

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/NO	YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO	YES/NO
(3) REVISED: 18/12/2013	
18/12/2013	[REDACTED]
DATE	SIGNATURE

CASE NO: 54940/2012

In the matter between:

ALFRED MASHABA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUGDMENT

(The matter was heard in open court but judgment was delivered electronically by uploading onto the electronic files of the matter on CaseLines. It was submitted to the representatives of the parties on CaseLines and the date of judgment is deemed to be the date thereof onto CaseLines)

Before: **HOLLAND-MUTER J**

[1] The plaintiff issued summons against the defendant for damages suffered as a result of an alleged unlawful arrest and detention (and further detention).

[2] The plaintiff avers that he was arrested by members of the South African Police executing their duty in service of the defendant on 22 February 2008. He was arrested without a warrant for arrest in terms of section 40(1)(b) of the Criminal Procedure Act, Act 51 of 1977 ("CPA"). He appeared in court on 25 February 2008 and after a formal bail application on 8 May 2008, bail was denied and he remained in custody until acquitted on 18 April 2011.

[3] He consulted with his attorney on 22 May 2012 and summons was issued and served on the defendant on 16 October 2012.

[4] The defendant raised a special plea of prescription against the plaintiff and this was what the parties requested the court to adjudicate before the merits are adjudicated.

[5] There was an agreement between the parties that the special plea be adjudicated separately and that the merits and quantum issues be postponed.

[6] The Institution of Legal Proceedings against Certain Organs of State, Act 40 of 2002 (*"The Act"*) provides for a party must deliver a notice of intention to institute action against an Organ of State within six months after the case of action arose before summons is issued. The plaintiff approached the court on 11 June 2013 to condone the late filing of the required notice in terms of

section 3 of the Act and Du Plessis AJ granted the condonation on 28 October 2014. Summons was issued and served on 16 October 2012.

[7] Prescription is governed by the Prescription Act, Act 68 of 1969 (*"Pr- Act"*). In terms of section 11(d) of the P-Act the period of prescription of debts shall be the following; ***"save where an Act of Parliament provides otherwise, three years in respect of any other debt"***

[8]Section 12 of the Pr-Act prescribes when prescription begins to run, and states: ***"Subject to the provisions of subsections (2);(3) and (4) prescription shall commence to run as soon as the debt is due".... and "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 acquired it by exercising reasonable care"***.

[9] Section 17 states that a court shall not of its own motion take notice of prescription. Prescription may be raised at any stage of the proceedings.

[10] The crisp issue in this matter is at what stage is the plaintiff deemed to have obtained reasonable knowledge of the facts giving rise to a claim against the defendant. The importance thereof is that it would be the date from when prescription will run. The plaintiff argues that prescription only commenced to run after release from custody, while the defendant argues prescription commenced running the day after the alleged arrest.

[11] The plaintiff was arrested on 22 February 2008 by members of the defendant without a warrant of arrest in terms of CPA and after an unsuccessful bail application on 8 May 2008 the plaintiff remained in custody until his acquittal on 18 April 2011.

[12] The cause of action in the summons is for the unlawful arrest *and* detention of the plaintiff. There are no separate claims for the arrest and detention and a globular amount is claimed for the arrest and detention.

[13] There is case law on the issue as to when prescription is deemed to begin running. One of the reasons for prescription is to protect defendants from undue delay by litigants who are laggardly in enforcing their rights. **Minister of Finance v Gore NO 2007 (1) SA 111 (SCA)** par [16]. The court further held in par [17] that time begins to run against the creditor when it has the minimum facts that are necessary to institute action.

[14] A similar approach is found in **Truter & Another v Deysel [2006] 17 SCA** judgment delivered on 17 March 2006; “... *a debt is due when the creditor (Plaintiff) acquires a complete cause of action for the recovery of debt, that is when the entire set of facts which the creditor must prove in order to succeed in his/her claim against the debtor is in place, in other words, when everything has happened which would entitle the creditor to institute and pursue his/her claim*”. This principle was applied in **Sello Thabang v Minister of Police; Gauteng North Case no 89077/2016**.

[15] The Court must distinguish between cases where two separate claims are instituted for the alleged unlawful arrest and later detaining of a plaintiff and the instance where one claim is instituted for the alleged unlawful arrest and detention as one on-going claim.

[16] The majority of case law is clear that in the case of unlawful arrest, the cause of action arises when the arrest is completed and prescription will commence to run after completion of the arrest. See **Phala v Minister of Safety and Security [2023] 1 All SA 227 (FB)** and **Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA)**.

[17] The present matter ought to be distinguished from those instances where the arrest does not result in a continuous detaining of the person because *“the proceeding from arrest to acquittal must be regarded as continuous and no action for personal injury done to the accused person will arise until prosecution has been determined by his discharge”*. See *Phala* supra par {46]

[18] In *Phala* supra par [68] the court refers to the dictum by Hulley AJ in the *Lebelo* matter that *“A wrongful arrest involves a single act, but, for so long as the accused remains in the detention of or under the vicarious control of the Minister of Police, his detention constitutes a continuing wrong”*.

[19] In those instances where the arrest and detention constitutes a continuing wrong, the basic facts to allege to institute action will only manifest after release from custody. If that is correct, prescription can only start to run after release from custody.

[20] It is not for this court to decide on the correctness of the pleaded cause of action but merely whether the pleaded cause of action has prescribed or not. In my view the particulars of claim purports to allege one cause of action and a single award for damages is claimed for the personal injury suffered by the plaintiff. It would have been different if a separate cause of action for the arrest and a second cause of action for the on-going detention were averred, but as is, the circumstances favour the notion that the plaintiff instituted a single action for the alleged suffering he sustained due to the one alleged wrong committed by the members of the defendant.

[21] I therefore find that prescription only commenced to run after release from detention on 18 April 2011. The summons was issued and served on 16 October 2012, well within three years of the plaintiff obtained knowledge of the identity of the debtor and the facts from which the debt arises.

[22] The evidence by the plaintiff during the hearing was merely on the formal aspect of prescription and merits cannot be determined on this alone. The defendant ought to be given the opportunity to have the necessary witnesses at court to ventilate the merits.

[23] The second special plea of non-joinder was not dealt with and will be argued in future when the merits and quantum issue be heard. This court was only requested to pronounce on the prescription issue.

[24] Accordingly the special plea of prescription cannot succeed.

ORDER:

1. The Special plea of Prescription is dismissed;
2. The issue of merits and quantum is postponed *sine die*; and
3. The defendant is ordered to pay the costs of the plaintiff on a party and party scale.


J HOLLAND-MUTER

18/12/2023

Judge of the Pretoria High Court

Matter heard on 15 August 2023; arguments presented on 11 September 2023

Judgment delivered on 18 December 2023

On behalf of Plaintiff:

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On behalf of Defendant:

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