



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

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

2021.05.27

DATE

SIGNATURE

CASE NUMBER: 67107/17

DATE: 27 May 2021

AARON NKOSI & 10 OTHERS

Plaintiffs/Applicants

V

THE MINISTER OF POLICE

First Defendant/Respondent

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant/Respondent

THE TSHWANE METRO POLICE DEPARTMENT

Third Defendant/Respondent

JUDGMENT

MABUSE J

[1] This application is brought by an attorney on behalf of a client, the Plaintiff in the main action. The Plaintiff seeks an order in the following terms:

"1.1 That the non-compliance "by the Plaintiffs" with s 3(1) and s 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002 in relation to a

claim instituted against the Third Respondent be condoned in terms of s 3(4) of the abovementioned Act.

1.2 That no order be made as to costs, same that, should any party oppose this application, such party/parties must be ordered to pay costs occasioned by such application.”

- [2] On 11 November 2017 the Plaintiffs instituted an action against the First and Second Defendants based on unlawful arrest, unlawful detention and malicious prosecution by officials of the First and Second Defendants. As it is obvious from the citation of the Defendants, at that stage the Third Defendant was not a party to the action so instituted.
- [3] The incident took place on 19 October 2015. The Plaintiffs were charged with various charges that included illegal gatherings. Copies of the combined summons were served on the First and Second Respondents on 3 October 2017.
- [4] The initiation of the action against the First and Second Defendant was preceded by a notice in terms of s 3 of the Act sent to the First and Second Defendants. No such notice was sent to the Third Defendant at the same time, because at the time when the Plaintiffs' attorney issued the notices in terms of s 3 of the Act to the First and Second Defendants, it had not been planned to initiate any such proceedings against the Third Defendant.
- [5] On 28 June 2018 the Plaintiff issued an application to join the Third Defendant. The order of joinder was granted on 29 October 2018. A copy of the relevant court order is attached to the founding affidavit as Annexure 'A'.
- [6] After the joinder order was granted the Plaintiff and the Third Defendant exchanged pleadings. They have already had a pre-trial conference in the main matter. Such pre-trial conference was held on 29 October 2019.

- [7] According to the Plaintiffs' attorney, despite the Third Defendant having joined the main action at a late stage, the joinder application and a copy of the combined summons were served on the Third Defendant before the Plaintiff's claim could become prescribed and within three years of the date of detention and withdrawal of the charges.
- [8] The attorneys take full responsibility for the failure to comply with the provisions of the Act.
- [9] The application for condonation is opposed by the Third Defendant. The answering affidavit of a certain Wardah Achmat, an adult female employed as the Deputy Director Compliance and Corporate Governance litigation of the Third Defendant is used for that purpose.
- [10] In opposing the application for condonation the Third Defendant relies on:
- 10.1 prescription;
 - 10.2 non-existence of a good cause;
 - 10.3 prejudice to the Third Defendant; and
 - 10.4 failure by the Plaintiffs to ensure that the application for joinder was served on the Third Defendant.
- [11] The version of Ms Achmat is as follows. On 19 October 2015 and at Pretoria the Plaintiffs were arrested and subsequently detained. The effective date on which their cause of action arose is accordingly 19 October 2015. It is common cause furthermore that the Plaintiffs were arrested and detained by the members of the First and Second Defendants. This is clear from paragraph 6 of the Plaintiff's particulars of claim. Summons was issued against the First and Second Defendants on 16 May 2017 and served on them on 3 October 2017. A summons citing the First and Second Defendants was served on the Third Defendant on 8 April 2018. A period of more than three years after the cause of action had arisen before the Plaintiffs joined, by way of an application, the Third Defendant as a defendant in the action. On 1 August 2019 the Plaintiffs served and amended their particulars of claim on the attorneys of the Third Defendant which introduced members of the Third Defendant as the

persons who effected the purported unlawful arrest on 19 October 2019. According to the Third Defendant this was done despite proper objection to a notice of intention to amend.

[12] According to the Plaintiffs they were arrested and detained by members of the South African Police Service. These members were in the employ of the First Defendant and at all material times were acting within their course and scope of their employment with the First Defendant.

[13] On 16 May 2017 the Plaintiffs issued summons against the First and Second Defendants. Copies of the summons were served on the First and Second Defendants on or about 3 October 2017. The summons that had cited the First and Second Defendants only was served on the Third Defendant on 8 April 2018. The Third Defendant was not cited as a party in the summons.

[14] On 28 October 2018 and by way of an application the Plaintiffs joined the Third Defendant as a defendant in the action. It is the Third Defendant's case that the application for joinder was not served on the Third Defendant but was only served on the office of the State Attorney who are the attorneys of record of the First and Second Defendants. It is not in dispute that a copy of the application for joinder was not served on the Third Defendant but was only served on the State Attorney. This fact was admitted by Mr Choeu who appeared for the Plaintiffs.

[15] On 1 August 2019 the Plaintiffs served their amended particulars of claim on the attorneys of the Third Defendant. The allegations against the Third Defendant, as they were against the other Defendants, were that the Third Defendant had purported to arrest unlawfully the Plaintiffs on 19 October 2015. On 19 September 2019 the Third Defendant served and filed its plea in the action. A copy of the Third Defendant's plea is attached to the papers as Annexure 'AA7'. In the said plea the Third Defendant raised a special plea of non-compliance with s 3 and s 4 of the Act.

[16] It is the Third Defendant's case that in order to be successful with its application for condonation the Plaintiff is required to at least satisfy the following requirements:

16.1 firstly, that the debt has not been extinguished by prescription;

16.2 secondly, that good cause exists for the failure by the Plaintiffs to give timeous notice in terms of the Act; and

16.3 that the Third Defendant had not been unreasonably prejudiced by the failure by the Plaintiffs to give timeous notice in terms of the Act.

PRESCRIPTION

[17] The date of the arrest and subsequent detention of the Plaintiffs was 19 October 2015. In terms of s 11 of the Prescription Act 68 of 1969 the effective date of prescription of the Plaintiffs' claim was 18 October 2018. The order to join the Third Defendant was only granted on 29 October 2018. Moreover, this order was only served and filed on the Third Defendant's attorneys of record on 5 July 2019.

[18] The Defendants only amended their particulars of claim which introduced members of the Third Defendant as the persons who allegedly effected the unlawful arrest on 19 October 2015, on 1 August 2019. This happened approximately 10 months after any possible claim against the Third Defendant had been extinguished by prescription. The Plaintiffs' attorney has failed to furnish this Court with a reasonable or acceptable explanation how the failure to give the Third Defendant the necessary notice in terms of s 3 of the Act came about. Furthermore, he failed to give any reason why there was such an unreasonably long delay before he decided to join the Third Defendant.

PROSPECTS OF SUCCESS

[19] The Plaintiffs' claim against the Third Defendant has been extinguished by prescription. It is not in the interest of justice to grant a condonation application to the Plaintiffs in circumstances where the cause of action on which the Plaintiffs rely has become prescribed.

Therefore, there will be no prospects of success for the Plaintiffs in the action in circumstances where the claim against the Third Defendant has already become prescribed.

SERVICE OF THE JOINDER APPLICATION

- [20] It is not in dispute that the application for joinder of the Third Defendant was not served on the Third Defendant but instead on the State Attorney, the attorneys acting for the First and Second Defendants. It is not clear as to whether this matter was pointed out to Judge Maumela when he granted the application for joinder. I am sure that if he had been informed that there was no service of the application for joinder on the Third Defendant he would not have granted the order that he did on 29 October 2018. That order was granted erroneously. Relevant facts were withheld from the Judge. The order of Maumela J was an order given without jurisdiction. It is therefore an invalid order that may be disregarded without the necessity of a formal order setting it aside. The Plaintiffs were not justified and entitled to rely on a return of service that showed that the application for joinder had not been served on the Third Defendant.

PREJUDICE

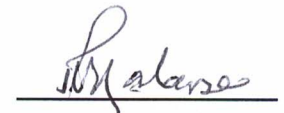
- [21] It is the Plaintiffs counsel's case that in terms of the provisions of s 3(4) of the Act the court must determine whether it would be in the interest of justice to grant condonation if the court is satisfied that:

- 21.1 the debt arising from the Plaintiffs' claim has not been extinguished by prescription;
- 21.2 good cause exists for the failure by the Plaintiffs to have served a notice in terms of subsection (2)(a); and
- 21.3 the Third Defendant was not unreasonable prejudiced by the said failure.

According to counsel for the Third Defendant it is not denied that the Third Defendant only became fully aware of the relevant dates on 1 August 2019, some four years after the alleged arrest had occurred. Furthermore, it is not denied by the Plaintiffs that their failure to timeously give notice before the claim had been extinguished by prescription the Third Defendant is severely prejudiced in having to defend and ward off the current litigation. The

allegations by the Third Defendant that he would suffer prejudice by such failure or to give notice in terms of s 3 of the Act or by the late delivery of the said notice in terms of s 3 of the Act would prejudice the Third Defendant. Finally, the Plaintiffs have not denied that the jurisdictional requirements have not been established and that the application should be dismissed with costs.

[22] I find that the application for condonation has several material problems. It cannot succeed and it is therefore dismissed with costs.


M MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiffs/Applicants:

Adv KM Choeu

Instructed by:

Nkome Attorneys Incorporated

Counsel for the Third Defendant/Respondent:

Adv WS Jungbluth

Instructed by:

Gildenhuys Malatji Incorporated

Date on the opposed roll before Mabuse J:

24 May 2021

Date of Judgment:

27 May 2021