

**IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)**

Case No.: 1686/2006

In the matter between:

FERDINAND WILHELMUS NEL
ETIENNE BRITZ

1st Plaintiff
2nd Plaintiff

and

MINISTER OF SAFETY AND SECURITY
SENIOR SUPERINTENDENT L. S. MOFOKENG
CAPTAIN W. BOSHOFF
SENIOR SUPERINTENDENT M. L. NGOBENI
SERGEANT M. NTSHIDI

1st Defendant
2nd Defendant
3rd Defendant
4th Defendant
5th Defendant

JUDGEMENT:

MABESELE, AJ

HEARD ON:

19 AUGUST 2008

DELIVERED ON:

28 AUGUST 2008

[1] This is a special plea of prescription and non-joinder raised by the defendants against the plaintiffs' claim insofar as is based on their wrongful, unlawful and malicious arrest and detention and malicious prosecution.

[2] The defendants contend, first; that the plaintiffs are debarred from bringing their action inasmuch as they have failed to commence their action within six (6) months after their cause

of action has arisen as required by the Institution of Legal Proceedings Against Certain Organs of the State Act.¹ Second; the plaintiffs failed to comply with the provisions of the Prescription Act.² Third; they failed to join the Minister of Justice and Constitutional Development and such a failure constitute a material non-joinder.

- [3] The plaintiffs and the defendants (except first defendant) are in the employ of the South African Police Services.
- [4] According to the Particulars of Claim, the plaintiffs were arrested on 28th January 2003 at Odendaalsrus, and were detained in an office at the Odendaalsrus Police Station for two hours.
- [5] The plaintiffs were charged and prosecuted for fraud, alternatively theft. They applied for a discharge in terms of section 174 of the Criminal Procedure Act,³ and were so discharged on 1 April 2004.

¹ Act 40 of 2002

² Act 68 of 1969

³ Act 51 of 1977

[6] In paragraph 8 of the Particulars of Claim, the plaintiffs, *inter alia*, said:

“Op ongeveer 28 January 2003 en te Odendaalsrus onder verwysingsnommer MAS499/1/2003 het Tweede, Derde, Vierde en Vyfde Verweerders die reg in beweging gebring deurdat:

- 6.1 Vierde Verweerder en/of Vyfde Verweerder onregmatiglik en kwaadwilliglik ‘n vals klagte by die Suid-Afrikaanse Polisie te Odendaalsrus gelê het teen Eisers ten opsigte van ‘n klagte van bedrog alternatiewelik diefstal van bewysstukke in die SAP13-stoor, te wete drank wat Eiser in opdrag moes vernietig het;
- 6.2 Op die stadium wat Vierde Verweerder en/of Vyfde Verweerder gemelde klagtes teen Eisers gelê het, het Vierde Verweerder en/of Vyfde Verweerder sonder redelike en geregverdigde grondslag opgetree het en was daar ‘n gebrek aan die redelike geloof in die waarheid van die bewerings vervat in die klagtes;
- 6.3 In en as gevolg van voormelde klagtes deur Vierde Verweerder en/of Vyfde Verweerder gelê, het Derde Verweerder in opdrag van Tweede Verweerder sonder redelike of geregverdigde grondslag, onregmatiglik en

kwaadwilliglik Eisers gearresteer en aangehou te die Suid-Afrikaanse Polisie, Odendaalsrus, vir twee ure;

6.4 Tweede en Derde Verweerders het Eisers gearresteer nie teenstaande die feit dat daar nie enige redelike geloof in die waarheid van die inligting wat die Vierde Verweerder verskaf is, geleë was nie;”

[7] At the commencement of the proceedings Counsel for the plaintiffs and the defendants accepted that the arrest of the plaintiffs on 28th January 2003 was a malicious arrest.

[8] The plaintiffs addressed a letter dated 17 September 2004, in terms of Act 40 of 2002, to the National Commissioner of the South African Police Services wherein they claimed damages arising out of alleged unlawful arrest. The letter was received by the defendants on the 28th September 2004.

[9] The letter reads:

“Ons plaas op rekord:

1. Op of ongeveer 28 Januarie 2003 en te Odendaalsrus het ‘n Kaptein Bailey en/of Kaptain N. B. A. Boshoff en/of Kaptain

Anthony Motaung en/of Sers Moses Ntsidi en/of Senior Superintendent M. L. Ngobeni, Polisiebeamptes wat te alle relevante tye in diens van die Suid-Afrikaanse Polisie diens was en opgetree het binne die aard en bestek van hulle diens aldaar, wederregtelik en kwaadwillig die reg in werking gestel het en wel deur skrywer se gemelde kliënte hierinbo genoem onregmatig te arresteer en aan te kla van diefstal, en/of korrupsie en/of bedrog en vervolging ten opsigte daarvan in te stel, in die hand te werk en voort te sit.

2. Daar het geen redelike of waarskynlike grond bestaand vir die handeling soos in die vooropstelling nie en is skrywer se kliënte as 'n resultaat van die gemelde optrede onregmatig gearresteer, aangekla en moes ook voor 'n geregshof gebring word op 'n klagte van diefstal en bedrog.

Na verhoor van die geleentheid het skrywer se kliënte in 'n geregshof ontslag ontvang gekry aan die einde van die staatsaak op 1 April 2004.

3. As gevolg van hierdie handeling het skrywer se kliënte skade gely in die bedrag van R1 000 000,00 (een miljoen rand) elk, welke skadevergoeding vir *contumelia*, skade vergoeding as gevolg van die ontneming van hulle vryheid en die ongemak en ongerief wat skrywer se kliënt moes verduur.
4. U word hiermee in terme van die bepalinge van Artikel 3 van Wet 40 van 2002 aangemaan tot betaling van voormelde

bedrae binne dertig (30) dae na datum hiervan, by ontstentenis waarvan skrywer instruksies het om die skade soos deur skrywer se kliënte gely geregteik van u te verhaal.”

[10] Mr. Nxusani, who appeared on behalf of the defendants, argued that such notice of intended legal proceedings must be served on the organ of the state within six (6) months from the date on which the debt arose.⁴

[11] He argued that failure by the plaintiffs to serve such a notice within the prescribed period debar the plaintiffs from proceeding with their claims.

[12] It was argued that the summons in respect of the plaintiffs' claims was served on the 9th May 2006. This was after a prescribed period of three (3) years from the date on which a debt became due.⁵

⁴ Section 3(2) provides: “ A notice must –

- (a) within six months from the date on which the debt became due, be served on the organ of the state in accordance with section 4(1); and
- (b) briefly set out –
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor.”

⁵ See Prescription Act, 68 of 1969

[13] It was accordingly submitted that the plaintiffs' claim was extinguished by prescription.

[14] Mr. Nxusani argued that the plaintiffs should have joined the Minister of Justice and Constitutional Development for any damages which they sustained as a result of the decision to prosecute them. He said failure by the plaintiffs to join the Minister as a party to the proceedings constitutes a material non-joinder.

[15] The plaintiffs deny that their claim prescribed. They deny also that their decision not to join the Minister as a party to the proceedings constitutes a material non-joinder.

[16] Mr. Zietsman argued on behalf of the defendants that prescription starts to run on the date from which a claim became due.⁶

⁶ Section 12(1) of the Prescription Act provides:

“...., prescription shall commence to run as soon as a debt is due.”

[17] He argued that although the plaintiffs were arrested on the 28th January 2003 a debt became due on 1 April 2004, the date on which they were discharged. He sought reliance on **THOMPSON AND ANOTHER v MINISTER OF POLICE AND ANOTHER.**⁷

[18] In the above-mentioned case, Eksteen J, held that in an action based on malicious prosecution and malicious arrest and detention no action will lie until the criminal proceedings have terminated in favour of the plaintiff.

[19] The learned Judge said:⁸

“In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be prejudged by the civil action. The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or decline to

⁷ 1971(1) SA 371

⁸ 371; A - C

prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, The proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge.”

From the above it follows that the plaintiffs’ claim in respect of the alleged malicious arrest and detention became due on 1 April 2004, the date on which they were discharged.

[20] The plaintiffs gave notice in terms of section 3 of Act 40 of 2004 in a letter dated 17th September 2004 which was received by the first defendant on 28th September 2004. Quite clearly, notice was given within a period of six (6) months from the date on which a debt became due. The plaintiffs, undoubtedly, acted within a prescribed period. The result is that the defendants’ first special plea must fail.

[21] The summons commencing the plaintiffs’ action was issued on the 21st April 2006 and served on the defendants on 24th April 2006; 8th May 2006 and 9th May 2006, respectively.

This was approximately two (2) years from the date on which a debt became due, that is, 1 April 2004. The plaintiffs acted within a prescribed period of three (3) years. Therefore, the second special plea must also fail.

[22] Mr. Zietsman argued that only the police (4th and 5th defendants) instigated the arrest or set the wheels of the criminal law in motion by effecting the arrest of the plaintiffs, the consequences of which act the police were aware would necessarily be to hurt the plaintiffs in regard to their person, dignity or reputation. He argued that on this basis alone there was no need to join the Minister.

[23] A further argument raised by Mr. Zietsman is that even the Director of Public Prosecutions, who is an employee of the Minister of Justice and Constitutional Development, has no interest in the outcome of this case. Therefore he cannot be joined.

In **UNITED WATCH AND DIAMOND CO v DISA HOTELS**⁹

⁹ 1972(4) SA 409 (CPD) at 415

Corbett J, (as he then was) said the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or to ensure that there is a waiver of the right to be joined are limited to cases of joint owners, joint contractors and partners ¹⁰ and where the other party has a direct and substantial interest ¹¹ in the issues involved. In my view, therefore, the Minister of Justice and Constitutional Development does not have any direct and substantial interest in the present case. Therefore, a special plea on non-joinder must fail.

I am fortified, in my view, by the manner in which both counsel presented argument in this matter.

[24] In view of the above, I make the following order:

Each special plea is dismissed with costs.

¹⁰ The Minister of Justice and Constitutional Development does not fall within this category.

¹¹ What constitutes a direct and substantial interest is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court. (See *United Watch and Diamond Co*, supra, par. H)

M. M. MABESELE, AJ

On behalf of the plaintiffs:

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On behalf of the defendants:

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