



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 5458/2014

In the matter between:

MONYAMOTSONE PETRUS KHANYA

Plaintiff

and

THE MINISTER OF POLICE

Defendant

CORAM: **MEINTJES, AJ**

HEARD ON: **04 JUNE 2019**

DELIVERED ON: **20 JUNE 2019**

JUDGMENT BY: **MEINTJES, AJ**

INTRODUCTION

[1] Plaintiff instituted a claim for damages against the defendant for wrongful arrest by the South African Police Service. Although the pleadings of this case refer to “arrest and detention” or

“incarceration” and “in custody”, it seems from the pleadings that plaintiff’s cause of action is founded on unlawful arrest only, which occurred on 16 April 2010.

- [2] The defendant pleaded to the particulars of claim and filed 2 special pleas, raising the defences of prescription, in terms of which he pleaded that the plaintiff’s claim had prescribed, and non-compliance with the Institution of Legal Proceedings against Certain Organs of State Act, Act 40 of 2002, in that plaintiff apparently failed to serve a notice contemplated in section 3(1)(a) of this Act.
- [3] This hearing, only for the determination of the question whether the plaintiff’s claim has prescribed or not (The 1st special plea, namely prescription). The plaintiff disputes this issue.

BACKGROUND FACTS

(Only as per the pleadings. No evidence was adduced)

- [4] Plaintiff was arrested on 16 April 2010 for an alleged armed robbery. He was beforehand, telephonically informed to report to the Police Station in Bethlehem, and by doing so, he was then thereafter detained.
- Bail was denied thereafter in the Magistrate Court. Plaintiff then remained in custody until he was acquitted on 3 April 2014, after he was charged and prosecuted for the said offence. Plaintiff at all material times during this, legally represented.

COMMON CAUSE FACTS

- [5] (a) Plaintiff was arrested on 16 April 2010.

- b) Summons was served on the defendant on 22 December 2014.
- (c) Plaintiff's cause of action is founded on unlawful arrest only.
- (d) Plaintiff's claim, in the normal course, would have been extinguished by prescription on 15 April 2013.

ISSUE FOR DETERMINATION

- [6] Whether plaintiff's claim has prescribed or not? This issue centres on the Prescription Act, Act 68 of 1969(the Act).
- [7] Section 11(d) of the Act, states that civil debts prescribe three (3) years after the debt is due. Which does apply in this case.
- [8] Section 12 (1) thereof, states that the debt must be immediately payable. This (section12(1)) a general rule, subject to three exceptions, stated in subsections (2), (3)and (4). Subsection (4) does not arise in this case and will not be dealt with. Section 12(2) of the Act reads: "If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt."
 Section 12 (3) stipulates: "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".

The first exception, in subsection (2),so it seems, only pertaining to cases where the debtor is wilfully preventing or has wilfully prevented the creditor from "coming to know of the existence of the

debt". From the totality in this matter, there is no basis that plaintiff was wilfully prevented from coming to know about the debt.

The second exception, in subsection (3), is that a debt is not deemed to be due until the creditor has knowledge of: "1) the identity of the creditor; and 2) the facts from which the debt arose.

This also subjected to another exception: "Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by reasonable care".

It seems that subsection (3) imposes a duty on the creditor (the plaintiff) to exercise reasonable care to obtain knowledge of the debtor (the defendant) and the facts from which the debt arises.

[9] In **Leketi v Tladi NO & Others** (2010) 3 ALL SA 519 (SCA) para 18 it was said: "In order to determine whether the appellant exercised "reasonable care", his conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge..."

[10] In **Truter and Another v Deyssel** 2006 (4) SA 168 (SCA) at 175 B Van Heerden JA said: "...Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running-it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence)..."

In **Mtokonya v Minister of Police** 2018 (5) SA 22(CC) para 36 Zondo J said: "Section12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from" the facts from which the debt arises". And para 45: "Therefore, such knowledge falls outside the phrase "knowledge of facts from which the debt arises" in section

12(3).The facts from which a debt arises are the facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor”.

CONTENTIONS BY THE PARTIES

[11] The defendant, upon whom the onus fell to establish prescription, contended that the plaintiff's claim has prescribed. The prescription period, commenced on the date of the alleged arrest, 16 April 2010.

Defendant also contends that plaintiff, at the time of his arrest, or shortly thereafter, already knew that he is innocent, that it was the South African Police who arrested him, that the Police is making a mistake by so arresting him and that he is suffering damages.

Reasonably, he could have acted earlier than he did, to delay or stop prescription.

[12] The plaintiff contends that he, at the time of his arrest, had no knowledge of the debtor and the facts arising from the debt. Section 11(d) of the Act therefor does not apply against plaintiff. The identity of the debtor and the facts giving rise to the debt, only became known to the plaintiff after consulting with his erstwhile attorneys. A written notice was served upon the defendant on 10 July 2014, after consulting an attorney. Plaintiff only become aware of the facts giving rise to the debt around July 2014.

Plaintiff also contends that prior to consulting his erstwhile attorney, he did not know whether he had a claim against defendant. He being a layman and of low education, not aware

that he had a claim against the defendant, until he was advised to consult an attorney.

As a result, prescription can only commenced from 10 July 2014 and not at any time prior to that period.

It was also argued on behalf of plaintiff, that he was, while incarcerated, unaware of the identity of the Minister of Police. Unaware also that he had been wrongfully arrested and that he can in fact sue the Minister of Police.

Even if Plaintiff knew the identity of the debtor, the claim would have been premature, because plaintiff would not have known the outcome of his prosecution at the time of his arrest. Contending there were then, no facts to rely on.

[13] The impact of section 12(1), read with section 12(3) is that prescription starts to run as soon as the creditor has or ought to have knowledge of the identity of the debtor and the facts from which the debt arises.

[14] If the majority decision in *Mtokonya (supra)* is applied on plaintiff's contentions, that he was unaware that he was wrongfully arrested and that he can sue the Minister of Police, it seems that, that were not a matter of fact but a conclusion of law.

[15] In para 44 of the said decision the learned judge Zondo said: "Whether the police's conduct against the applicant was wrongful and actionable is not a matter capable of proof. In my view, therefor, what the applicant said he did not know about the conduct of the police, namely, whether their conduct against him was wrongful and actionable was not a

fact and, therefore, falls outside of section 12(3). It is rather a conclusion of law.” That not necessary for the purpose of section 12(3).

[16] Plaintiff’s averments in his particulars of claim, more so the amended particulars, re his arrest, how his arrest came about and by whom he was arrested and what followed thereafter, and all behind his innocence according to him, are all facts of the incident, within the ambit of section 12(3). Indicative that he was aware, already with his arrest, and shortly thereafter, that the debtor is at least the Police and well aware of these material facts of the incident itself. During all this time he was legally represented.

[17] Clearly, by applying the objective standard, or when plaintiff’s conduct is tested against to what a reasonable person in his position would have done with this knowledge (minimum but material facts), plaintiff failed to institute action timeously, caused by inaction and not an inability to obtain knowledge of the identity of the debtor and the facts timeously. The contention as argued that plaintiff had no facts to rely on at the time of his arrest, because he then would not have known the outcome of his prosecution at that time and his ignorance as a layman, both of no significance.

Unlawful arrest, subsequent detention and prosecution is not to be treated as one continuous transaction which is not completed until the outcome of the criminal prosecution.

In **Lombo v African National Congress** 2002 (5) SA 668 (SCA) at para 26 it was said: “...His cause of action in this respect did not arise

once and for all on the day he was detained, nor did it first arise on the day of his release from detention.”

In **Barnard and Others v Minister of Land Affairs and Others** 2007 (6) SA 31 (SCA) at para 20 it was also said: “In accordance with the concept, a distinction is drawn between a single, completed wrongful act-with or without continuous injurious effects, such as a blow against the head-on the one hand and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment as long as the wrongful conduct endures”.

This was confirmed in **Minister of Police N.O. National Prosecuting Authority of South Africa v Yekiso** 2019 (2) SA 281 (WCC) at para19.

Plaintiff as seen from the particulars of claim, not such a layman at the time, but being a businessman, owing and operating a business as a long distance taxi operator.

[18] Plaintiff’s claim therefor has prescribed. He had enough time to institute proceedings and there is no reason to stretch the minimum period of three years.

[19] **ORDER**

1. The defendant’s special plea of prescription in terms of the Prescription Act, Act 68 of 1969, is upheld.
2. The plaintiff’s claim is dismissed with costs.

S.G.MEINTJES, AJ

On behalf of the plaintiff: Adv. C. Sihlali
Instructed by:
J. Socikwa Attorneys

On behalf of the defendant: Adv. Wright
Instructed by:
The State Attorneys