

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No. 20/18028

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
27 August 2024	
DATE	SIGNATURE

SIBUSISO CLEMENT SHABANGU

Plaintiff

And

THE MINISTER OF POLICE:

1st Defendant

NATIONAL COMMISSIONER OF POLICE:

2nd Defendant

PROVINCIAL COMMISSIONER OF SAPS:

3rd Defendant

NATIONAL PROSECUTING AUTHORITY:

4th Defendant

JUDGMENT ON SPECIAL PLEAS

MNYATHELI AJ

Introduction

[1] These are action proceedings in which Plaintiff claims against the Defendants compensation for damages allegedly occasioned on the Plaintiff pursuant to his unlawful arrest and detention by members of the First, Second and Third Defendants, acting within the course and scope of their employment, (“the Defendants”). The arrest was allegedly followed by malicious prosecution by or at the behest of Fourth Defendant, National Prosecuting Authority (“the NPA”).

[2] The claim is resisted by, and on behalf of all the Defendants on several grounds including various Special Pleas, based on the contention, *inter alia*, that the claim has all but prescribed, in terms of the Prescription Act (“the Prescription Act”),¹ as well as under the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act, hereinafter referred to as (“the ILPACOSA”)² for want of compliance with the strictures contained in the latter Act. Other Special Pleas related to non-compliance with the provisions of the State Liability Act. There is also a General Plea or Plea-over.

[3] It was agreed before the start of the matter, that the issue of special pleas is, for reason not difficult to discern, to be dealt with and disposed of first. The parties also agreed that the claim as against the Second and Third Defendants would also be

¹ No. 68 of 1969

² No. 40 of 2002

jettisoned, such that the claim remains against the First and the Fourth Defendants only; the claims, however, remaining as they were.

[4] At the start of the proceedings, the parties advised the court that by agreement between them that accordingly, Plaintiff is no longer proceeding against the Second and Third Defendants; the Plaintiff's counsel also advising the court that the claim as against Second and Third Defendants is practically withdrawn. In consequence the special pleas as against the above two Defendants were also *ipso facto* abandoned. Nothing more need then be said *qua* Second and Third Defendants.

The Facts

[4] It is common cause that Plaintiff was arrested by members of the Defendants on 03 April 2016. He was charged and arraigned with charges ranging from armed robbery and murder and detained in terms of the Criminal Procedure Act.³ He unsuccessfully applied to be released on bail and remained in custody, being remanded several times until his case was heard over a period of not less than three (3) years and seven (7) months, all that period being in custody. He was eventually found not guilty and discharged on 15 November 2019.

[5] On 27 January 2020 Plaintiff served on the Defendant, the statutory notice ("the Notice") in terms of Section 3 of ILPACOSA, demanding compensation and advising of

³ No. 51 of 1977

an intention to issue summons against the Defendant. It is common cause that the Notice was acknowledged by or on behalf of the Defendants on 13 February 2020.

[6] On 23 July 2020 Plaintiff issued summons against the Defendants including the Fourth Defendant for a composite amount of R50 000 000 [Fifty Million rand]. There is no issue raised regarding the service of the summons at issue.,

[7] Initially four (4) Special Pleas were raised on behalf of the Defendants against the claim of the Plaintiff, as follows:

- 7.1 That the claim had prescribed in terms of the section 11 of the Prescription Act;
- 7.2 That Plaintiff failed to comply with the provisions of Section 3 of the ILPACOSA and was late of the statutory Notice required in terms thereof, in that it was not served within six (6) months of the precipitation of the cause of action;
- 7.3 Failure to comply with Section 5 of the ILPACOSA; and
- 7.4 Failure to adhere to the provisions of Section 2 of the State Liability Act;⁴

Issues for decision

[8] I reiterate that upon hearing of the matter, counsel for the Defendants and the Fourth Defendant informed the court that they were abandoning the last two Special Pleas

⁴ No. 20 of 1957

referred to in 6.3 and 6.4 above. The result was that only the Special Plea of Prescription in terms of section 11 of the Prescription Act and the Special Plea under the provisions of the Section 3 of ILPACOSA remained for adjudication.

[9] Both parties elected not to lead any evidence in support of their cases on the special pleas of Prescription under both the Prescription Act and compliance requirements under the ILPACOSA. It is trite that our courts have been at pains to point out that it is wrong of a court to seek to decide issues which the parties have not raised in their papers. It was pertinently pointed out in *Mtokonya v Minister of Police*,⁵ that a court should not tell a litigant what it should complain about, unless it is a matter of a point of law that has not been raised by the parties but is apparent in the papers. This matter will, therefore, be mainly decided on the parties' heads of argument and their arguments and contentions in presenting their respective cases.

[10] The issues that remain for adjudication, in consequence, are:

When would prescription be said to have started running in the trajectory of the Plaintiff's case in respect of his claims;

Whether the claim of the Plaintiff based on unlawful arrest and detention and the claim of malicious prosecution have been extinguished by prescription in terms of section 11 of the Prescription Act; and

⁵ 2018 (5) Sa 22 (CC)

Whether there was due and proper compliance with the prescripts laid out in section 3 of ILPACOSA as regards the statutory notice ("the Notice")

The law

[11] Generally the Prescription Act governs issues of prescription of claims arising from causes such as delicts and contracts and even unjust enrichment. In this case the issue at hand is damages in delict. It is now settled that claims of the nature concerned in this case are claims based on *actio injuriarum*. See *Holden v Assmang Limited*⁶; See also *Kruger v National Director of Public Prosecutions*⁷

[12] In relevant parts the Prescription Act provides that the period of prescription shall be three years save where an Act of parliament provides otherwise.⁸

[13] Section 12 of the Act is to the following effect:

- (1) *Subject to the provisions of subsection (2) (3) and (4), prescription shall commence as soon as the debt is due.*
- (2) *If the debtor willfully prevents the creditor from coming to know of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*

⁶ 2020 ZASCA 145

⁷ 2019 ZACC 13; 2019 BCLR 703 (CC)

⁸ See Section 11

- (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 the exercise of reasonable care*

[14] For a debt to be due and for prescription to start running section 12(3) above requires that the creditor must have knowledge of the identity of the debtor and of the facts from which the debt arises. The section does not require that before a debt can be said to be due or before prescription can start running, that the creditor must know that the conduct of the debtor giving rise to the debt is wrongful and actionable, as that is a legal conclusion and not fact. Per Zondo J in *Mtokonya v Minister of Police*⁹; See also *Minister of Safety and Security v Slabbert*¹⁰

[15] Given the nature of the Pleas of the Defendant it is apparent that to adjudicate the matter the issue of dates is of prime importance. Of more importance is the determination of the date on which the cause of action in the matter arose. In other words, the strike date as to when the claim against the Defendants became due is the gravamen of this case.

[16] For its sake, the cause of action is the totality of all the facts and circumstances that give rise to a claim that would entitle the Plaintiff to prosecute a claim against the Defendants. According to Section 12 (3) a debt becomes due when the Plaintiff is able to identify the debtor and the facts upon which the claim arises. So for claims based on an

⁹ supra

¹⁰ [2010] 2 All SA 474 (SCA)

allegation of unlawful arrest the debt becomes due on the date that the offending conduct was committed, *See Makhwelo v Minister of Safety and Security*¹¹

[17] For a claim based on malicious prosecution to succeed on the merits, Plaintiff must allege and prove:

17.1 that the Defendant set the law in motion in the sense of initiating or instigating the Proceedings that the Plaintiff alleges were malicious;

17.2 that the Defendant acted without reasonable and probable cause;

17.3 that Defendant acted with malice or animus injuriandi; and

17.4 that the prosecution was decided in favour of the Plaintiff or that the matter was withdrawn against him. *See Minister of Justice and Constitutional Development and Others v Moleko*¹²

[18] The distinguishing factor with regard to claims based on malicious prosecution is that unlike other claims generally such as one based on unlawful arrest, the claim for malicious prosecution can only arise if the proceedings at issue are terminated in favour of the Plaintiff. This much was said with authority in *Els v Minister of Law and Order*¹³. The reason for this is that a claim for malicious prosecution cannot anticipate the outcome of the proceedings yet to be finalized. Finality of the proceedings, in favour of the claimant is what is an essential requirement.

¹¹ 2017 (1) SDA 274 (GJ)

¹² [2008] 3 All SA 47 (SCA)

¹³ 1993 (1) SA 12 (CC)

[19] In *Holden v Assmang*¹⁴ Dlodlo JA asserted that 'a claim for malicious prosecution can only arise after the successful conclusion of the criminal case in a plaintiff's favour. In a criminal matter such a favourable conclusion in plaintiff's favour would occur on acquittal or the withdrawal of the charges by the Director of Public Prosecutions. The institution of a civil claim based on a malicious prosecution before such prosecution has been finalized in the plaintiff's favour, may amount to prejudging the results of the pending proceedings'

[20] A claim based on unlawful arrest is much different from one based on malicious arrest and/or prosecution. In the case of an unlawful arrest the cause of action arises when all the facts upon which a claim may ensue are present, and the claimant is able to identify its debtor, unless they are prevented from doing so by the debtor himself. This is only possible upon arrest. As regards a claim based on malicious prosecution, it is imperative that the cause of action only gets completed upon the termination of the proceedings in favour of the claimant

[21] In addressing the first issue for decision herein at: as to when prescription would have started to run in the trajectory of the Plaintiff's case regarding his claims *Ms Liphoto* for the Defendants submitted that it is common cause that Plaintiff was arrested on 03 April 2016, and that this is in accordance with his very summons. This, she says, was repeated in the Plaintiff's Replication¹⁵ and must be taken as an admission on his part as

¹⁴ [2020] ZSCA 145

¹⁵ The Replication pretty much repeats the particulars of Claim with an emphasis that the date of the 3rd April 2016 is common cause and not in dispute

he says it is common cause. Plaintiff was arrested by members of the First Defendant, Police officials; he was also informed of the reason for the arrest, in that he was charged with robbery and murder.

[22] The submission in short is that the Plaintiff knew or had knowledge of the identity of his debtor on that date of the 3rd of April 2016. Also on being informed that he was being arrested on charges of robbery and murder he would then have known of the facts giving rise to, and the reason for his arrest, and therefore the debt and the debtor. Ms Liphoto relies for her submissions, *inter alia*, on the judgment of *Kutoane v Minister of Police and others*¹⁶

[23] The thrust of *Ms Liphoto's* submissions on behalf of the Defendants was that the claim of the Plaintiff was based on an assertion that he was unlawfully arrested and detained on 3 April 2016, and was in custody for the period of more than three years until his acquittal on the 15 November 2019.

[24] It is common cause that he then, on the 27 January 2020, issued the Notice in terms of Section 3 of the ILPACOSA to the First Defendant.

[25] *Ms Maisela* on behalf of the Plaintiff also pursued her arguments along the Heads of Argument she had presented, arguing, in the main, that the claim of the Plaintiff had not been extinguished by prescription. She stuck to the common cause facts of this

¹⁶ 2024 (

matter: that the arrest of the Plaintiff was on the 03 April 2016; He was languishing in the Johannesburg prison where he was detained, bar postponements, appearance for bail applications and the trial itself and remands in-between till his acquittal on 15 November 2019. He spent in total a period of Three (3) years and Seven (7) months in custody.

[26] *Ms Maisela* further argues through, *inter alia*, her heads of argument, that Plaintiff was denied bail hence he was kept in custody for this length of time; that over the period of custody he was not aware of his rights to sue; further *that even if Plaintiff might have known about his rights to sue for his unlawful arrest and malicious prosecution, he had to allow the prosecution process to take its course*. She submitted that it would have been *prematurely (sic)* to bring any action against the Defendants whilst the prosecution was still underway. *Ms Maisela* argues that even if Plaintiff knew of his rights to sue, he was kept in custody at the Johannesburg Central Prison and had no means to bring this action against the Defendants.¹⁷

[27] In objecting to the contention of prescription argued for by *Ms Liphoto*, *Ms Maisela* referred also to the decision in *Mtokonya v Minister of Police*¹⁸ averring that there was a split decision by the Judges of the Constitutional Court in that case. Since this decision is against the arguments of *Ms Maisela* by majority, she obviously aligns herself with the minority view. Unfortunately, the principles of *stare decisis* do not avail her arguments. She presented arguments of the majority and those of the minority. For this I commend

¹⁷ Plaintiff's Heads of Argument (HoA) Page 4 paragraph 11

her but from both a substantive law point of view and the law of procedure the arguments of the minority do not find favour with the current legal position.

[28] I engaged the parties on the Latin maxim, *lex non cogit ad impossibilia*, (the law does not expect a person to do the impossible), since there have been some differences in the authorities and some case law on this issue. The arguments by counsel for the Plaintiff also appear to be leaning towards the implications under this maxim. On a strict interpretation of the maxim and the notion that the law does not expect a person to do the impossible, it would seem that this would implicate the principles and some judicial pronouncements on the issue of ignorance of the law and impossibility of performance. This speaks more to the minority judgment arguments posited by *Ms Marisela* in the *Mtokonya* judgment. Referring to Paragraph [140] in that judgment counsel quoted the following passage:

'In the case where section 12(2) applies, prescription does not commence even if the debt becomes due. What prevents the running of prescription is the creditor's lack of knowledge of the existence of the debt brought about by the debtor.

At paragraph [148] Therefore, in my view section 12(3) should not be read as authorising prescription to commence running where the claimant, through no fault of his or hers, has successfully established that he or she was not aware of the existence of the debt. The effect of holding otherwise would be denying the uneducated and poor people in custody the protection arising from constitutional rights...'

[29] The above arguments obviously do not thump the sentiments expressed in the majority judgment in *Mtokonya*, namely that 'the question before them as to whether the High Court was correct in its decision that section 12(3) of the Prescription Act does not

require a creditor to have knowledge that the conduct of the debtor giving rise to the debt was wrongful and actionable before prescription could start running' was to be answered in the affirmative or not.

[30] Dismissing the minority arguments the court went on to say, "we decline the invitation by Counsel for Applicant to hold that the meaning of the provision in Section 12(3) that a debt shall not be deemed to be due until the creditor has "knowledge of the facts from which the debt arises" includes that the creditor must have knowledge of legal conclusions, i.e. the conduct of the debtor was wrongful and actionable".

[31] The Court went on to brand counsel's overtures as an invitation to render our law of prescription *so ineffective that it may as well be abolished, because prescription would then not run against people who have no legal training at all, including professionals in non-legal disciplines.*

[32] It was the judges' overall impressions in the *Mtokonya* case that prescription would hardly run against trained lawyers even, if the issue arises in areas of law in which they do not specialise, and the percentage of people against whom prescription would not run would be exceedingly high.

[33] In short a decision in favour of allowing uninformed, illiterate or uninitiated people in the law governing prescription would open the proverbial floodgates of litigation against the state and the public purse would soon be bankrupted.

[34] There was an issue raised by the court *mero motu*, regarding whether it can be said that the case of the Plaintiff would fall under what was referred to as ‘superior force’ in a recent decision of this court. Counsel was not bound by any of the sentiment expressed in that case and the matter was not covered by their respective cases, nor was the court entitled to traverse matters that fell outside the parties’ cases. No further discussion will therefore, be held on these issues in this judgment. *See the recent judgment in Katha v Pillay and Others*¹⁹

Conclusion and Ruling

[34] Now, in this matter counsel for Applicant made it clear to the court, that their challenge of prescription in their special pleas did not extend to the claim based on malicious prosecution and their arguments did not implicate the law governing such situations. This was a fair, and dare I say, wise approach. I need, therefore, not burden myself with argument on that particular score at this stage, and will cross that proverbial bridge, if and when, I come to it.

[35] The summary of the above reasoning and legal treatise is that as regards a claim based on unlawful arrest and detention prescription will ordinarily commence to run immediately after the arrest has been effected. That is the trigger event of the running of prescription.

¹⁹ 2024 (1) SA 159 (GJ)

[36] As regards unlawful detention, each day that the claimant is in detention gives rise to a separate claim with regard to prescription. It runs [afresh] in respect of each such day. See Also Unreported Judgment: Case No. 2007/67791

[37] So, when Applicant was apprehended by members of the First Defendant on the 03 April 2016, that is the date when he is deemed to have identified his debtor, the First Defendant Minister of Police and the facts and circumstances from which the arrest or apprehension arose.

[38] As nothing was done by him or anyone on his behalf till his acquittal on 15 November 2019, the period of prescription ran its course and was extinguished on 03 April 2019. It does not avail Plaintiff that he was in custody or did not know his rights all of the period of three (s) years and seven (7) months.

[39] It will be found that Plaintiff's claim against the First Defendant for unlawful arrest and detention had prescribed.

[40] Regarding prescription in terms of Section 40 of ILPACOSA concerning the above claim, it is common cause that no notice was issued in terms of Section 3 of ILPACOSA, as Plaintiff believed that he did not need one since being in custody.

[41] It will be found that the claim would have prescribed for the reasons stated above with regards to.

[42] The hearing did not traverse the issue of costs in this interlocutory aspect. Since the matter is not over yet, I would have been prepared to rule that the costs be in the action.

[43] However since these aspects of prescription under the Prescription Act and under the ILPACOSA have been dealt with, in my view exhaustively between the parties, and in the exercise of my judicial discretion I rule that costs should follow the results that the losing party shall bear the costs hereof.

Order

[44] The following ORDER is made:

- 44.1 Plaintiff's claims based on unlawful arrest have prescribed in terms of the Prescription Act;**
- 44.2 Plaintiff's action under the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 has also prescribed.**
- 44.3 Plaintiff shall bear the costs of the proceedings on the above interlocutory aspects.**
- 44.4 Further process on the matter is postponed sine die**



MNYATHELI AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing :22 August 2024

Date Judgment delivered: 27 August 2024

Appearances:

For the Plaintiff: Adv Maisela

Instructed by: Molohe Madondo Attorneys

For the Defendant: Adv L Liphoto

Instructed by : State Attorney