



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.: **5039/2018**

In the matter between:

WILLY THULANI NKUNA	1ST APPLICANT
JABULANI WILLIAM MKHWANAZI	2ND APPLICANT
LUCKY SIFISO SIBIYA	3RD APPLICANT

and

EKURHULENI METROPOLITAN MUNICIPALITY	1ST RESPONDENT
THE MINISTER OF POLICE	2ND RESPONDENT
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	3RD RESPONDENT

JUDGMENT BY: **I VAN RHYN AJ**

HEARD ON: **26 JULY 2019**

DELIVERED: **26 JULY 2019**

- [1] This is an application for leave to appeal against part of a judgment delivered by myself on 29 April 2019. The applicants seek leave to appeal to the Supreme Court of Appeal, alternatively to the full bench of this court. During argument, Mr Mene applied for leave to appeal to the full bench of this court.

- [2] The applicants are of the opinion that in respect of their claim for the unlawful arrest and assault, I erred in finding that their reliance on the provisions of Section 13(1) (a) of the Prescription Act No 68 of 1968 is misplaced. Furthermore my finding that the special plea by the respondents pertaining to the prescription of these claims, is sound and should succeed, is also under scrutiny.
- [3] In respect of the claim relating to the unlawful detention of the applicants it is argued that I erred by placing the onus on the applicants with regard to a special plea of prescription. The applicants contend that the finding that, due to a lack of particulars regarding any bail application and information placed before the magistrate by the arresting officers of the first and second respondents, and the possibility of holding the arresting officers liable for detention as discussed in the *De Klerk v Minister of Police*¹ case, I somehow reversed the onus resting on the respondents. I do not follow the argument.
- [4] Unlawful arrest and detention infringes the right to bodily freedom, a concept recognized in the Roman Law and by our courts as entrenched in the Bill of Rights s 12(1) (a) and (b) of the Constitution. Therefore the applicants' right to vindicate their well-established common law remedy such as their delictual claims for damages for unlawful arrest, detention and assault perpetrated by all or some of the respondents, must be protected. In the Constitutional Court's judgment in *Zealand v Minister for Justice and Constitutional Development*² the principle was affirmed that the onus rests upon the Minister to justify an arrested person's loss of liberty.
- [5] At this stage the only question I had to consider was whether the applicants complied with the three criteria in s 3(4)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 i.e. that the debt has not been extinguished by prescription (at issue in this case); that good cause exists for the creditor's failure; and that the organ of state has not been unduly prejudiced. The court has a discretion to condone the non-compliance

¹ (329/17) [2018] ZASCA 45 (28 March 2018)

² *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458.

of the notice in terms of the provisions of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

- [6] The reasons for the costs order against the applicants are further grounds of appeal.
- [7] On behalf of the applicants it is contended that there is a reasonable possibility that another court may interpret the facts and legal principles pertaining to the application for condonation and the question and finding as to the costs differently and that the appeal would thus have a reasonable prospect of success.
- [8] I agree with the applicants that such a possibility does exist.
- [9] Leave is therefore granted to the applicants to appeal to the full Bench of this court. Costs to be costs in the appeal.

It is so ordered.

I. VAN RHYN, AJ

On behalf of Applicant:

Adv B.S. Mene
Instructed by
SMO Seobe Attorneys
BLOEMFONTEIN

On behalf of 1st Respondent:

Adv L.J. Leeuw
M Neale Attorneys
c/o Rossouws Attorneys
BLOEMFONTEIN

On behalf of 2nd Respondent:

Adv L.R. Bomela
State Attorney
BLOEMFONTEIN