

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 44235/2019

DATE: 29-07-2024

10 In the matter between

NONHLANHLA MTHEMBU

and

WOOLWORTHS (PTY) LIMITED

ABSA (PTY) LIMITED

1st Defendant

2nd Defendant

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 29 July 2024

SIGNATURE

Plaintiff

J U D G M E N T *EX TEMPORE*

20 **WILSON, J:** In her particulars of claim the plaintiff advances a case of injury to dignity, and to freedom and security of the person arising from a search that took place on 13 December 2016. The plaintiff's particulars of claim and her summons were served on the first defendant on 17 June 2020, and on the second defendant on 11 February 2020.

It is trite that under the Prescription Act 68 of 1969, an ordinary delictual debt of this nature falls due when the plaintiff has the minimum facts necessary to sustain her cause of action. The debt prescribes three years after that date. Given that both defendants were served well after three years from the date on which the plaintiff alleges she was subjected to an unlawful search, the defendants raise special pleas of prescription.

The facts necessary to determine the pleas are all
10 common cause. Mr Carstens, who appeared for the second defendant, suggested that the plaintiff's knowledge of the identity of the second defendant had not been established as a matter of evidence, and out of an abundance of caution, he led the evidence of a Mr Edgar Yende who on 13 December 2016 was employed by the second defendant and who confirmed that he introduced himself to the plaintiff on the day that she was searched, and that he disclosed to the plaintiff that he worked for the second defendant. He was not cross-examined on that issue, and to the extent
20 that the plaintiff's knowledge of the identity of the second defendant as at 13 December 2016 was not common cause before Mr Carstens led his evidence, it must now be taken as undisputed.

Counsel for the plaintiff quite properly accepted that the date on which the search took place and the date on

which the summons and particulars of claim were served are all common cause. She submitted however, that the plaintiff only acquired knowledge of the claim she brings today on 5 October 2017. That was the date on which the plaintiff was acquitted on charges of fraud in connection with which the search of 13 December 2016 took place. Counsel was unable to suggest what it was that became known to the plaintiff on the date of her acquittal that was not already known to her in connection with the claim an
10 injury to her dignity, and to the freedom and security of her person arising from the search 13 December 2016.

I cannot see on the papers, nor have I heard any evidence of, what the plaintiff became aware of on the 5 October 2017 that is relevant to the claim. Had of course the plaintiff claimed against either of the defendants or against the Minister of Police, or against the National Director of Public Prosecutions, for malicious prosecution, then the date on which she was acquitted would have been relevant, and she would have had to have known the date
20 on which the prosecution was discontinued to complete her cause of action. But as should be abundantly clear by now, the plaintiff does not pursue a claim for malicious prosecution or wrongful arrest and indeed neither the Minister nor the Director of Public Prosecutions are joined to these proceedings.

It is therefore clear to me that the debt that the plaintiff claims on her particulars of claim fell due when she was searched on 13 December 2016.

Her claim, absent special circumstances, none of which were pleaded or proved before me, therefore prescribed on 14 December 2019. The first defendant having been served more than six months after that date and the second defendant having been served approximately two months after that date, I have no choice
10 but to conclude that the claim the plaintiff pursues today has prescribed.

Accordingly, the special pleas of prescription will be upheld, and the claim will be dismissed.

On the question of costs, Mr Makola asked for costs of counsel on the C scale. Mr Carstens asked for costs of counsel on the B scale. However, given the simplicity of the point of prescription I have had to determine, it seems to me that the default position in rule 67A is the appropriate one. Rule 67A makes it clear that, absent the court
20 ordering otherwise, the A scale is the scale on which costs should be taxed on an ordinary party and party order, and that is the order I shall make.

I register a degree of discomfort with what appears to have been on the face of it a set of facts which demonstrate that the plaintiff approached her attorney in time to institute

the claim so as to interrupt prescription, but for whatever reason that her attorneys did not serve her summons and her particulars of claim in time to interrupt prescription. Counsel for the plaintiff suggested that the defendants were difficult to find. I cannot accept that one of the country's leading grocery retailers and one of the country's leading banks were so elusive as to be incapable of prompt service via Sheriff or otherwise.

10 I am left somewhat disturbed by the fact that the plaintiff's attorneys did not act as promptly as it appears they could have done to serve her summons and particulars of claim. However, I can put it no higher than that because the facts surrounding the plaintiff's instructions to her attorneys, and what her attorneys then did to give effect to those instructions, have not been established or tested before me.

For all of those reasons, and with some regret, I make the following order;

- 20 1 The first and second defendants' special pleas of prescription are upheld.
- 2 The action is dismissed with costs.



WILSON, J
JUDGE OF THE HIGH COURT
29 JULY 2024