigation pointless. The court must be placed in a position to make an assessment of the merits in order to

¹⁶ 2010 (4) SA 109 (SCA) para 37.

balance that factor with the cause of the delay as explained by the applicant. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of an intended action, e.g. where an expert report central to the applicant's envisaged claim is omitted from the condonation papers.'

[52] In his founding affidavit, save for asserting that he has 'high prospects of success', the applicant proffers no meaningful factual detail to set up a prima facie case of unlawful arrest, unlawful detention and malicious prosecution; and where reference is made to the Full Court judgment – which in any event made no pertinent findings relevant to the elements of these causes of action – the judgment, without intending criticism, merely represents the opinion of another court and is inadmissible in these proceedings.

[53] In argument, the applicant's failure to address the issue of the absence of reasonable or probable cause as one of the jurisdictional elements in a cause of action for malicious prosecution was straightforwardly drawn to the Court's attention.

[54] A reading of the appeal judgment indicates that its outcome turned on the credibility of the complainant as a single witness on the issue of identification. Exactly how that would translate into an absence of reasonable and probable cause is the question to which the applicant ought to have applied his mind in seeking to persuade this Court that good cause exists for granting condonation.

[55] For reasons aforesaid, it cannot be expected of this Court to draw inferences from the findings of the Full Court and to speculate on whether the applicant has a cause of action, or more precisely whether the requisite jurisdictional element/s are evident in satisfaction of good cause.

[56] Insofar as the applicant places store on the judgment, it does not assist him.

[57] In my view the applicant has fallen short of the requirements in *Rance* and it would be a matter of conjecture to determine that there are prospects of success in satisfaction of good cause.

Unreasonable prejudice

[58] It is apposite to quote what is stated in *Madinda v Minister of Safety and Security*¹⁷:

‘The approach to the existence of unreasonable prejudice ... requires a common sense analysis of the facts, bearing in mind that whether grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus lies on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.’

[59] In addressing this issue the applicant states in his founding affidavit:

‘34.3.1 [T]he evidence is largely preserved in that the police and criminal case records relating to my arrest, detention, prosecution, conviction and successful appeal are available. The said criminal records including transcripts are available in the archives of the registrar of this Honourable Court under case number CA 306/2012. I have even attached a copy of the appeal judgment... as a clear demonstration of the availability of the records. The police officers who unlawfully arrested me as well as the public prosecutors who maliciously prosecuted me are still available in the service of the respondents as employees. Their names can be gleaned from the records of the appeal criminal court file ... in the possession of the registrar and one of the police officers involved is the second respondent whom I believe is still based in Port Elizabeth.

¹⁷ 2008 (4) SA 312 (SCA) para 21.

34.3.2 Secondly, the respondents have easy access to the said police docket and criminal records as I have mentioned above.

34.3.3 Thus I submit that the respondents have not been unreasonably prejudiced ...'

[60] The Full Court judgment does not constitute proof of the availability of the records which the applicant maintains are available in the archives of the registrar of this Court. As at the date on which this application was argued, no assurance was given that the said records are available, or that the applicant has obtained them or secured their preservation and safekeeping, or that the docket survives on the SAPS Crime Administration System and can be retrieved by tracking its reference number (also known as a CAS number).

[61] In answer to the applicant's averments the deponent to the respondents' answering affidavit states that the charge sheet and details relating to the bail application and recordings are no longer available. He attaches an affidavit from an incumbent employed in the Legal Affairs Division of the National Prosecuting Authority to confirm this. He mentions that a significant period of 12 years have passed since the applicant's arrest. In that regard he points out the potential difficulty which employees of the respondents would encounter if they were required to recall minute detail in the event of proceeding to trial. Moreover, Ntshinkose is no longer in the service and employment of the Minister.

[62] The substantial lapse of time long after events relating to the applicant's arrest, detention and prosecution must obviously have an effect on human recollection and cannot, in the circumstances of this matter be downplayed. The prejudice occasioned to the respondents is not anything speculative. It is based on a common sense approach to the matter stemming from the practical difficulty of expecting witnesses to testify on events without relevant documentation which may assist in recollection.

Conclusion

[63] I am not persuaded that the applicant has met the requirements of section 3(4)(b) of the Proceedings Act.

[64] The applicant's papers, to say the least, are confusing and purposely scant in detail.

[65] The applicant sought final relief and made no request to refer any issues to oral evidence notwithstanding numerous disputes of fact presenting themselves on the papers, particularly those relevant to prescription, good cause and prejudice.

[66] These disputes fall to be dealt with in accordance with the approach conventionally known as the 'Plascon-Evans rule' set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹⁸, namely:

'[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

[67] This principle applies even where the onus may be on an opposite party¹⁹ (as in this instance where the respondents are required to lay a basis for claiming prejudice).

The order

(a) **The application is dismissed with costs.**

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

¹⁸ 1984 (3) SA 623 (AD) at 634E-635C.

¹⁹ *Aetiology Today CC t/a Somerset Schools v Van Aswegen and Another* 1992 (1) SA 807 (WLD) at 809J.

APPEARANCES:

For the Applicant:	M. Mayekiso
Instructed by	Ayabonga Koswana Attorneys c/o Mgangatho Attorneys Makhanda (Ref: A. Mgangatho)

For the Respondents:	C. Goremusando Zilwa Attorneys Makhanda (Ref: T. Zilwa)
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Date heard:	17 November 2022
Date delivered:	23 March 2023