



**THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION**

Reportable: YES/NO

Case No: 1294/2019

In the matter between:

MALEFETSANE PAULUS RAMOHAPI

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**THE NATIONAL DIRECTOR:
PUBLIC PROSECUTIONS**

Second Defendant

**THE MINISTER:
JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

Third Defendant

Bench: Opperman J

Heard: 11 June 2024

Delivered: 3 October 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 3 October 2024. The date and time of hand-down is deemed to be 15h00 on 3 October 2024

Summary: Civil procedure – Action against state – Special plea of prescription – Non-compliance with Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 condoned

ORDER

The following orders are made:

1. The plaintiff's claim of malicious prosecution against the first defendant has prescribed and is accordingly dismissed. The plaintiff is to pay the first defendant's costs on scale C.
 2. The special plea of prescription raised by the second defendant is upheld and the plaintiff's claim of malicious prosecution against the second defendant is accordingly dismissed. The plaintiff is to pay the second defendant's costs and on scale C.
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JUDGMENT

Opperman J

[1] The issue for adjudication is that of prescription after non-compliance with the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). By agreement between the parties, it was ordered in terms of rule 33(4), that the matter of prescription be separated from the rest of the action. The only claim that is still relevant is that against the second defendant and of malicious prosecution.

[2] The predicament of the plaintiff is that the claim would have prescribed¹ had he not served on the State Attorney on 22 March 2019. He served in time but that caused

¹ **Section 11** of the Prescription Act 68 of 1969 provides: '**Periods of prescription of debts** —The periods of prescription of debts shall be the following: . . .
(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt. (Accentuation added).

transgressions of ss 3² and 5(2) and brought s 5(3)³ of the Act into play. Section 5(2) specifically orders that no process for the institution of legal proceedings may be instituted

² **Section 3 of the Act states: 'Notice of intended legal proceedings to be given to organ of state**

- (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state—
 - (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
 - (b) the organ of state in question has consented in writing to the institution of that legal proceedings—
 - (i) without such notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).
- (2) A notice must—
 - (a) within six months from the date on which the debt became due, be served on the organ of 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.
- (3) For purposes of subsection (2)(a)—
 - (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state willfully prevented him or her or it from acquiring such knowledge; and
 - (b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.
- (4)
 - (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.
 - (b) The court may grant an application referred to in paragraph (a) if it is satisfied that—
 - (i) the debt has not been extinguished by prescription;
 - (ii) good cause exists for the failure by the creditor; and
 - (iii) the organ of state was not unreasonably prejudiced by the failure.
 - (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate. (Accentuation added).

³ **Section 5(2) of the Act provides: 'No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of 60 days after the notice, where applicable, has been served on the organ of state in terms of section 3(2)(a): Provided that if the organ of state repudiates in writing liability for the debt before the expiry of the said period, the creditor may at any time after such repudiation serve the process on the organ of state concerned.'**
[S5(2) substituted by s 33(a) of Act 8 of 2017 with effect from 2 August 2017.]

Section 5(3) of the Act stipulates that: 'If any process referred to in subsection (1) has been served as contemplated in that subsection before the expiry of the period referred to in subsection (2), such process must be regarded as having been served on the first day after the expiry of the said period.'

Section 5(1)(a) of the Act decrees that: 'Any process by which any legal proceedings contemplated in section 3(1) are instituted must be served in accordance with the provisions of section 2 of the State Liability Act, 1957 (Act No. 20 of 1957).'

Section 2 of the State Liability Act 20 of 1957 provides:

'Proceedings to be taken against executive authority of department concerned.

- (1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.
- (2) The plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a

before the expiry of 60 days after the notice in terms of s 3 was served. A notice in terms of s 3(2)(a) must be served within six months from the date on which the debt became due. Section 5(3) complicates the situation for the plaintiff in that:

'If any process referred to in subsection (1) has been served as contemplated in that subsection before the expiry of the period referred to in subsection (2), such process must be regarded as having been served on the first day after the expiry of the said period.' (Accentuation added)

[3] The following dates are important regarding the claim of malicious prosecution against the second defendant:

- The plaintiff was acquitted on appeal on 31 March 2016. The cause of action arose on 31 March 2016; the debt became due on this date.⁴
- The claim would have prescribed on 30 March 2019.⁵
- Service of the claim against the second defendant was effected on 22 March 2019⁶ on the Office of the State Attorney.
- The letter of demand (notice) was sent by registered mail on 18 February 2019 to the Director of Public Prosecutions.⁷ Notice should have been given on or before 30 September 2016.⁸ According to both the plaintiff and the second defendant the notice was only given on 18 March 2019.⁹ The sixty days before summons could have legislatively legally been served thus expired on or about 3 May 2019.
- Condonation for non-compliance with the Act of s 3 and s 5 was granted on 9 June 2022 (June 2022 – order). This is the order:

department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney.' (Accentuation added).

⁴ Application for condonation by plaintiff handed in as exhibit B on 11 June 2024 at para 21: 'It is common cause between the parties that the cause of action in respect of the 2nd Respondent arose on 31 March 2016 and the notice should have been given on or before 30 September 2016. I only gave the notice on the 18th of March 2019.'

⁵ Heads of argument by counsel for the plaintiff dated 10 June 2024 at para 3.4.

⁶ See the return of service at page 4 of the "Index: Pleadings" bundle dated 14 March 2023.

⁷ See page 39 and further "Index: Pleadings" bundle dated 14 March 2023.

⁸ Application for condonation by plaintiff handed in as exhibit B on 11 June 2024 at para 21.

⁹ In their heads of argument for the second defendant at paragraph 1.1 they refer to 13 February 2019, but it was only the Minister of Justice & Constitutional Development and the Minister of Police that was notified on 13 February 2019. At para 21 of the founding affidavit of the plaintiff in the condonation application (Exhibit B dated 14 June 2024) the date is stated as 18 March 2019. At para 11 of defendants' plea, they also refer to 18 March 2019 (page 6 of the defendants' plea; page 67 of the bundle "Index: Notices" dated 14 March 2023).

'IT IS ORDERED THAT

1. The Applicant's failure to comply with the provisions of Section 3 of Act 40 of 2002 is condoned;
2. The Applicant's premature service of the summons upon the Respondents in the main proceedings under case 1294/2019 is condoned.'

[4] Counsel for the second defendant correctly argued that notwithstanding the condonation granted, and in terms of the prevailing legislation, the service of the claim had only happened when the 60 days – period have expired, and not 22 March 2019. The court that dealt with the condonation did not make any declaration on prescription since it was not applied for it to do so. It only condoned the early service. The finding of the court that granted the condonation is correct because the claim had not prescribed at the time of the application. The claim became prescribed in terms of s 5(3) of the Act after the court granted the condonation for the premature service. The court did not make a ruling on the effect of s 5(3) of the Act on the order. Section 5(3) of the Act is mandatory.¹⁰ The June 2022 – order did not disturb the working of s 5(3) of the Act.

[5] The above finding is made with due awareness of the fact that the Act was introduced to harmonize periods of prescription of debts owed by organs of state, and to make provision for a uniform requirement for the giving of notice in connection with the institution of legal proceedings. The Act came after a decision in the Constitutional Court in *Mohlomi v Minister of Defence*¹¹ (*Mohlomi*). The Act is meant not only to bring consistency to procedural requirements for litigating against organs of state but also, it is clear, to render them compliant with the Constitution. The way in which it seeks to achieve a procedure that is not arbitrary and that operates efficiently and fairly both for a plaintiff and an organ of state is to give a court the power to condone a plaintiff's non-compliance with procedural requirements in certain circumstances. Thus, access to courts is

¹⁰ *Mohlaka v Minister of Finance and Others* (J2283/07) [2008] ZALC 152; [2009] 4 BLLR 348 (LC); (2009) 30 ILJ 622 (LC) (13 November 2008) at paras 49-55.

¹¹ *Mohlomi v Minister of Defence* (CCT41/95) [1996] ZACC 20; 1996 (12) BCLR 1559; 1997 (1) SA 124 (26 September 1996).

facilitated, while at the same time procedures against large governmental organizations that need to keep their affairs in order, are regulated.¹²

[6] The purpose of having special requirements in place for the institution of action against a state body was depicted by Didcott J in *Mohlomi*:

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations 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.'¹³

[7] The history of the litigation in this case is of concern. The special plea of prescription was served on 25 November 2019 by the defendants. The plaintiff did not reply to it. Notwithstanding being *dominis litis* on the issue, it was not brought to court by the defendants. Four years later, an eventual pre-trial hearing was held on 3 April 2023 during which there was no appearance for the State Attorney representing the defendants and after due notice to them. The presiding judge ordered that:

'No appearance for the State Attorney. PI (sic) is ready to set the matter down for trial. State Attorney to ensure that there is a written explanation in the file expl (sic) non—appearance.'

The order did not come to the notice of the State Attorney and reasons were not filed. The court was forced to certify the matter ready to go on trial. The issue of the special pleas was not canvassed at the pre-trial hearing.

¹² *Minister of Safety and Security v De Witt* (588/2007) [2008] ZASCA 103; 2009 (1) SA 457 (SCA) (19 September 2008). Also see John Saner, *Civil Procedure, Prescription in South African Law*, Chapter 1 Introduction, 1.5 Other statutory time limitations, Last Updated: August 2023 - SI 34, LexisNexis.

¹³ *Mohlomi* fn 9 para 11.

[8] Important is that counsel for the plaintiff conceded during the hearing of the matter on 11 June 2024 that only the claim of malicious prosecution against the second defendant is still alive for adjudication. It became common cause that the claim against the third defendant was withdrawn and the claim against the first defendant prescribed. The court will make an order on the prescription of the claim of malicious prosecution against the first defendant for the sake of completeness.

[9] As to costs; in *Mashavha v Enaex Africa (Pty) Ltd*¹⁴ the approach to setting a scale of costs under Rule 67A (3) involves first identifying the appropriate scale based on the importance, value, and complexity of the case, and then considering whether the scale should be reduced due to any inartful or unethical conduct as identified in Rule 67A (2).

[10] Counsel for the second defendant was only available on 11 June 2024 to deal with the special plea but the case was set down for three days for trial by the plaintiff. The plaintiff was duly informed of this, the court not. It only came to the attention of the court that the matter would not proceed on trial when the heads of argument for the plaintiff was filed on 10 June 2024. The heads of argument for the second defendant were handed up to the court at the start of the hearing on 11 June 2024. The attorneys for the plaintiff refused to amend the date to be only for the hearing of the special plea and to accommodate counsel for the second defendant.¹⁵ To add fuel to fire, the case was also set down for 2, 3 and 5 July 2024 by the plaintiff. The notice of set down was served on 19 February 2024. This notice was not withdrawn. On 28 February 2024 a notice of set down was served for 11, 12 and 14 June 2024 by the plaintiff. This is unacceptable; much time was wasted, and confusion reigned. Ultimately, the only claim that is still on the table is against the second defendant and for malicious prosecution, but this is not clear from the papers presented by the plaintiff. The court had to do some organisation of the file and sift through the evidence to ascertain the status of the case. For the sake of the expeditious administration of justice, the court let the matter proceed.

¹⁴ (2022/18404) [2024] ZAGPJHC 387 (22 April 2024).

¹⁵ See exhibit A handed in by counsel for the second defendant on 11 June 2024.

[11] Costs will follow the cause. Due to the extensive experience of counsel for the second defendant and the complications in the case, scale C shall apply against the plaintiff.¹⁶

[12] **ORDER**

In result the following orders are made:

1. The plaintiff's claim of malicious prosecution against the first defendant has prescribed and is accordingly dismissed. The plaintiff is to pay the first defendant's costs on scale C.
2. The special plea of prescription raised by the second defendant is upheld and the plaintiff's claim of malicious prosecution against the second defendant is accordingly dismissed. The plaintiff is to pay the second defendant's costs and on scale C.


OPPERMAN J

¹⁶ Rule 67A (2):

In considering all relevant factors when awarding costs, the court may have regard to—

- (a) the provisions of rule 41A;
- (b) failure by any party or such party's legal representative to comply with the provisions of rules 30A, 37 and 37A;
- (c) unnecessary or prolix drafting, unnecessary annexures and unnecessary procedures followed;
- (d) unnecessary time spent in leading evidence, cross examining witnesses and argument;
- (e) the conduct of the litigation by any party's legal representative and whether such representative should be ordered to pay such costs in his or her personal capacity; and
- (f) whether the litigation could have been conducted out of the magistrate's court.

APPEARANCES

On behalf of plaintiff

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