

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

Case NO: 12/2019

In the matter between:

MINISTER OF POLICE

Applicant

and

ABONGILE ZAMANI

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MBENENGE, JP:

[1] This is an opposed application for leave to appeal to the full Court of this division against the judgment of this Court dismissing, with costs, the applicant's¹ special plea on prescription, delivered on 10 November 2020.

[2] The Court's pronouncement departed from the premise that, in the light of the manner in which the special plea had been couched,² reliance could not be placed on section 12(3) of the Prescription Act as that was neither the case the applicant had advanced in the special plea, nor one which the respondent could be called upon to meet at the trial stage.

¹The applicant is the defendant in the action from which this application arises.

² The applicant had merely pleaded that the claim had prescribed after the lapse of 3 years from the date of the respondent's arrest (02 March 2014), without the applicant having specifically relied on section 12(3) of the Prescription Act 68 of 1969.

[3] The Court found that, in any event, the evidence of “*Sergeant Ngcoza did not bring the [applicant’s] case within the ambit of section 12(3)*” as he “*merely testified to the date when and by whom the [respondent] was arrested and shed no light in relation to why the claim [was] hit by prescription.*”³

[4] The respondent, on the other hand, held the Court, had “*discharged any evidential burden that might be said to have rested on him to establish that he acquired knowledge of the identity of the debt and of the facts giving rise to the debt after obtaining legal advice concerning the availability of a cause of action against the [applicant] during or about November 2018.*”

[5] The applicant relies on the following grounds in pursuit of the application, namely:

- “1. That the learned Judge erred in finding that the applicant could not rely on section 12(3) of the Prescription Act.
2. That the learned Judge erred in not finding that:
 - 2.1 The debt became due, and prescription commenced to run, when the respondent had knowledge, or deemed knowledge, of the identity of the debtor and the facts from which the debt arose in order to institute a claim.
 - 2.2 The common cause facts were that the respondent:
 - 2.2.1 was arrested by the police on 02 March 2014;
 - 2.2.2 was detained by, or at the instance of the police, until 12 May 2014; and
 - 2.2.3 the summons claiming damages for wrongful arrest and detention was issued on 16 January 2019.
 - 2.3 The identity of the debtor was manifest – the Minister of Police.
 - 2.4 The facts from which the debt arose were the arrest and the detention of the plaintiff.
 - 2.5 Neither possession of the police docket nor receipt of legal advice affected the respondent’s obligation to institute a claim within 3 years.
 - 2.6 The decision of the Constitutional Court in *Mtokonya v Minister of Police* could not be distinguished, was binding and fell to be followed.
 - 2.7 The decision in *Makhwelo v Minister of Safety and Security* was wrongly decided, inconsistent with the Constitutional Court decision in *Mtokonya* and could not be followed.
 - 2.8 The respondent’s claim had prescribed.”

[6] At the hearing of the application the parties were in one accord that the issue for determination had, in spite of the fact that the special plea on prescription lacked precision, been properly identified and the trial had proceeded (and evidence led) on the issue of prescription.

³*Zamani v Minister of Police* [2020] ZAECBHC 23 at para 29 (impugned judgment).

[7] It was accordingly submitted, on behalf of the respondent, that there would be no justification for interference by an appellate tribunal merely because the pleadings of the applicant had not been explicit as might have been on the issue. The applicant did not argue to the contrary. In light of the view I take of the matter, this issue need not be pronounced on.

[8] Differing contentions on the merits of the application were made. The test to be adopted in applications for leave to appeal was also subjected to some debate, yet the applicable legal position is trite.

[9] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[10] In *Valley of the Kings Thaba Motswere (Pty) Ltd and another v A L Mayya International*⁴ Smith J aptly put it thus:

“[4] There can be little doubt that the use of the word ‘would’ in section 17(1)(a)(i) of the Superior Courts Act implies that the test for leave to appeal is now more onerous. The intention clearly being to avoid our courts of appeal being flooded with frivolous appeals that are doomed to fail. I am, however, of the respectful view that the ‘measure of certainty’ standard propounded by the learned judge in *Mont Chevaux Trust* may be placing the bar too high. It would, in my respectful view, be unreasonably onerous to require an applicant for leave to appeal to convince a judge – who invariably would have provided extensive reasons for his or her findings and conclusions – that there is a ‘measure of certainty’ that another court will upset those findings. It seems to me that a contextual construction of the phrase ‘reasonable prospect of success’ still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party.
..”

[11] I remain satisfied that even if it were to be found that the applicant was, on the pleadings, entitled to rely on section 12(3), he did not bring his case within the purview of the section. The respondent, on the other hand,

⁴*Valley of the Kings Thaba Motswere (Pty) Ltd and another v A L Mayya International* [2016] ZAECHGHC 137; Also see *MEC for Health, Eastern Cape v Neliswa Mbola obo Asavela Mbola* [2019] ZAECHMHC 21, where, with reference to the Supreme Court of Appeal judgment in *MEC for Health, Eastern Cape v Mkitha* [2016] ZASCA 176 at para 17, it was held:

“... an applicant for leave to appeal must convince the court on proper grounds that there is a “reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case, or one that is not hopeless, is not enough. There must be a sound basis to conclude that there is a reasonable prospect of success on appeal.”

discharged the onus resting on him to establish that he acquired knowledge of the identity of the debt and the facts giving rise to the debt on or about November 2018. Apart from all else, under cross-examination, Sergeant Ngcoza, who testified on behalf of the applicant, did not dispute that the respondent became suspicious that his arrest might have been unlawful in November 2018, and that he became aware of the fact that his arrest was unlawful upon consulting with his lawyer during the same period. For his part, Sergeant Ngcoza was, during his testimony, oblivious to why the claim was said to have prescribed. Without having had sight of the relevant police docket, the identity of the debtor could not have been manifest.

[12] The conclusion reached by the Court in the impugned judgment was influenced principally by *Makhwelo*⁵, which makes access to a police docket pivotal to the identification of the debtor, the appropriate cause of action, and the opportune moment for launching the action before it is hit by prescription.

[13] It has, however, greatly exercised my mind whether, upon a reading thereof, the subsequent pronouncement in *Mtokonya*⁶ may not be said to have watered down the principle enunciated in *Makhwelo*. In the first place, *Mtokonya* was decided on the basis that the court had to determine a legal (as against a factual) issue which did not prevent prescription from running and that the applicant therein “... *did have the knowledge of the identity of the debtor and the material facts giving rise to the debt at the time he was released from detention . . . but . . . did not know that he had a legal remedy against the defendant.*”⁷ In the instant matter the respondent’s uncontroverted testimony was that he had no knowledge of the identity of the debtor, certainly not without having had sight of the police docket. It is a matter of concern that the line between what is purely factual, as against legal, within the meaning of

⁵*Makhwelo v Minister of Safety and Security* [2015] ZAGPJHC 10; 2017(1) SA 274 (GT).

⁶*Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018(5) SA 22 (CC).

⁷ *Id* at para 25.

section (12)(3), is too narrow and may at times result in a conflation of these terms.

[14] The problem that confronts us is exacerbated if one has regard to the following remarks by Froneman J (writing for the majority) in *Kruger*⁸:

“It is not clear to me whether the first judgment purports to lay down a legal rule that in all debts arising from delictual claim based on malicious prosecution, prescription starts to run only when a claimant has knowledge of the contents of the police docket. That would be a disquieting departure from the clear conceptual logic of the precedents in this area. For the reason stated above—that the evidence to prove lack of reasonable and probable cause and intent to injure will vary from case to case- a legal rule to that effect cannot and should not be posited.”

[15] There is no reason in logic and common sense why these remarks may not be applied to a case, such as the instant one, involving wrongful arrest and detention.

[16] Much as I am confident that the impugned judgment is correct, there is, in light of what is stated in paragraphs 13 and 14, a compelling reason why the appeal sought should be heard.

[17] Accordingly, the following order is made:

(a) The applicant is granted leave to appeal to the full Court of this division against the judgment and order dismissing the applicant’s special plea on prescription delivered on 10 November 2020.

(b) Costs of this application shall be costs in the appeal.

S M MBENENGE

⁸ *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 (6) BCLR 703 (CC) at para 80.

JUDGE PRESIDENT OF THE HIGH COURT

Applicant's counsel : *R Quinn SC (with him, V Sangoni)*

Applicant's attorneys : State Attorney
East London
C/o Legal Shared Services
Office of the Premier
King Williams Town

Respondent's counsel : *A Bodlani (with him, L van Vuuren)*

Respondent's attorneys : Cinga Nohaji Inc
East London

Date application for leave to appeal heard: 18 January 2021

Date judgment delivered : 02 February 2021