

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, MTHATHA)**

Reportable	Yes

APPEAL CASE NO: CA51/2012

CASE NO. 657/2003

In the matter between:

ZANDISILE MNYAKA

APPELLANT

and

MINISTER OF SAFETY AND SECURITY

RESPONDENT

FULL BENCH APPEAL JUDGMENT

D VAN ZYL J:

- [1] On 23 July 2003 the appellant commenced an action for damages against the respondent by issuing a summons. His claim arises from injuries he is alleged to have sustained on 19 February 2001 while he was in police custody. It is common cause that the appellant was arrested on 18

February 2001 by a traffic officer, a certain Mate, on a charge of driving a motor vehicle while under the influence of intoxicating liquor. Mate placed the appellant in the custody of police officials at the Mount Frere police station who detained him in the holding cells.

- [2] The appellant alleges that while in detention, he was assaulted by unknown persons and sustained certain injuries as a result. He was hospitalised and received medical treatment. The appellant further alleges that his injuries were caused by the negligence of the respondent's employees who in breach of a legal duty, failed to protect him from harm while he was under their control.
- [3] In terms of the now repealed section 57(1) of the South African Police Service Act 68 of 1995 ("the Police Service Act"), it was a prerequisite for the enforcement of the appellant's claim that he instituted legal proceedings before the expiry of a period of twelve months. The subsection reads as follows: **"No legal proceedings shall be instituted against the Service or any body or person in respect of any alleged act performed under or in terms of this Act or any other law, or an alleged failure to do anything which should have been done in terms of this Act or any other law, unless the legal proceedings are instituted before the expiry of a period of 12 calendar months after the date upon which the claimant became aware of the alleged act**

or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date.” A further requirement for the institution of legal proceedings was contained in subsection (2). In terms thereof a claimant could not institute legal proceedings before the expiry of **“at least one calendar month after written notification of the intention to institute such proceedings has been served on the defendant, wherein particulars of the alleged act or omission are contained.”**

- [4] The appellant admittedly failed to comply with the requirement in subsection (1). The respondent as a result raised the appellant’s non-compliance as a defence by way of a special plea. In response the appellant filed a replication wherein he asked the trial Court to condone his failure to timeously institute legal proceedings. This request is based on the provisions of subsection (5) which empowered a Court to dispense with the requirements or prohibitions in subsections (1) and (2) **“where the interests of justice so required.”** At the hearing thereof the appellant formally and on notice supported by an affidavit applied for an order dispensing with the requirements of section 57(1) of the Police Service Act.

[5] The issue raised by the respondent's objection was tried as a preliminary issue. The Court *a quo* held that it was not empowered to consider the appellant's application and consequently that the appellant's claim had been extinguished by prescription. It reasoned that subsection (5) could not find application as the whole of section 57 was repealed by the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Legal Proceedings Act"). The latter Act came into operation on 28 November 2002. Although, as will be indicated hereunder, it extended the time period within which a claimant could institute legal proceedings against the respondent, the Court *a quo* held that it could not "**revive a dead debt**". The reason, so the Court found, lies in the fact that by the time the Legal Proceedings Act came into operation, the time period within which the appellant had to institute legal proceedings as required in section 57(1) of the Police Service Act, had already expired. For these reasons the Court *a quo* made an order upholding the respondent's special plea, thereby effectively dismissing the appellant's claim. It is against this order that the appellant now appeals with the leave of the Court *a quo*.

[6] The appellant has failed to comply with the provisions of Rule 49(6) of the Uniform Rules of Court in the prosecution of his appeal. The result is that the appeal had lapsed. The appellant has applied for condonation

seeking the reinstatement and enrolment of his appeal. In my view the appellant has shown good cause as required by Rule 49(6) for the relief sought. It is well established that when an application for condonation is considered the Court is exercising a judicial discretion based on the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors relevant to this enquiry are **“the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the interests in finality, the convenience of the Court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for non-compliance are taken into account. These factors are interrelated, for example, good prospects of success on appeal may compensate for a bad explanation for the delay.”** (Per Snyders JA in *S v Van der Westhuizen* [2009] 4 All SA 51 (SCA) at 53d – e. See also *Van Wyk v Unitas Hospital* (Open Democratic Advice Centre as *Amicus Curiae*) 2008(2) SA 472 (CC) at 477A – B.)

- [7] The appellant explains that the reason for his failure to comply with Rule 49(6) is that the attorney who represented him in the Court *a quo* had failed to carry out his instructions to prosecute the appeal, despite having assured him that the necessary steps would be taken. As a result he was forced to instruct his present attorneys of record to take the matter over

and to apply for condonation. Although the appellant's explanation of what he personally did in order to ensure that his instructions were timeously carried out is far from satisfactory, it must be weighed against the importance which the issue raised in the appeal has for him, as well as the prospects of success of the appeal. These two considerations in my view adequately compensate for the deficiencies in the appellant's explanation for the delay.

- [8] Turning then to deal with the merits of the appeal, on a reading of section 57(1) of the Police Service Act it is evident that it prescribes a general period of limitation of twelve months for the institution of legal proceedings against the respondent. Subsection (1) clearly embodies, what is generally referred to as an expiry or limitation period. The purpose of provisions of this nature is to prevent inordinate delays in litigation which are damaging to the interests of justice. Delays in litigation are said to **“ . . . protract the disputes over the rights and obligation sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.”** (Per Didcott

J in *Mohlomi v Minister of Defence* 1997(1) SA 124 (CC) at 129G – 130B.)

- [9] Although the nature and effect of a limitation period coincides with that of extinctive prescription, they have been held to be separate concepts. (*Commissioner for Customs and Excise v Standard General Insurance Company* 2001(1) SA 967 (SCA) at 984H – I). As it is not in dispute that subsection (1) constitutes a limitation period, the conceptual basis for the distinction is not of any relevance to the issues raised in this appeal. (See generally de Wet and Yeats **Kontraktereg** 4th ed at page 275 and Loubser **Extinctive Prescription** at page 18 to 21 and page 171 to 176.) The practical importance of the distinction between a limitation period and prescription period is that save for certain common law rules such as *lex non cogit ad impossibilia*, the general principles relating to prescription do not find application to a limitation period. (See *Hartman v Minister van Polisie* 1983(2) SA 489(A) and *Montsisi v Minister van Polisie* 1984(1) SA 619(A).) The reason is to be found in the provisions of section 16(1) of the Prescription Act 68 of 1969 (the Prescription Act). In terms thereof the provisions of Chapter III of that Act will apply to all debts save where they are ousted by the provisions of an Act of Parliament which is inconsistent and then only to the extent of the inconsistency. Inconsistent provisions which will oust some or all of the

provisions of Chapter III of the Prescription Act are provisions “... which (a) prescribe a specified period within which a claim is to be made; (b) prescribe a specified period within which an action is to be instituted in respect of a debt; or (c) impose conditions on the institution of an action for the recovery of a debt.” (*Moloi and Others v Road Accident Fund* 2001(3) SA 546 (SCA) at 552C – D)

- [10] Section 57(1) is a provision falling under (b) above as it determines a specific period in which legal proceedings were to be instituted by a claimant. Otherwise than its predecessor (section 32 of the Police Act 7 of 1958), section 57 not only extended the prescription or limitation period to twelve months, subsection (5) thereof also enables a Court to dispense with the limitation period and notice requirement in subsection (1) and (2) thereof where “the interests of justice so require”. The differences between these two enactments were dealt with by the Court in *Minister of Safety and Security v Molutsi and Another* 1996(4) SA 72(A) at 96D – H. Subsection (5) has been held to grant the Court the power in the circumstances mentioned to condone a claimants non-compliance with the requirements of the section (*Mohlomi v Minister of Defence* supra at 133D and H – J).

- [11] Because the Court does not *mero motu* invoke statutory provisions prescribing time limits for the institution of an action, subsection (5) has

the effect of entitling a claimant, who has failed to institute its claim within the required time period, to apply to a Court to exercise its power to dispense with the time limitation embodied in subsection (1). Whether the granting of an application in terms of subsection (5) would be in the interests of justice “**. . .in the context in which that expression is used involves, in my view, essentially a value judgment based on general considerations of equity and fairness to both parties, viewed against the factual matrix of each case.**” (Per Ponnann JA in *Mugwena and another v Minister of Safety and Security* 2006(4) SA 150 (SCA) at 155B – C.) It permits the Court to take account of “**. . . the claimant’s fault or the lack of that and the prejudice suffered by the State or its absence . . .**” (Didcott J in *Mohlomi v Minister of Defence* supra at 133 I.)

- [12] On a reading of subsection (1) it is clear that it is a condition precedent to the institution of an action against the respondent and that the claimant must do so within a period of twelve months. The sanction for a failure to comply with subsection (1) is that the claimant is barred from instituting proceedings for the recovery of the debt. (See *Hartman v Minister van Polisie* supra and *Minister of Safety and Security v Molutsi and Another* supra.) If invoked and proved, it prevents the claimant from enforcing his claim, thereby effectively exempting the respondent from

performance. The sanction will be lifted if the claimant applies to a Court in terms of subsection (5) to condone, in the exercise of its dispensing power, his or her failure to timeously institute legal proceedings. The granting of an order of this nature has been held to have the effect of terminating the suspension of the enforceability of the claim. (*Transnet Ltd v Ngcezula* 1995(3) SA 538(A) at 550C.) The refusal of an application to dispense therewith on the other hand, is that **“the claim is in effect, and in substance, extinguished.”** (*Transnet Ltd v Ngcezula* supra at 550D.)

- [13] It is common cause that the appellant became aware on 19 February 2001 of the alleged omission of the servants of the respondent to protect him from harm while he was in detention. The appellant’s claim was consequently liable to become time barred on 19 February 2002. That date went by without the institution of proceedings. On 22 November 2002 Act 40 of 2002 was passed. It came into force on 28 November 2002. A further eight months went by before the appellant issued summons on 23 July 2003 claiming damages for the injuries he is alleged to have sustained in the assault. If the requirements of section 57(1) are to apply to the appellant’s claim, the result is that the appellant instituted legal proceedings one year and five months late.

[14] Dealing next with the Legal Proceedings Act, it has as its purpose the regulation of the prescription and the harmonisation of the periods of prescription of debts for which organs of the State are liable. It also makes provision for notice requirements in connection with the institution of legal proceedings against certain organs of State in respect of the recovery of debts, whatever their nature. The effect of this Act in relation to section 57 of the Police Service Act was to repeal it in whole and to replace it with the provisions of chapter III of the Prescription Act. It effectively substituted the time period of twelve months with the periods of prescription applicable to all other debts. Consequently, the period of prescription applicable to a claim such as that of the appellant, is in terms of section 11(d) of the Prescription Act determined to be three years. Further, in terms of section 15(1) of that Act, the running of prescription shall be interrupted by the service on a **“debtor of any process whereby the creditor claims payment of the debt.”** Accordingly, if the provisions of the Legal Proceedings Act are to be found to apply to the appellant’s claim, his claim would only have become prescribed in February 2004, the running of prescription having been interrupted by the issuing and service of summons in July 2003.

[15] On these facts, and the legislative background, it is necessary to consider the effect of the Legal Proceedings Act and its repeal of section 57 of the

Police Service Act. What is required is a determination of the intention of the legislature with its repeal of section 57. The enquiry is essentially aimed at establishing whether the provisions of the Legal Proceedings Act has had the result of removing the time bar to the appellant's claim, and if not, whether its repeal of section 57 of the Police Service Act constitutes an obstacle to the appellant in applying, and for a Court to dispense, as envisaged in subsection (5) of that Act, with the requirement relating to the time limitation of twelve months.

- [16] The appellant's argument is that although the Legal proceedings Act does not find application to his claim and cannot assist him, its repeal of section 57 of the Police Service Act does not effect his entitlement to apply for condonation in terms of subsection (5). In support of this argument the appellant placed reliance, in my view correctly so, on the provisions of section 12(2) of the Interpretation Act. The provisions relevant to the present enquiry read as follows:

“12(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not –

(a) ...

(b) ...

- (c) **affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or**
- (d) **...**
- (e) **affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, . . . as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced . . . as if the repealing law had not been passed.”**

[17] The purpose of section 12(2)(c) is to preserve the *status quo* and to prevent any interference with existing rights or obligations by the repeal of a statutory enactment. (*Transnet Ltd v Ngcezula* supra at 552G). This conforms with the common law principle of interpretation that a statute should not be interpreted as having retrospective effect unless there is an express provision to that effect, or that result is unavoidable on the language used. **“Repeal legislation is for the most part directed at matters future rather than matters past. Pre-repeal business must generally speaking be dealt with, unless a contrary intention is apparent, as if no repeal had been enacted.”** (Per Nienaber JA in *Chairman, Board on Tariffs & Trade v Volkswagen of SA (Pty) Ltd* 2001(2) SA 372 (SCA) at 380A – B.) A statute is retrospective if it **“... takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.”** (*Yew Bon Tew v Kenderaan Bas Mara* [1982] All ER 833 (PC) at 836b –d, quoted with

approval by Marais JA in *Minister of Public Works v Haffeejee NO* 1996(3) SA 745(A) at 752B – C.) A provision that deals with pre-repeal matters and has, in the context of the present matter, the effect of “reviving” or terminating the right of a claimant to enforce a claim for compensation, and thereby the claim itself, would therefore be retrospective in its operation.

- [18] Section 12(2)(c) seeks to prevent retrospectivity by providing for the protection of “accrued” and “acquired” rights. The term “accrue” has been held to have a narrower meaning than “acquire”. “A right ‘accrues’ when all the conditions for its existence in relation to the particular beneficiary are met (cf *Transnet Ltd v Ngcezula* 1995(3) SA 538(A) at 551E – F, 551E – G); a right is ‘acquired’ when all the conditions for its existence are met and the particular beneficiary in addition avails himself of the statutory provision concerned by some individual action or effort on his part (*Mohamed NO v Union Government* (*supra* at 9 – 11); *Rustenburg Platinum Mines Ltd v Motletlegi NO and Another* 1954(2) SA 597(T) at 603C – H; *Dys v Dys* 1979(3) SA 1170(O) at 1173H – 1175A; *Minister of Public Works v Haffeejee NO* 1996(3) sa 745(A) at 754D – G”. (*Chairman, Board on Tariffs & Trade v Volkswagen of SA (Pty) Ltd* *supra* at 380E – F.) Applied to the present matter, when the appellant failed to commence action within the specified time period, the respondent acquired the right to resist the appellant’s claim by pleading a time bar. “. . . appellant had acquired a vested right consisting of immunity from suit in

respect of that cause of action” (Marais JA in *Minister of Safety and Security v Molutsi and Another* supra at 87F. See also *Kettledas NO v Minister of Law and Order 1998(2) SA 76 (SECLD)* and *Transnet Ltd v Ngcezula* supra at 551E – F.) Consequently, the repeal of section 57 by the Legal Proceedings Act would not affect the respondent’s right to plead a limitation of action, unless it is to be concluded that it was the intention of the legislature that the prescription periods in the latter Act apply to claims that would otherwise have been unenforceable due to the limitation provisions in section 57.

- [19] Conversely, the appellant had an accrued right in terms of section 57(5) of the Police Service Act prior to its repeal, to apply for and be granted leave to institute proceedings outside of the twelve months limitation period. The conditions for its existence were met when the limitation period expired. Further, for purposes of determining the applicability of section 12(2)(c) the ability of the appellant to satisfy the Court that it would be in the interests of justice to grant condonation must be assumed. (*Transnet Ltd v Ngcezula* supra at 552A – G.) Although the wording of subsection (5) is different from that of the statutory provision considered by the Court in *Transnet Ltd v Ngcezula* supra, there is in my view no reason, and none has been suggested, to ascribe a different meaning thereto. In giving meaning to subsection (5) consideration must be given

to the fact that section 57 seeks to place a limitation on the constitutionally protected right of the appellant in section 34 of the Constitution to have any justiciable dispute decided by a Court of law or, where appropriate, by another independent and impartial tribunal or forum (Compare *Mohlomi v Minister of Defence* supra.) Subsection (5) forms an inextricable part of the scheme of section 57 namely to, in contrast with the repealed section 32 of the Police Act 7 of 1958, regulate the ability of a claimant to enforce his or her right of action in a less rigid manner which is more consistent with the dictates of section 34 of the Constitution.

- [20] Accordingly, to find as the Court *a quo* did, that the repeal of section 57 had deprived it of its power to consider an application to dispense with the requirement in subsection (1), would result in effectively depriving the appellant of an accrued right in respect of which a legal proceeding is necessary, as envisaged in section 12(2)(c) and (e) of the Interpretation Act. The denial of the right to apply for and be granted condonation means that the appellant's right to enforce his claim for compensation and the claim itself are, in the words of Botha JA in *Transnet Ltd v Ngcezula* supra at 550D, in effect and substance extinguished.

[21] The next question is whether by the promulgation of the Legal Proceedings Act and its repeal of section 57 of the Police Service Act, the legislature intended to deprive the respondent of a defence based on non-compliance with the time limitation in section 57(1), and the appellant of his right to apply for condonation for such failure in terms of section 57(5). It has, in my view quite correctly so, not been submitted that there is anything in the language used and the context of the Legal Proceedings Act that points to a **“contrary intention”** as envisaged in section 12(2) of the Interpretation Act. The Act does not propose to affect any existing rights which arose as a consequence of the expiry of a limitation period. The reason lies in sections 1(2)(a) and 2(1) thereof. Section 1(2)(a) provides that the Act does not apply to any debt **“which has been extinguished by prescription before the fixed date,”** while section 2(1) simply and without qualification repeals section 57 of the Police Service Act. Although it speaks of **“period of prescription”** and **“extinguished by prescription”**, it is evident on a reading of the Act that it was the intention of the legislature for it to be inclusive of all claims against the State, the institution whereof are regulated by the laws repealed in section 2(1) thereof. This Act was clearly designed, as the preamble thereto suggests, to rationalise all the laws applicable to the institution of legal proceedings against the State in respect of the recovery of debts, and to provide for transitional arrangements. Terminology therein that is more relevant to

extinctive prescription must therefore not be given a technical or a restricted meaning, but must be read so as to also include, what is categorised as expiry or limitation periods, such as that contained in the now repealed section 57(1) of the Police Service Act. The Legal Proceedings Act is accordingly in my view not retroactive in operation and has no application to a claim, the enforcement of which was barred before it came into operation.

[22] It accordingly follows that the appellant's right to apply and be granted condonation for his failure to comply with the requirements of section 57 of the Police Service Act survived its repeal, and that the Court *a quo* erred in upholding the respondent's special plea. It should have considered the application by the appellant in terms of section 57(5) for an order dispensing with the requirements of section 57(1) of the Act. For these reasons the following order is made:

- (1) The appeal is allowed with costs.
- (2) The order of the Court *a quo* is set aside and the matter is remitted to the said Court to hear and decide the appellant's application in terms of the provisions of section 57(5) of the South African Police Service Act 68 of 1995.

D VAN ZYL
JUDGE OF THE HIGH COURT

I agree

J W EKSTEEN
JUDGE OF THE HIGH COURT

I agree

N CONJWA
ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant:

Adv V S Notshe (SC)

Instructed by:

W T Mnqandi & Associates
Offices 511 – 512,
5th Floor Absa Building
60 Sutherland Street
MTHATHA

Counsel for the respondent: Adv N K Dukada (SC) and Adv. M N
Hinana

Instructed by: State Attorney
C/o CAPS Pangwa & Associates
Suite 302 Offices 311 & 312
City Centre Complex
York Road
P O Box 1266
MTHATHA

Appeal heard on: 30 November 2012

Judgment delivered on: 14 December 2012