

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2016/27587

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: YES/~~NO~~

20 November 2024

DATE

SIGNATURE

In the matter between:

RASIMATI SOLLY MABUNDA

First Plaintiff

JERRYMOJALEFA MONAMA

Second Plaintiff

and

THE MINISTER OF POLICE

First Defendant

NATIONAL PROSECUTING AUTHORITY

Second Defendant

ORDER

1. The plaintiffs are liable for the costs of their withdrawal of the action against the second defendant, on party and party scale A.
2. The first defendant's second special plea of prescription is upheld.

3. The plaintiffs' remaining claims are dismissed with costs on party and party scale A.

JUDGMENT

VAN TONDER AJ

Introduction

- [1] The plaintiffs, both police officers, instituted action against the Minister of Police (first defendant) claiming damages arising from their alleged unlawful arrest on 5 June 2012 and detention until 6 June 2012, and against the National Prosecuting Authority (second defendant), from their ensuing alleged malicious prosecution which concluded on 19 June 2015. The total amount claimed is R2 000 000.
- [2] In their plea, the defendants raised two special defences:
 1. first, that the plaintiffs failed to comply with the notice requirements under section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("**ILPACOSA**") in respect of their claims against both defendants; and
 2. second, that their claims against the first defendant have prescribed in terms of section 11 of the Prescription Act 68 of 1969 ("**Prescription Act**").
- [3] The trial came before me on 12 November 2024, where Ms Makopo appeared for the defendants and Mr Marokane for the plaintiffs. Bearing the onus to do so, Ms Makopo commenced address on the special pleas and applied that these issues be separated from the merits in terms of Rule 33(4). In his answering address, Mr Marokane agreed with the rationale of Ms Makopo's application – that it may be most expeditious to deal with these potentially wholly dispositive issues first – and I accordingly granted such separation order.
- [4] In his argument Mr Marokane also acknowledged that he was unable to show that the requisite notice under section 3 of ILPACOSA had been given to the

National Prosecuting Authority at all. He consequently withdrew the claim against the second defendant for malicious prosecution. He tendered costs for such withdrawal on party and party scale A, which tender was accepted by Ms Makopo.

[5] The remaining issues for determination are therefore:

1. Whether or not there was also non-compliance with section 3 of ILPACOSA in respect of first defendant; and
2. Whether the claims for unlawful arrest and detention have prescribed.

Summary of Claims

[6] The plaintiffs were employed as police officers at the time of their arrest. On 5 June 2012, they were arrested in uniform at their workplace by members of the Hawks Unit for alleged theft of copper. They were disarmed in front of their colleagues and detained for one day at the Vereeniging Police Cells in what they describe as a 3m x 3m cell with an open toilet offering no privacy.

[7] Following their arrest, the plaintiffs were suspended from duty for three months. Criminal proceedings were instituted against them, which continued from June 2012 until 19 June 2015, when they were ultimately discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977 due to insufficient evidence.

[8] On 17 November 2015, approximately five months after their acquittal, the plaintiffs caused notices in terms of section 3 of ILPACOSA to be prepared. These notices were served on the South African Police Service on 19 November 2015 and claimed R600,000 each in damages arising from what was described as "unlawful arrest and detention." No specific mention was made in these notices of any claim for malicious prosecution.

[9] The claims were initiated by the parties separately with the two summonses served on 17 and 19 August 2016 respectively. The actions were subsequently consolidated, and the particulars of claim amended. In the final version of the particulars of claim the amounts sought were increased to R1 000 000 per plaintiff, divided into two claims:

1. Claim A against the Minister of Police for R1 000 000, comprising:
 - i. R500 000 for unlawful arrest and detention
 - ii. R200 000 for deprivation of liberty
 - iii. R100 000 for loss of dignity
 - iv. R100 000 for humiliation
 - v. R100 000 for discomfort
2. Claim B against the National Prosecuting Authority for R1 000 000 for malicious prosecution.

Submissions by Counsel

- [10] Ms Makopo submitted that the only section 3 notices sent on behalf of the plaintiffs that could be found on record, appear at CaseLines from 009-1. They bear the date of 17 November 2015 and were only addressed to the Minister of Police. Acknowledgment of receipt of such letters by the first defendant appears at 009-9 and were signed on 23 December 2015. Ms Makopo submitted that as the arrests occurred on 5 June 2012, these notices were served well outside the six-month period required by section 3(2) of ILPACOSA.
- [11] Ms Makopo further referred the Court to CaseLines 001-25 where a condonation application was filed by the plaintiffs in an apparent attempt to cure the defect to the late service of the section 3 notices.
- [12] She pointed out that while an order dated 11 March 2021 appears at CaseLines 015-3 for such condonation application, it remains unsigned in draft form. No other proof exists that late service of the notice was ever condoned.
- [13] On prescription, Ms Makopo relied principally on *Manchu v Minister of Police*¹ and *Mofokeng v Minister of Police*,² arguing that prescription runs from the date of arrest for unlawful arrest claims, with each day of detention constituting a

¹ *Manchu v Minister of Police and Others* (1005/2021) [2024] ZAGPJHC 535 (3 May 2024)

² *Mofokeng v Minister of Police and Another* (5150/2021) [2023] ZAFSHC 432 (31 October 2023)

separate claim. She submitted that as police officers, the plaintiffs should have known their rights and could have sought legal advice immediately after release on 6 June 2012.

[14] In response, Mr Marokane relied primarily on *Dirk Links v MEC for Health*,³ arguing that the plaintiffs initially believed their arrest was lawful and only realised they may have a claim after the case was withdrawn on 19 June 2015 for lack of evidence. He submitted that only then did they acquire knowledge of facts giving rise to their claim.

[15] Reference was also made to *Stemmet v Mokhehi*⁴, which dealt with some of the applicable principles.

Legal analysis

[16] In respect of the first special plea, section 3 of ILPACOSA reads as follows:

"(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless—

(a) the creditor has given the organ of state in question notice in writing of his or her 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

³ *Links v Member of the Executive Council, Department of Health, Northern Cape Province* (CCT 29/15) [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC)• (30 March 2016)

⁴ *Stemmet and Another v Mokhehi and Another* (681/2022) [2023] ZASCA 127 (4 October 2023)

(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."

(emphasis added)

[17] In summary section 3(1) prohibits legal proceedings against organs of state without proper notice being given and section 3(2) requires such notice within 6 months of when the debt became due. The essential question is thus: when did the debts remaining in issue, fall due? This is also relevant to assess the second special plea on prescription.

[18] Section 11 of the Prescription Act deals with periods of prescription, and subject to certain exceptions not applicable to this case, section 11(d) sets extinctive prescription at 3 years.

[19] Section 12 of the Prescription Act, in turn provides that:

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

(2) ...

(3) A debt which does not arise from contract 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."

(emphasis added).

[20] Two competing approaches on the interpretation of this question emerge from the case law as presented by the parties. The first, exemplified in *Manchu v Minister of Police* and *Mofokeng v Minister of Police*, holds that for unlawful arrest and detention claims, prescription begins to run from the moment of arrest, as each day of detention constitutes a new and separate debt. As Mathopo AJ stated in *Manchu*:

"[28] In this context, the courts indicate that an unlawful arrest is not inherently a continuing wrong, nor is it necessarily linked to any subsequent unlawful detention. Arrest and detention represent a separate and distinct legal process. While both involve the deprivation of an individual's liberty, this shared outcome does not merge them into a single legal process. Each may be considered a distinct cause of action, with its own legal implications and limitations. Thus, in a case of unlawful arrest and detention, the debt arises from the moment of his arrest and each day in detention constitutes a new debt as long as the wrongful conduct endures."

- [21] The second approach, reflected in *Links v MEC for Health*, emphasizes that a plaintiff must have knowledge of sufficient facts that would cause them on reasonable grounds to think that they have a claim. As Zondo J held:

"[42] ... Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises."

- [22] In the recent Supreme Court of Appeal matter of *Coetzee and Another v Le Roux and Another*,⁵ Mocosie JA held that:

"[18] In due course, in an application where a special plea of prescription is raised, there are two enquiries that must take place... First, the determination of the primary facts, on one hand, and on the other hand, the knowledge or deemed knowledge thereof. This means that once the facts from which the debt arose (the primary facts) have been determined, the enquiry turns to the creditor's knowledge of the primary facts."

- [23] The court also expressly rejected the notion that a creditor must appreciate the legal consequences flowing from facts before prescription begins to run:

"[15] In *Fluxmans*, this Court confirmed that s 12(3) of the Prescription Act does not require knowledge of legal conclusions on the part of a creditor before a debt can be said to be due. Both the majority and the minority judgments were agreed on this: that an agreement being invalid is not a fact, but a legal conclusion."

⁵ *Coetzee and Another v Le Roux and Another* [2022] ZASCA 47 (8 April 2022)

[24] In *Mtokonya v Minister of Police*,⁶ the Constitutional Court clarified that knowledge of legal consequences is not required:

"[63] Furthermore, to say that the meaning of the phrase 'the knowledge of ... the facts from which the debt arises' includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished."

Application of the law to the facts

[25] The following periods are relevant for applying the above conclusions to the present case:

1. The period between the arrest (5 June 2012) and service of summons (17 August 2016) of approximately four years and two months;
2. The period between the end of the criminal proceedings (19 June 2015) and service of summons of approximately fourteen months;
3. The section 3 notices served within five months of the conclusion of criminal proceedings but more than three years and five months after the arrest and detention.

[26] Taken together, the plaintiffs' argument that they only acquired knowledge of their claim upon acquittal cannot succeed. The primary facts - their arrest and detention - were known to them immediately. Their later appreciation that these events may have been unlawful represents a legal conclusion, not a fact required to complete their cause of action. As police officers, they would have known whether reasonable grounds existed for their arrest at the time it occurred. Their subsequent acquittal may have strengthened their conviction about the merits of their case, but as emphasised in *Coetzee*, this does not delay the running of prescription. The Supreme Court of Appeal's warning in *Coetzee* that prescription periods would become "*elastic, open ended and contingent upon the claimant's subjective sense of legal certainty*" if such an approach were adopted is particularly relevant here.

⁶ *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC)

[27] The present case is distinguishable from *Links*, where the plaintiff could not have known the cause of his medical condition without expert input. Here, the plaintiffs would have known immediately whether there were reasonable grounds for their arrest and whether proper procedures were followed. This position is supported by the authority of *Stemmet*.

[28] Applying these principles, the plaintiffs had knowledge of both the identity of the debtor (the Minister of Police) and the material facts giving rise to their claims for unlawful arrest and detention on the date of arrest in 2012. Their assertion that they needed to await the outcome of criminal proceedings to appreciate the legal merits of their claim conflates knowledge of facts with knowledge of legal conclusions.

[29] The subsequent acquittal in 2015 may have strengthened their conviction about the merits of their case, but it did not provide new factual knowledge required to complete their cause of action. As held in *Gore NO v Minister of Finance*:⁷

"The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'."

[30] This is consistent with the principles in *Manchu* and *Mofokeng*, that prescription began running from the date of arrest in 2012 for the unlawful arrest claim, and daily for the detention claim. The summons served in 2016 was well outside the three-year prescription period.

[31] While the filed condonation application contains some attempts at an explanation for their delay, no order granting condonation for the late filing of the notices has been provided. As such, their late service contravenes the peremptory legislative requirements as raised in the first plea, and the non-compliance has not been cured by any available legal mechanism. The prescription of the claims nonetheless renders any such condonation and the application of ILPOCOSA moot, with the former being dispositive of the issue on its own.

⁷ *Minister of Finance and Others v Gore NO* (230/06) [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) (8 September 2006)

Conclusion

[32] Ms Makopo's submission that the plaintiffs' status as police officers is relevant to when they acquired knowledge carries weight. Unlike the plaintiff in *Links* who needed expert medical evidence to understand the cause of his injury, police officers would be expected to know whether reasonable grounds existed for their arrest. The argument advanced by Mr Marokane that they believed the arrest lawful until acquittal speaks to legal conclusions rather than factual knowledge, as emphasised in *Coetzee v Le Roux* where the SCA reaffirmed that "*knowledge of legal consequences is not required before prescription begins to run.*"

[33] As noted in *Coetzee*, the exercise of determining when a creditor acquired knowledge of the facts giving rise to a debt requires careful analysis in each case. However, the authorities are clear that awaiting certainty about legal rights or the outcome of criminal proceedings does not delay prescription where the creditor possessed the minimum facts needed to institute action.

[34] The special plea of prescription must succeed. The plaintiffs had the requisite knowledge under section 12(3) of the Prescription Act from the date of arrest. Their delayed appreciation of potential legal remedies does not postpone the running of prescription. Both the claims for unlawful arrest and detention prescribed before summons was issued.

Order

[35] I therefore make the following order

1. The plaintiffs are liable for the costs of their withdrawal of the action against the second defendant, on party and party scale A.
2. The first defendant's second special plea of prescription is upheld.
3. The plaintiffs' remaining claims are dismissed with costs on party and party scale A.



BL VAN TONDER
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiffs: M Marokane instructed by Mekhoe Attorneys

For the Defendants: N Makopo instructed by the State Attorney

Date of Hearing: 12 November 2024

Date of Judgment: 20 November 2024