



**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: 377/2014

In the matter between:

MOTHOBI ALBERT TLAKE

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT BY: C REINDERS, J

DELIVERED ON: 20 OCTOBER 2017

- [1] The plaintiff issued summons against the Ministers of Police and Justice in their official capacities. The summons was served on the 19th of February 2014. Pursuant to a court order dated 17th September 2015 the second defendant's citation was amended to the National Director of Public Prosecutions.

- [2] In his summons the plaintiff avers that on or about 25th January 2011 near QwaQwa he was unlawfully arrested by members of the South African Police Services (SAPS) and detained in Kestell police cells. He was charged with assault, armed robbery and the pointing of a fire-arm. He was detained from the 25th of January 2011 until 2nd of February 2011 when the charges were withdrawn. He was however immediately re-arrested and joined under a new case number in QwaQwa and charged with armed robbery, theft, attempted murder, stock theft and offences under the Prevention of Organised Crime Act. He was acquitted and released on all charges on 8 May 2013. He avers that the arrest(s), detention and prosecution was unlawful, malicious, unreasonable and unjustified. He avers that his arrest was without any reasonable grounds and that there was no reasonable and probable cause to believe that he may be guilty of any offence before and during the arrest periods as well as before prosecution was initiated. He claims general damages from the defendants in the amount of R 350 000.00 for unlawful detention, arrest, malicious prosecution, injury to dignity and freedom of movement.
- [3] The defendants in a special plea joins issue and plead "that the plaintiff's claim for damages resulting from the first period of detention" be dismissed in that such claim is prescribed in terms of the Prescription Act 68 of 1969. This plea is premised thereon that plaintiff claims damages resulting from his alleged unlawful detention from the 25th of January 2011 to 2 February 2011 occurred more than three years before the summons was served on the defendants (on 19th February 2014). Apart from the special plea defendants do not dispute that plaintiff was arrested and

detained on the dates alleged but aver that a reasonable suspicion was entertained that plaintiff committed one or more offences. It is denied that either the SAPS or the Prosecuting Authority or any employee of the defendants acted unlawful or malicious. It is not denied that the plaintiff was detained and admitted that he was acquitted and released.

- [4] The plaintiff filed a replication to the plea of prescription. Therein it is averred that the unlawful arrests and detentions constituted a superior force which precluded the plaintiff from pursuing his claim for damages and relying on sec 13 of the Prescription Act it is averred that prescription only commenced on the 8th of March 2013. It is relied upon in the alternative that this court on the 16th of March 2017 granted an order condoning plaintiff's failure to serve a notice contemplated in sec 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (Act 40 of 2002) and that the court has therefore already decided that prescription had not intervened and that the issue of prescription has become *res judicata*. In a further alternative it is claimed that plaintiff's claim only arose on his acquittal.
- [5] At the commencement of the trial I was requested to order in terms of Rule 33(4) of the Rules of Court that the plea of prescription be determined first and if need be the liability of the defendants, with the issue of quantum to stand over for later determination. It was so ordered. I was requested in the event that I dismiss the special plea to make a ruling on the duty to begin.

- [6] No evidence was adduced in regards to the special plea. Mr Patel on behalf of plaintiff and Ms Mokopo appearing for the defendants supplied me with heads of argument and I am indebted to them. I am to consider the special plea on the pleadings as it stands. There is no dispute that a party who raises a special plea bears the onus to prove the facts underlying the special plea.

See: Masuku v Mdlalose 1998 (1) SA (SCA).

- [7] The main contention by defendant is that the only case that the plaintiff has against the first defendant is based on the unlawful arrest and detention emanating from the 25th January 2011 and/or 2nd February 2011 and that that claim arose on the day of the plaintiff's arrest. Service of the summons on the 19th February 2014 was more than three years after the claim arose and therefore the claim has prescribed. Reliance was placed on Thompson and Another v Minister of Police and Another 1971 (1) SA 371 ECD wherein it was found that the injury lies in the arrest without legal justification and that the cause of action arises as soon as the illegal arrest has been made.

- [8] Mr Patel referred me to Unilever Bestfoods Robertsons (Pty)Ltd and Others v Soomar and Another 2007 (2) SA 347 (SCA) wherein it was held as follows:

"The principle underlying the cases relied on was stated by De Villiers CJ in Lemue's case (at 407) in the following terms: While a prosecution is actually pending its result cannot be allowed to be prejudged in the civil action. A different reason for the rule was given by Solomon J in Bacon v Nettleton (supra). He said (at 142-3):

"The proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge."

Compare also the judgment of Spilg J in **Makwelo v Minister of Safety and Security** 2017 (1) SA 274 (GJ) at paras [56] and further.

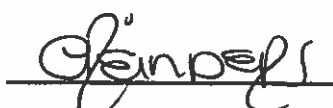
- [9] Not only am I bound by **Unilever** *supra* but do I respectfully align myself therewith that the proceedings from arrest to acquittal is to be regarded as continuous and that the plaintiff's claim did not arise before his acquittal. The special plea therefore stands to be dismissed.
- [10] In passing by I might mention that Mr Patel also relied on the unreported judgment of **Adv. I. Strydom N.O. and Another v The Premier Gauteng Province and Another** case number 35977/2013 GLD wherein Van Oosten J concluded that the granting of condonation for failure to file a notice of intention to institute legal proceedings as required by secs 3(1)(a) and 3(2)(a) of the Act 40 of 2002 is based on a finding that "the debt has not been extinguished by prescription and therefore constitutes an absolute bar to a defendant raising prescription" as it has become *res judicata*. Having come to the conclusion as I did above I find it unnecessary to make any findings in this regard.
- [10] Having dismissed the special plea the matter is to continue on the question of liability as ordered by myself at the commencement of

the trial and by agreement between the parties. I have indicated herein before that I was requested to make a ruling on the duty to begin. In terms of the rule of practice in this Division I am to postpone the matter to the next available pre-trial roll date on 30th of October 2017 for the allocation and/or arrangement of a trial date. The matter might therefore not be placed before me for further hearing. In that event it would be improper of me to make an interlocutory procedural ruling as to who is to begin adducing evidence. The then presiding judge might take a different view than I may have and for that reason I do not intend to make any ruling in this regard. I might place on record for the convenience of the parties that should the matter be placed before me for hearing my provisional view is that the plaintiff has the duty to begin but I do not intend to make any order in this respect.

[12] I therefore make the following orders:

12.1 The special plea of prescription is dismissed with costs.

12.2 The matter is postponed to 30 October 2017 on the pre-trial roll for the arrangement and allocation of a trial date for continuation of the trial.


C. REINDERS, J

On behalf of the Plaintiff :

Mr. M. Patel

Instructed by:

T.T. Hlapolosa Incorporated

c/o Morobane Incorporated
BLOEMFONTEIN

On behalf of the Defendants:

Adv. N. Mokopo
Instructed by:
The State Attorney
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