

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No:73161/16

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

A handwritten signature in black ink, appearing to be "B. J. J.", is written over a light blue grid background.

9 February 2021

In the matter between:

KONTSIWE XOLILE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

SK Hassim AJ

Introduction

[1] On 4 August 2016,¹ the plaintiff (the applicant in this application) instituted proceedings against the defendant (the respondent in this application) for compensation for

¹ This is the date on the rubber stamp imprint affixed by the Registrar on the face of the summons.

unlawful arrest and detention, assault, and malicious prosecution. (It is convenient to refer to the parties as in the action).

[2] The summons was served by the Sheriff on the defendant on 29 September 2016. The imprint of a rubber stamp bearing the words “Ministry of Police” and date “16 September 2016” appears on the face of the summons. This suggests that the summons was delivered prior to service by the Sheriff. Nothing however turns on this.

[3] Even though each of the claims constitutes a separate cause of action, these are not pleaded as such in the particulars of claim. Notwithstanding this, on a careful reading of the particulars of claim, it is evident that the plaintiff relies on three separate causes of action.

[4] On 14 November 2017, the defendant delivered a plea embodying the undermentioned two special pleas, both confined to the plaintiff’s claim for unlawful arrest and detention.

- (i) the plaintiff’s claim arising out of his unlawful arrest and detention has prescribed.
- (ii) the notice contemplated in section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act No 4 of 2002 (*“the Act”*) had not been served on the defendant timeously. This notice is henceforth referred to as *“the statutory notice”*.

[5] On 30 August 2019, the plaintiff delivered an application in terms of section 3(4) of the Act to condone the failure to serve the requisite notice timeously (*“the condonation application”*). In response, the defendant delivered a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court.

The factual matrix

[6] On 8 August 2013, the plaintiff was shot by members of the South African Police Service (“SAPS”) and thereafter arrested and detained for seven (7) days. On 14 August 2013, the plaintiff appeared in court on a charge of attempted murder. On the following day, he was released from detention. As appears hereunder the plaintiff was not prosecuted for the alleged crime. Hence the claim for compensation for malicious prosecution.

[7] On 8 September 2015², being a date more than two years after the assault and the arrest and detention, the notice contemplated in section 3(1) of the Act (i.e., the statutory notice) was served on the defendant.

[8] The defendant was notified that the plaintiff intended instituting legal proceedings for the payment of the sum of R2 million which was made up of compensation in the amount of R1 million for pain and suffering and R1 million for unlawful arrest. While reference is made to the prosecution being malicious, no mention is made of an intended claim for compensation for malicious prosecution.

[9] The summons in the action was issued on 4 August 2016 but was served by the Sheriff almost a month later, namely on 29 September 2016. On 14 November 2017, the defendant filed a plea, embodying two special pleas. The one is that the plaintiff’s claims for unlawful arrest and detention had prescribed in terms of the Prescription Act, Act No 68 of 1969 (“*the Prescription Act*”) and the other is that the plaintiff had failed to serve the statutory notice timeously.

The applicable provisions of the Act

[10] In terms of Section 3(1) of the Act a creditor who intends instituting proceedings against an organ of state must within six months from the date on which the debt becomes due, notify the organ of state of its intention to do so.

² The letter is dated 7 September 2015.

[11] Section 3(4)(b) of the Act confers upon a court the discretion to condone the failure to notify the organ of state as required by section 3(1). However, the discretion exists under three circumstances only:

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for the creditor's failure to notify the organ of state (or to timeously notify it); and
- (iii) the organ of state is not unreasonably prejudiced by the creditor's failure.

[12] While a discretion is conferred on the court to condone the failure to notify the organ of state as required by section 3 (1), the discretion is removed if the debt has been extinguished by prescription.³

The claim for compensation for unlawful arrest and detention.

[13] The first question must be whether the plaintiff's claim for compensation flowing from the assault and his unlawful arrest and detention has prescribed. In order to determine this, the date when the debt became due to the plaintiff must be identified.

[14] Van Heerden JA interrogated this question in Truter and Another v Deyssel⁴ where the court was confronted with the question when the "*debt is due*" in the context of the Prescription Act⁵ and held as follows:

*"For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."*⁶

³ Cf. Minister of Safety and Security v De Witt 2009(1) SA 457 (SCA) at para [13].

⁴ 2006 (4) SA 168 (SCA) para 16.

⁵ Section 12 (1) of the Prescription Act, (s 12) reads:

"Subject to the provisions of ss (2) and (3), prescription shall commence to run as soon as the debt is due".

⁶ Para 16. See also Makhwelo v Minister of Safety and Security 2017 (1) SA 274 (GJ).

[15] This dictum is applicable when identifying the date on which “*the debt became due*” for purposes of the Act.

[16] The plaintiff acquired a complete cause of action for compensation for unlawful assault and arrest on 8 August 2013 and for unlawful detention on each day of his detention, the last day being 15 August 2013.⁷ These claims would have been extinguished by prescription between 7 August 2016 and 14 August 2016.

[17] Mr Gwebu, who appeared on behalf of the plaintiff, submitted that the claim had not prescribed because the summons had been issued prior to the expiration of three years from the date on which the cause of action arose.

[18] In terms of section 15(1) of the Prescription Act, prescription is interrupted when a summons is served; not when it is issued by the Registrar. The plaintiff’s claims for assault and unlawful arrest and detention had prescribed by the time the summons was served on the defendant by the Sheriff on 29 September 2016. Consequently, section 3(4)(b)(i) of the Act precludes me from condoning the plaintiff’s failure to serve (or rather timeously serve) the statutory notice in respect of the claims arising from the assault and the unlawful arrest and detention.

The claim for compensation for malicious prosecution.

(i) *When were the proceedings terminated in the plaintiff’s favour?*

[19] The papers are not clear when the criminal proceedings were terminated in the plaintiff’s favour. I illustrate:

(a) In paragraph 10, of the particulars of claim the plaintiff alleges that he was prosecuted for attempted murder and acquitted on 15 August 2013.

⁷ Cf. Minister of Police and Another v Yekiso 2019 (2) SA 281 (WCC) para [27].

- (b) In paragraph 12, of the founding affidavit in the condonation application the plaintiff alleges that the criminal proceedings were terminated in his favour on 24 April 2018. In paragraph 26 he alleges that that a *nolle prosequi* certificate was issued on 24 August 2018. However later in the paragraph he alleges that the certificate was issued on 24 April 2018. In support of the latter date the plaintiff refers to the cover of the case docket annexures “XK 3(a) and “XK 3(b) the founding affidavit. Both are seemingly a copy of the face of the case docket. On annexure XK 3(a) the words “*Nolle Prosequi*” appear in the space allowed for recording the “*finding/result of the trial*”. The words that follow on these are illegible. The signature of apparently the prosecutor is appended. Even though a space appears for the insertion of a date, none has been inserted. The date “2018.04:24” is however inserted in manuscript in the left side margin of the page. There is no indication who inserted this date. These particulars also appear on Annexure “XK 3(b) save that the words “*Not enrolled*” precede the words “*Nolle Prosequi*”.

The other difference between the two annexures is that the date “15/12/15” is annotated as the date of the last court appearance on “XK 3(a)” while on “XK 3(b)” it is annotated as “30/8/2017”.

- (c) In paragraph 33, of the founding affidavit, the plaintiff suggests that the criminal proceedings were terminated in his favour on 25 April 2018. However, in paragraph 39 the date is alleged to be 24 April 2018.
- (d) According to paragraph 5 of the heads of argument delivered on behalf of the plaintiff, the charges against the plaintiff were withdrawn on 25 April 2018.

[20] Considering that the criminal proceedings were enrolled for 24 June 2015 as well as 15 December 2015 it is implausible that the criminal proceedings terminated in the plaintiff’s favour on 15 August 2013; it is more plausible that the proceedings terminated on 24 April 2018 being the date annotated in the left-hand margin of the face of the case docket. The statutory notice had to therefore be served within six months of 24 April 2018.

(ii) *Was the defendant notified of the plaintiff's intention to institute proceedings for compensation for malicious prosecution?*

[21] It is evident from the founding affidavit that the plaintiff's case is that the statutory notice served on 8 September 2015 served as notice of his intention to institute proceedings for compensation for not only assault and unlawful arrest and detention, but also for malicious prosecution.

[22] Mr Gwebe argued that the statutory notice served on 8 September 2015 contained all the allegations necessary to support a claim for malicious prosecution and therefore a notice had been served on the defendant in respect of this claim. His argument was therefore that this is not a case where the plaintiff had failed to give notice. I disagree.

[23] The debt arising out of the malicious prosecution could not have fallen due before the criminal proceedings terminated in the plaintiff's favour on or about 24 April 2018. Before this date one crucial element of a claim for compensation for malicious prosecution was lacking; the proceedings had not yet been terminated in the plaintiff's favour.⁸ There was accordingly no debt due when the statutory notice was served on 8 September 2015.

[24] Additionally, the statutory notice served on 8 September 2015 does not contain all the facts giving rise to the debt. (The proceedings had not yet been terminated in the plaintiff's favour.) Nor does it inform the defendant that the plaintiff intends instituting legal proceedings for compensation for malicious prosecution. There are only two statements in the statutory notice regarding the plaintiff's malicious prosecution:

“3.5 *Following the unlawful and wrongful arrest, the SAPS instigated that [sic] our client be prosecuted by placing false information in the docket namely that our client has committed a crime of attempted murder.*

3.6 *During an internal investigation by the South African Police Service, it became apparent that the SAPS instituted the criminal proceedings maliciously.”*

⁸ Cf. Thompson v Minister of Police 1971 (1) SA 371 (E); Els v Minister of Law and Order 1993 (1) SA 12 (C).

[25] I am unable to find that the statutory notice served on 8 September 2015 constitutes a notification to the defendant that the plaintiff intends instituting legal proceedings for compensation for malicious prosecution. Any doubt which exists is put to rest by the following two statements in the notice.

“2. *Our client has instructed us to give you notice... of his intention to institute and prosecute a civil action against the Minister of South African Police Service [sic], for the payment of R 2 million (two million rand) for damages suffered as a result of unlawful arrest, assault and detention[sic].*

...

4. *... Our client has suffered damages for pain and suffering, due to unlawful and wrongful arrest as well as injuries sustained from gun wounds in the sum of R 2 000 000.00 (Two million rands).*

PAIN AND SUFFERING R1 000 000.00

UNLAWFUL ARREST R1 000 000.00”

[26] I accordingly find that the plaintiff failed to notify the defendant of its intention to institute proceedings for compensation for malicious prosecution. I have the discretion in terms of section 3(4)(b) of the Act to condone this failure provided that I am satisfied (i) the claim for malicious prosecution has not prescribed; (ii) good cause exists for the plaintiff’s failure; and (iii) the defendant is not unreasonably prejudiced by the failure.

(iii) Has the plaintiff’s claim for compensation for malicious prosecution prescribed?

[27] I have identified 24 April 2018 as being the more plausible date when the proceedings were terminated in the plaintiff’s favour. The plaintiff’s claim for compensation for malicious prosecution would thus prescribe on 23 April 2021.

[28] The averments in the particulars of claim sustain a claim for compensation for malicious prosecution. However, the proceedings were not terminated in the plaintiff’s favour until 24 April 2018. This being so the cause of action for malicious prosecution had not arisen when the summons was issued or served; it arose approximately 20 months thereafter. The parties were not called upon to address me on whether the summons issued on 4 August 2016 interrupted the plaintiff’s claim for compensation for malicious prosecution or not. I therefore refrain from expressing myself on the issue save for stating

that if the claim had not been interrupted by that summons then a fresh summons will have to be issued prior to the claim prescribing on 23 April 2021.

[29] Having found that the claim has not prescribed, I turn to consider two issues. First whether good cause exists for the plaintiff's failure to deliver the statutory notice. Second, whether the defendant has been unreasonably prejudiced by the plaintiff's failure to serve the statutory notice. The latter issue can be disposed of immediately.

(iv) *Is the defendant unreasonably prejudiced by the plaintiff's failure to serve the statutory notice?*

[30] The plaintiff avers in the founding affidavit that the defendant will not be "unduly" prejudiced if the failure to serve the statutory notice is condoned. The defendant has elected not to deliver an answering affidavit. The averment is therefore unchallenged. In the circumstances I am entitled to accept, as I do, that the defendant has not been unreasonably prejudiced by the plaintiff's failure to serve the statutory notice.

(v) *Good cause*

[31] This leaves the question whether the plaintiff has demonstrated good cause for the failure to serve the statutory notice. Unless I am satisfied that good cause exists for the failure to serve the statutory notice, I do not have the discretion to grant condonation.⁹

[32] Hefer JA in Madinda v Minister of Safety and Security¹⁰ remarked as follows on the element of good cause:

“Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation

⁹ Minister of Safety and Security v De Witt 2009(1) SA 457 (SCA) at para [13].

¹⁰ 2008 (4) SA 312 (SCA) at para [10].

offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor."

[33] In the final analysis the question whether good cause has been shown resolves into a balancing of the relevant factors and interests of the parties. The reason for the failure to notify an organ of state of intended legal proceedings is one of the factors that a court may take into consideration. Another is the prospects of success in the intended action.

[34] Considering the argument advanced on behalf of the plaintiff that the notice served on 8 September 2015 constituted the statutory notice for the claim for malicious prosecution, it comes as no surprise that no explanation is given in the founding affidavit why the statutory notice for the debt arising from the plaintiff's malicious prosecution was not served on the defendant.

[35] The plaintiff's attorney was of the view that the statutory notice served on 8 September 2015 was sufficient notification of intended proceedings for the claim arising out of the plaintiff's malicious prosecution. The plaintiff had entrusted the litigation to his attorney, and he had no reason to doubt the correctness of his attorney's view of the legal position. Nor was there any reason for him to believe that his attorney would not take all the steps required by law to give effect to his mandate to his attorney to recover compensation for his malicious prosecution. It is not in the interests of justice¹¹ for the plaintiff to be penalised for his attorney's understanding (or misunderstanding) of the law, which would be the result if I refuse the condonation application on the basis that an explanation is wanting for the failure to serve the statutory notice.

[36] Moving to the plaintiff's prospects of success in the action for compensation for malicious prosecution. The defendant does not contend that the plaintiff's claim for malicious prosecution is without merit. If that were the case, he would have said so. The defendant's plea on the merits of the plaintiff's claim for compensation for malicious

¹¹ Minister of Agriculture and Land Affairs v CJ Rance 2010 (4) SA 109 (SCA).

prosecution is a bare denial. It is evident from the copy of the face of the case docket that the prosecutor refused to prosecute the plaintiff. There is in my view a case for the defendant to answer.

[37] Furthermore, the defendant does not contend that the plaintiff has not acted reasonably or that he is not *bona fide* in enforcing a legitimate claim.¹²

[38] The object of prior notification is to afford an organ of state the opportunity to investigate claims against it prior to it becoming embroiled in litigation.¹³ To this end section 3(2)(b)(i) of the Act requires the creditor to set out the facts giving rise to the debt.

[39] Notwithstanding my finding that the plaintiff failed to notify the defendant of its intention to institute proceedings for compensation for malicious prosecution, I cannot ignore that the letter served on the defendant on 8 September 2015 alerted the defendant to (i) the plaintiff's grievance that the SAPS had instigated his prosecution by "*placing false information in the docket*" to support a charge of attempted murder; and (ii) an internal investigation had been conducted by the SAPS and it was found that the criminal proceedings had been instituted maliciously.

[40] In this case the defendant was informed of the facts giving rise to the claims, except for the termination of criminal proceedings against the plaintiff. The defendant not having delivered an answering affidavit can be taken to admit that the SAPS conducted an internal investigation. The significance of this is twofold. First, there has already been an investigation and second, after the investigation was completed an authorised person within the SAPS formed the view that the criminal proceedings had been instituted maliciously.

[41] The factual background to the plaintiff's claim was therefore brought to the defendant's attention as far back as 8 September 2015. In addition, an internal investigation had been conducted and concluded.

¹² MEC for Education, KwaZulu-Natal v Shange 2012(5) SA 313 (SCA) at para 19.

¹³ Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)

[42] In the present case the defendant cannot complain that he was not afforded an opportunity to gather and preserve information and evidence.¹⁴ In this case the object of prior notification has not been thwarted.

[43] I am satisfied, for purposes of section 3(4)(b)(ii) of the Act, that good cause exists for the plaintiff's failure to have given the statutory notice to the defendant insofar as his claim for compensation arising out of his malicious prosecution is concerned.

[44] The plaintiff has however failed in his application to condone the failure to serve the statutory notice in respect of his claim for compensation for assault and unlawful arrest and detention. Both parties have therefore been partially successful. In the circumstances it is fair that no order should be made as to costs.

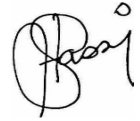
[45] However, considering (i) the inconsistencies on the date when the criminal proceedings were terminated in the plaintiff's favour; (ii) the ill-conceived argument that prescription is interrupted when a summons is issued as well as the ill-conceived argument that the notice served on the defendant on 8 September 2015 (prior to the cause of action for malicious prosecution arising) constituted notice in respect of the plaintiff's claim for malicious prosecution, I am of the view that it would be unjust for the plaintiff to pay to his attorney any costs associated with the condonation application.

[46] In the result I make the following order:

- (a) The plaintiff's failure to serve the notice contemplated in section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act No. 40 of 2002 ("*the Act*") in respect of his claim for compensation for malicious prosecution is condoned.
- (b) The plaintiff must serve the notice contemplated in section 3(2)(a) of the Act in respect of his claim for compensation for malicious prosecution within fifteen (15) days of this order.

¹⁴ Cf. Mabaso v National Commissioner of Police and Another 2020 (2) SA 375 (SCA) para [49].

- (c) The plaintiff's attorney may not charge fees for any work associated with the condonation application.



S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria

(electronic signature appended)

9 February 2021

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the plaintiff's legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 February 2021.

Date of hearing: 6 October 2020

Appearances: For the plaintiff: Mr Gwebu

For the defendant: Adv Sevenster