



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not Reportable

Case no.: 1294/2019

In the matter between:

MALEFETSANE PAULUS RAMOHAPI

Applicant¹

and

THE MINISTER OF POLICE

1st Respondent²

THE NATIONAL DIRECTOR:

PUBLIC PROSECUTIONS

2nd Respondent³

THE MINISTER:

JUSTICE & CONSTITUTIONAL DEVELOPMENT

3rd Respondent⁴

Coram: Opperman J

Heard: 14 February 2025.

¹ Plaintiff *a quo* (plaintiff).

² During the hearing of the case, it was common cause that the claim against the third defendant was withdrawn and the claim against the first defendant became prescribed.

³ Second defendant *a quo* (defendant).

⁴ See fn 2.

Delivered: 3 April 2025. This judgment was handed down in court and electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be on 3 April 2025 at 15h00.

Summary: Leave to appeal – 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 application for leave to appeal is dismissed with costs on party and party scale C.

JUDGMENT

Opperman J

[1] I ordered on 3 October 2024 that:

- '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.'

[2] There now lies an application for leave to appeal the judgment and order dated 3 October 2024. The notice of application for leave to appeal is of grave concern. Apart from the spelling errors,⁵ the grounds of appeal were not stated

⁵ *Inter alia*: 'Recived', 'cmail', '219', 'fromm', 'asif', 'Honopurable', 'Judged' Opperman.

clearly and concisely. Just as *a quo*,⁶ the court had to do extensive sieving and sifting just to ascertain and endeavour to discover what the issues were and thus the grounds of appeal. The plaintiff's legal representative did not deal with the separate grounds for leave to appeal in a particularised and detailed manner. The heads of argument for the plaintiff were not of much assistance either. Paragraphs 1.1.2 and 3.1 in the notice of appeal are wrong. Counsel for the defendant is correct where she stated that:

'Section 4 of the Prescription Act deals with acquisitive prescription, and not extinctive prescription (which is the issue in this matter). Insofar as the Plaintiff intended to deal with the statutory issue of the interruption of extinctive prescription, section 15 of the Prescription Act contains the relevant statutory provisions.'

[3] Imperative is that the plaintiff indicated in para 5 of the notice for the application for leave to appeal that he reserved the right to supplement the grounds of appeal once the record becomes available. There is not any indication of the existence of a notice of the supplementing or amendment of the grounds of appeal. The plaintiff is not allowed to supplement the grounds for appeal without formal notice to the opposing party and the court. He cannot do so by just arguing some points in his heads of argument.

[4] In *Songono v Minister of Law and Order*⁷ the court stated that:

'At the outset the applicant faces a procedural difficulty. Leave to appeal was not requested at the time of judgment and Rule 49(1)(b) accordingly became of application. It provides that:

'When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against . . .'

In attempted compliance therewith the applicant filed a document headed 'Application for leave to appeal', in which he purported to set out the grounds upon which leave to appeal was to be sought. These so - called 'grounds constitute a diatribe of some 17 pages criticising the judgment, analysing (at times incorrectly) certain of the evidence and the findings made,

⁶ See paras 7 and 10 of the judgment *a quo*.

⁷ *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385-386.

putting forward certain submissions and quoting various authorities. This lengthy, convoluted and at times disjointed criticism of the judgment did not clearly and succinctly spell out the grounds upon which leave to appeal is sought in clear and unambiguous terms - indeed, it served more to deceive, particularly as, during the course of argument, there were several points which the applicant's counsel, Mr *Bursey*, sought to raise which were not indicated in the document.

. . . Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court *a quo*, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet . . .

. . . Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as peremptory. In my view the lengthy and rambling notice of appeal filed *in casu* falls woefully short of what was required. Mr *Bursey* suggested that grounds of appeal could be gleaned from the notice but that is not the point - the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed. But in any event, even if I am incorrect in reaching that conclusion, there does not seem to me to be a reasonable prospect of another Court finding that the applicant is entitled to damages on his claims.'

[5] It is alleged by counsel for plaintiff that the court *a quo* disregarded the right to access to courts in terms of s 34 of the Constitution of the Republic of South Africa, 1996; the judgment that will be quoted and the record of the hearing of the application *a quo* will show that the blame lies in the manner the parties litigated. They disobeyed the law and caused access to court to be legislatively restricted and denied.

[6] The plaintiff relies on ss 17(1)(a)(i) and (c) of the Superior Courts Act 10 of 2013.⁸ That is that the appeal would have a reasonable prospect of success and where the decision sought to be appealed does not dispose of all the issues in the

⁸ Para 4 of the notice of appeal.

case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

‘4. On a conspectus of all the aforesaid grounds, the Applicant submits that, it it [sic] is in the interest of justice that an appeal be allowed, as contemplated in section 17 (1) (a) (i) an (c) of the Superior Courts Act, 10 of 2013.’

[7] The grounds for leave to appeal seems to be that:

- a. The service of summons on the NDPP on 22 March 2019 interrupted prescription and the court erred in not making such finding.
- b. The condonation order in terms whereof premature service was remedied was not appreciated by the court. In the alternative the court decided to act as a court of appeal.
- c. The court *a quo* infringed the rights of the plaintiff to access to court.

[8] This is the relevant part of the judgment:

‘[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 against the second defendant and of malicious prosecution.

[2] The predicament of the plaintiff is that the claim would have prescribed⁹ had he not served on the State Attorney on 22 March 2019. He served in time but that caused

⁹ 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 3¹⁰ and 5(2) and brought s 5(3)¹¹ of the Act into play. Section 5(2) specifically orders that no process for the institution of legal proceedings may be instituted 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:

- ¹⁰ **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 unless—
 - (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 wilfully 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).
- ¹¹ **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)aa: 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 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).

‘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.¹²
- The claim would have prescribed on 30 March 2019.¹³
- Service of the claim against the second defendant was effected on 22 March 2019¹⁴ 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.¹⁵ Notice should have been given on or before 30 September 2016.¹⁶ According to both the plaintiff and the second defendant the notice was only given on 18 March 2019.¹⁷ 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:

‘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

¹² 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.’

¹³ Heads of argument by counsel for the plaintiff dated 10 June 2024 at para 3.4.

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

¹⁵ See page 39 and further “Index: Pleadings” bundle dated 14 March 2023.

¹⁶ Application for condonation by plaintiff handed in as exhibit B on 11 June 2024 at para 21.

¹⁷ 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).

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 was 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.¹⁸ 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*¹⁹ (*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 facilitated, while at the same time procedures against large governmental organizations that need to keep their affairs in order, are regulated.²⁰

[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.”²¹

¹⁸ *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) paras 49-55.

¹⁹ *Mohlomi v Minister of Defence* (CCT41/95) [1996] ZACC 20; 1996 (12) BCLR 1559; 1997 (1) SA 124 (26 September 1996).

²⁰ *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.

²¹ *Mohlomi* fn 9 para 11.

[9] Meritless appeals may not be allowed. The test in an application for leave to appeal is simply whether there are any reasonable prospects of success in an appeal, not whether a litigant has an arguable case or a mere possibility of success. The Supreme Court of Appeal (SCA) has in the past criticized the regularity with which leave to appeal is granted in matters not deserving its attention. Marais AJ stated that:

“... The inappropriate granting of leave to appeal to this court increases the litigants’ costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to compete for a place on the court’s roll with a case which is not.”²²

[10] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Section 17 of the Superior Courts Act 10 of 2013²³ is the law. The prevailing law as it developed was clarified in *H.B (Nee D.J) v R.J.B (Leave to Appeal)*²⁴ in that a court may not grant leave to appeal where the threshold which warrants such leave has not been cleared by the applicant. The threshold has been given legislative force and clarity.

[11] With regard to the meaning of reasonable prospects of success, it was held in *S v Smith*²⁵ as follows:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court

²² *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* (231/2002) [2003] ZASCA 57; [2003] 3 All SA 123 (SCA); 2003 (5) SA 354 (SCA) (30 May 2003) para 6.

²³ ‘17. Leave to appeal. — (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

²⁴ *H.B (Nee D.J) v R.J.B (Leave to Appeal)* (21480/2014) [2024] ZAGPPHC 401 (2 April 2024).

²⁵ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[12] The decision of *Ramakatsa and Others v African National Congress and Another*²⁶ did not lower the baseline. It also reminded that there might exist some other compelling reasons why the appeal should be heard.

Conclusion

[13] The applicant/plaintiff did not meet any of the thresholds in law that will allow this court to send the matter on appeal. The application for leave to appeal must be denied and costs must be for the account of the unsuccessful party.

Order

[14] In result the following order is made:

‘The application for leave to appeal is dismissed with costs on party and party scale C.’


Opperman J

²⁶ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) para 1.

Appearances

On behalf of plaintiff

T SNYDERS

Johannesburg

Mlozana Attorneys Inc.

Bloemfontein

On behalf of the 2nd defendant

G J M WRIGHT

Bloemfontein

Office of the State Attorneys

Bloemfontein