

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA
(MAIN SEAT)

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: YES |

25/06/2024

SIGNATURE

DATE

CASE NO: 1609/2019

In the matter between:

GODFREY MANGO LISENGA

Plaintiff

and

MINISTER OF JUSTICE

Defendant

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 25 June 2024 at 10:00.

J U D G M E N T

MASHILE J:

[1] Central to this case is whether the claim for damages instituted against the Defendant ("the Minister") by the Plaintiff ("Lisenga") has prescribed for lack of observance of the provisions of Section 3 of the Institution of Legal Proceedings against certain Organs of State, Act 40 of 2000 ("Act 40 of 2000") or in terms of Section 12 of the Prescription Act 68 of 1969 (Act 68 of 1969"). When the matter served before this Court, the parties had on 18 August 2023 obtain a court order directing that the special plea raised by the Minister be decided separately as it could be dispositive of the whole case.

[2] This is how the question of prescription has become the sole issue for consideration by this Court. The facts from which the issue arises are common cause between the parties. At Paragraph 4 of his particulars of claim, Lisenga alleges that the Minister is liable because he was wrongfully or negligently convicted during January 2002 following which, a criminal record was noted against his name. Lisenga avers further that his name was endorsed on the register of offenders after the clerk and Magistrate at Hazyview Court had prepared and authorized his SAPS 69 or fingerprints forms and forwarded them to the Local Criminal Record Center. Following this, a criminal record was updated on his name for an offence of theft.

[3] At Paragraph 5 of the particulars of claim, Lisenga states that the criminal case against him was withdrawn by the Magistrate's Court but the Clerk of the Court together with the Magistrate, both acting in their scope of employment and furthering the interest of the Minister, wrongfully or negligently prepared and authorized SAPS 69 form. The SAPS 69 was thereafter forwarded to the Criminal Record Center for update on the system. In consequence of this, concludes Lisenga, he came to acquire a criminal record

of theft, which he discovered in June 2016 when he was advised that he was convicted by the Hazyview Magistrate's Court in 2002.

[4] The Minister acknowledged that he bore the onus of showing that the claim had become prescribed. That said, he opted not to call any witnesses in support of his defence and closed his case. Testifying to validate the allegations in the particulars of claim was Lisenga personally. When he finished his evidence, his Counsel announced that he was closing his case too. Lisenga's testimony was that on 13 June 2016, it dawned upon him for the first time that he might have a claim for delictual damages based on the incorrect conviction and subsequent criminal record that followed.

[5] His further evidence was that it was in 2012 and 2013 when he learned of the conviction and criminal record for the first time. The revelation was made by a potential employer, Woestalin Mine in Middleburg. Woestalin Mine informed him that it emerged during his background check that he had a criminal record, which he had failed to disclose. In consequence of this non-disclosure and existence of the criminal record the prospective employer deemed him unsafe and dishonest and declined to engage him further.

[6] The background to the above, he said, was that he attended an interview in August 2012 where he was requested to complete certain forms. One of the forms required him to state whether he had any previous convictions or not. Oblivious of the conviction and criminal record, he said that he had none following which his fingerprints were scanned. He was surprised when he was questioned about the conviction and criminal record from 2002 in Hazyview. His explanation of what had transpired led the interviewer to give him a paper bearing Cas 145/11/2001 and advised him to obtain a police testimonial from investigating officer Deon Meyer.

[7] Lisenga also testified that armed with the case number, he went to the Hazyview Police station a few times looking for Deon Meyer without any success. He ultimately left his contact telephone number with a message that Deon Meyer must contact him. While

he was still expecting to hear from Deon Meyer, he received a job offer from Sparton Truck Hire in Middleburg. He signed the contract on 13 September 2012 and commenced employment as a yard supervisor on 17 September 2012. On 30 August 2013, he was informed by the company that he failed to disclose his previous conviction during his job application. He was accused of failure to disclose his conviction and dishonesty because of which, he was discharged.

[8] Following his dismissal at Sparton Truck Hire, he once again visited the police at Hazyview to obtain a testimonial. He told them that he had lost his previous employment due to an alleged conviction and existence of a criminal record whereupon he was directed to the White River Magistrate's Court. The Court referred him back to the police in Hazyview. He stated that it was back and forth between the police at Hazyview and the Court in White River. Ultimately though, he met Magistrate Oosthuizen who requested that he be given a certain document, which he could not really understand. Frustrated with this back and forth, he reported the matter to the provincial commissioner. In the process of all this and on 13 June 2016, he was advised that he had a claim against the Minister as the people who committed the wrongful negligent act were in the employ of the Minister.

[9] He did not immediately find an attorney because he had thought that he would not afford even if he were to find one. Surprisingly, in 2019 he met his attorney of record who agreed to assist Lisenga who claimed that during the period between 2013 and June 2016 he did not know that he could sue anyone or that he had a claim. Lisenga said that his level of education is Grade 12.

[10] Now that I have dealt with the factual matrix of this case, it is opportune to turn to the legal framework governing the subject. Section 12 of Act 68 of 1969 provides that:

"(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

- (2) *If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*
- (3) *A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."*

[11] The essentials of this section have been a subject before various Courts in this country. Thus, the Constitutional Court in *Mtokonya v Minister of Police*¹ held that the facts of which the creditor needed to be aware do not extend to the knowledge of the legal consequences but simply to those facts the creditor would need to prove in order to prove his claim against the debtor. In *MEC for Health, Western Cape v M C*², the SCA held that the required knowledge extends to the minimum facts necessary to prove a claim and that a debt is due when it is owing and payable.

[12] The minimum necessary *facta probanda* to sustain a claim founded on a claim for delictual damages are:

- 12.1 Establishment of the identity of the debtor, the minister in this case.
- 12.2 Commission of a wrongful act;
- 12.3 Fault in the form of either negligence or intention. The wrongful act must have been committed either negligently or intentionally;
- 12.4 Causation. There must be a causal link between the wrongful act that has been committed negligently or intentionally and the damages that have ensued;

¹ [2017] ZACC 33 at paragraph 36

² [2020] ZASCA 165 (SCA) paragraphs 6 and 7

12.5 Patrimonial loss. This is the loss that the plaintiff would have suffered because of the negligent or intentional wrongful act.

[13] It is necessary to point out from the onset that the dates referred to by the parties are common cause. Lisenga states that he was told that he had a criminal record stemming from a theft conviction. One Deon Meyer of Hazyview Police Station investigated the case. He acquired knowledge of this when he went for an interview at the Woestalin Mines in Middleburg in 2012. During his interview at the mine, he was required to complete a form. In an answer to a question whether he had a criminal record or not, he had stated that he did not. After processing his application, the mine declined to employ him advising that he was dishonest as he had failed to disclose that he had been convicted for theft in 2002 for which he paid a fine of **R400.00**. This was new to him. The correct position is that his co-accused was in fact the one who was convicted and fined **R400.00**.

[14] On 13 September 2012, he went for another interview at Sparton Truck Hire in Middleburg. He was successful and commenced employment on 17 September 2012. On 30 August 2013, his employer discharged him from employment because of his failure to disclose that he was convicted and therefore had a criminal record. On this occasion, a piece of paper bearing Cas No: 145/11/2001 was supplied to him. Everything said, the point is that Lisenga had known from the time he had attended the interview at the Woestalin Mines that he had a criminal record. Besides, Lisenga himself told the Clinical Psychologist that the first time he acquired knowledge of his conviction and subsequent criminal record was in 2012/2013 when he attended employment interviews.

[15] He also knew that the Magistrate's Court that convicted him must have had their facts confused as, according to him, he was never convicted and therefore could not have a criminal record. These were the minimum facts that would have enabled him to institute his delictual claim. Accepting that these were the facts that Lisenga needed to know, it is not necessary that they should extend to the knowledge of the legal consequences. It is

sufficient that they constitute the minimum facts that Lisenga required to establish his claim against the Minister. The exceptions in Section 12(2) and (3) do not find application here. Firstly, there is no allegation that the Minister prevented him from finding out the facts and secondly, he knew the identity of the Minister.

[16] This conclusion is unavoidable because Section 12 of Act 68 of 1969 does not require actual knowledge but it is adequate that he could have acquired it by exercising reasonable care. Could Lisenga have known of the creditor, the Minister, by the exercise of reasonable care? The answer must be in the affirmative because he was exposed to personnel such as that which informed him that he might have a claim against the Minister in 2016. Lisenga could have enquired when he visited the Hazyview Police Station, White River Magistrate's Court and again the police at Hazyview when he revisited them.

[17] From his evidence though, he did not consult with attorneys because he thought such exercise as beyond him and prohibitive. He came to know that there were attorneys who probably, I guess, could take cases on contingency unfortunately, well after the claim had prescribed and had to contrive lack of knowledge of the Minister and minimum facts to avoid prescription. The claim of Lisenga prescribed as early as 2015 or, at best, in 2016. This is because Section 12(1) states that a debt begins to run as soon as it becomes due. On the facts of this case, the debt fell due in 2012 when Lisenga was told that he had a conviction and that a criminal record had been noted against his name. Constructively, he has always known of the identity of the Minister since the day he was advised about the conviction and criminal record.

[18] In the result, I am constrained to uphold the special plea and I make the following order:

The claim is dismissed with costs.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

Counsel for the Applicant:
Instructed by:

Adv LD Tjale
TP Radebe Attorneys

Counsel for the Respondent:
Instructed by:

Mr D Slabber
State Attorney (Pretoria)
C/O Slabber Attorneys Inc

Date of Judgment:

25 June 2024