FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 3861/2013

In the matter between:-

FRANCIS RALENTSOE MOLOI Applicant

and

MINISTER OF SAFETY AND SECURITY 1st Respondent

MINISTER OF CORRECTIONAL SERVICE 2nd Respondent

DIRECTOR OF PUBLIC PROSECUTION, FS 3rd Respondent

HEARD ON: 29 MAY 2014

JUDGMENT BY: KRUGER, J

DELIVERED ON: 12 JUNE 2014

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[1] The applicant, a citizen of Lesotho, residing in Lesotho, applies for condonation for the non-filing of a notice to institute legal proceedings against the Minister of Safety and Security and the Minister of Correctional Services in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). These ministers are the first and second respondents, represented by Mr Mene, and oppose the relief sought. The third respondent is the Director of Public

Prosecutions, Free State who was not represented in court in these proceedings.

[2] The chronology of events appears to be as follows from the founding affidavit and other documents:

(i) January 2007: Applicant arrested in Bloemfontein on charges of armed robbery and attempted murder and detained at Grootvlei prison awaiting trial.

(ii) According to the judgment of Rampai J the trial commenced on 27 July 2009. Applicant was accused number 5 in that trial. The trial was postponed several times. Rampai J says in his judgment that the trial was marred by several interruptions. A number of delays were caused by legal representatives withdrawing. He specially refers to the withdrawal of Mr Vorster for accused number 1 due to lack of funds, and the withdrawal of Mr Potgieter, which then left accused 3, 4 and 5 unrepresented.

(iii) According to the judgment, Mr Vorster later came back with a renewed brief, now being instructed to appear for accused 1, 3, 4 and 5. The judgment continues (par [12]): “From that moment I expected the trial to run smoothly, it did not. On that very same day Tuesday 16 February 2010 accused 4 and 5 made a dramatic escape from the court holding cell”. Applicant’s version is that on 15 February 2010 he appeared in Free State High Court where the trial was postponed for hearing at a later date. Applicant felt frustrated by the delays

and escaped from the cells and made his way back to Lesotho.

(iv) According to the founding affidavit, about six months later applicant received information that the Lesotho police were looking for him, and together with his lawyer went to the police station. He was told that he was wanted in South Africa on charges of armed robbery and escaping. He was never taken to a court in Lesotho and was taken to a small police post near the border with South Africa in the vicinity of Wepener.

(v) On 8 June 2010 at that police post near Wepener, in Lesotho, applicant was handed to members of the South African Police Service who took him to Bloemfontein where he was detained at Park Road Police station. That arrest on 8 June 2010 is his cause of action for his wrongful arrest claim. According to the respondents the applicant was arrested in South Africa for being an illegal immigrant.

(vi) On 24 July 2010 applicant stood trial in the Bloemfontein magistrates' court on a charge of escaping. His attorney raised a special plea under section 106(1)(f) of the Criminal Procedure Act 51 of 1977 that the court lacked jurisdiction to deal with the charge of escaping because he had been abducted from Lesotho by the South African Police.

(vii) On 28 July 2011 the magistrates' court upheld the plea against jurisdiction.

(viii) Thereafter the applicant was detained at Grootvlei prison to await his trial on the charges of armed robbery and attempted murder.

(ix) Applicant says in the founding affidavit that the trial in the Free State high court commenced during the latter part of 2011. This statement is in conflict with the judgment of Rampai J, referred to above, according whereto the trial commenced on 27 July 2007. When applicant was brought before the high court in the latter part of 2011 applicant's attorney raised the same argument of lack of jurisdiction because of the wrongful arrest.

(x) On 14 November 2011 the high court ordered the release of the applicant on the magistrate's finding as to jurisdiction. Applicant says on 14 November 2011 he became aware without any doubt, and for the first time, that he had been arrested and detained unlawfully for the period from 8 June 2010 up to 14 November 2011 (19 months). In the founding affidavit applicant says: "Before the final verdict on 14 November 2011, my lawyer indicated to me that he was of the opinion that my arrest was executed unlawfully and wrongfully. Since I am a layman in matters regarding the law, I took notice of what my lawyer said at the time, but I could not be sure that he was right." Applicant therefore alleges that his cause of action arose on 14 November 2011. He says he had to give notice of his action against the respondents before 14 May 2012, which was not done.

(xi) After 14 November 2011 applicant went back to Lesotho and went on with his life and got a new business going. He was not concerned about the prescription of his claim against the respondents as he knew that "the period of prescription for claims of this nature is 8 (eight) years in Lesotho".

(xii) During the first half of February 2013 he approached his attorney in Bloemfontein.

(xii) On 15 February 2013 applicant's attorney addressed a letter to the state attorney, Bloemfontein, stating that the applicant intended to institute an action for damages arising from his unlawful arrest and detention, "and our client has not been able to address a section 3 notice in terms of Act No 40, 2002". The attorney requested the state attorney "to accept or consent to us in writing that it will not be necessary to issue such a notice since our client could not do it because he is a citizen of Lesotho".

(xiii) In a letter dated 25 February 2013 the state attorney informed applicant's attorney that his letter did not comply with Act 40 of 2002 and that he must address his letter as well as his request for condonation to the National Commissioner of the South African Police Service.

(xiv) Applicant says his attorney and counsel advised him that requesting such condonation from the commissioner "would probably delay the matter for many more months, and that

we should rather approach the above Honourable Court for the condonation required".

(xv) On 18 June 2013 the applicant's lawyers then set about getting a copy of the judgment of the high court, which they got in August 2013.

(xvi) On 27 June 2013 the present application was issued by the registrar and served on the first two respondents namely the Minister of Safety and Security and the Minister of Correctional Services care of the state attorney, Bloemfontein.

[3] Mr Loubser submitted that the applicant had two court orders confirming his wrongful arrest when he decided in February 2013 to seek condonation from the state attorney. Mr Loubser says the respondents cannot raise a denial of the wrongful arrest. Mr Mene, for the respondents, disagrees. He says it is absurd to say the magistrate made a ruling that the arrest was unlawful. All the magistrate did was to uphold a plea against jurisdiction. From the answering affidavit of the first respondent it appears that the applicant was illegally in South Africa when he was arrested on the charges of robbery and attempted murder. The magistrate was dealing with a charge of escaping. In the high court the order dated 14 November 2011 was: "The case against accused 5 is stayed". The high court did not make a finding that the arrest was unlawful.

[4] Mr Mene's first argument is that this application is premature. No notice has been given to the state. Before the applicant can apply for condonation, the state must refuse. In this case there has been no refusal by the state. Section 5 of the Act deals with service of process. Section 5(1)(b)(ii) and (iii) deal with process directed at the Minister of Safety and Security and the Minister of Correctional Services respectively. When the Minister of Safety and Security is the defendant or respondent, section 5(1)(b)(ii) provides that such process may be served on the National Commissioner of the South African Police Service or the Provincial Commissioner. When the Minister of Correctional Services is the defendant or respondent, process may be served on the Commissioner of Correctional Services or the Provincial Commissioner. The state attorney has no authority or power to accept notices in terms of the Act. Further, the letter to the state attorney was not a notice and gives no particulars of the alleged wrong. The state attorney told the applicant's attorney what to do, namely to serve a notice on the Commissioner, which the applicant's attorney failed to do. Mr Mene points out that in **Minister of Safety and Security v De Witt** 2009 (1) SA 457 (SCA) at par [6] a notice was sent, which was rejected. Then summons was issued and the condonation application followed. The Supreme Court of Appeal held that a court does have the power to condone a failure to serve a notice prior to the creditor's institution of action (par [17]). In this case there has been no notice and no rejection. No summons has been issued. Thus this application is premature, and Mr Mene asks that it be rejected on that basis alone. Mr Mene says the normal procedure in these cases is that a summons is issued against the minister. If no notice was given, or notice was late or defective, the

minister raises a special plea, and the issue of condonation is dealt with at that stage, and the main action is stayed during that debate.

[5] On the merits Mr Mene raises prescription. He submits that at the date of his arrest applicant knew it was an unlawful arrest. He refused to sign the form the police gave him to confirm that his constitutional rights had been complied with. Prescription starts to run on the date when the applicant knew the facts from which the debt arose – **Santam Ltd v Ethwar** 1999 (2) SA 244 (SCA). His cause of action was complete on his arrest (252I-J). In the magistrates' court applicant alleged that his arrest was illegal. Applicant was legally represented by competent attorneys. In the present case Mr Mene says it would, as was said in **Santam v Ethwar** (supra) at 256B - D lead to an untenable situation to be kept in suspense indefinitely. Fault is a legal conclusion, it is not part of a plaintiff's cause of action. See **Truter and Another v Deysel** 2006 (4) SA 168 (SCA) par [17]. A party does not need to be conclusively sure before prescription starts to run.

[6] As to the requirement of good cause for the failure which the applicant must show in terms of section 3(4)(b)(ii), Mr Mene pointed out that Mr Loubser conceded that the applicant does not have a case in respect of his detention, because he was detained under valid warrants issued by the courts - **Isaacs v Minister van Wet en Orde** 1996 (1) SACR 314 (A) at 322h-323j.

[7] Mr Loubser says it was not necessary for the applicant to send a notice to the state because there are two court orders. It was not necessary to give details of the times. Mr Loubser says the state

attorney should have got instructions from its client, the Minister of Safety and Security.

CONCLUSIONS

[8] As to the service of process, the law is that service against the Minister of Safety and Security must be done on the state attorney (State Liability Act 20 0f 1957 section 2(2)). Act 40 of 2002 deals specifically with the notice to be sent before proceedings are instituted. The persons to whom the notice is to be given are spelled out in section 5 of Act 40 of Act 2002. A notice is not process of court. It is possible that the state attorney may not be instructed by the minister to appear for the particular minister in the matter in respect whereof a notice is given. The minister may use other attorneys.

[9] A notice in terms of act 40 of 2002 is not a formality. It gives the organ of state details of an event in respect whereof the subject seeks to hold the state liable. That letter allows the organ of state time to investigate the complaint and possibly agree to payment or settlement without incurring the costs of litigation. Section 5(2) provides that no process instituting legal proceedings may be served before the expiry of 30 days after the service of the notice. The principle that an organ of state must be given an opportunity to consider the claim is not new. It existed under the Multilateral Motor Vehicles Accident Fund Act 93 of 1989 (and earlier legislation), dealing with claims against the Road Accident Fund, in terms whereof prescription was suspended for 90 days after the claim had been lodged, so that the Road Accident Fund could consider the claim without incurring cost of litigation. The serving

of the notice under Act 40 of 2002 puts in place a chain of enquiry in the offices of the organ of state. The organ of state does not need to investigate a complaint until a letter of demand has been received.

[10] This application must fail for a number of reasons. Firstly because no notice was given to the Commissioners of Police and Correctional Services as prescribed in Act 40 of 2002, and particularly section 5(1)(b) where the recipients of the notices are identified. The purpose of the notice is to give the minister the opportunity to assess the merits of the claim. The Act does not contemplate a situation where condonation is considered before summons has been issued where no notice has been given. Section 5(2) provides that no summons may be issued before the minister has had 30 days to consider the claim. This application is premature and cannot be considered in the absence of a notice or a summons. I do not lose sight of the fact that a court can consider condonation also where no notice was given before the summons was served.

[11] The second reason why the application must fail is because it has become prescribed. Prescription started running on the day of applicant's arrest on 8 June 2010. He was represented by an attorney when he went to the police, and at the police station he refused to sign the form that his constitutional rights had not been violated. He was represented by attorneys throughout. Applicant was aware of his claim. His claim became prescribed on 7 June 2013. As for his detention, he was detained in terms of valid

warrants issued by courts of law, and no claim lies in respect thereof. He also accepted his detention by applying for bail.

[12] Applicant has not shown good cause. He was aware of his cause of action, but failed to do anything. His attorney failed to follow the advice of the state attorney to give notice to the Commissioner. He had no need to wait for the judgment of the high court. There is no merit in applicant's claim.

[13] The last requirement the applicant has to satisfy in terms of section 3(4)(b)(iii) is that the Minister was not unreasonably prejudiced. It appears from the answering affidavit of the second respondent's deponent that the original file of the applicant containing the signed warrants of detention could not be located. A long period of time has elapsed since the arrest of the applicant, and the applicant's original file with the warrants cannot be traced. There is no merit in the application.

ORDER

1. The application is dismissed with costs.

A. KRUGER, J

On behalf of applicant:	Adv P. J. Loubser Instructed by: Fixane Attorneys BLOEMFONTEIN
On behalf of 1st & 2nd respondents:	Adv B. S. Mene Instructed by: State Attorney BLOEMFONTEIN