



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, MTHATHA)**

CASE NO: 926/2018

In the matter between:

ZWELIDUMILE GCAM-GCAM

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MAKAULA J:

A. Introduction

[1] The matter concerns two special pleas raised by the defendant in a matter where the plaintiff is suing the defendant for unlawful arrest and detention. The special pleas relate to (a) prescription in terms of sections 12 of the Prescription Act¹, (the Act) and (b) non-compliance with the Institution of Legal Proceedings Against Certain Organs of State Act² (the statutory notice). Before the matter proceeded,

¹ Act 68 of 1996

² Act 40 of 2002

the parties agreed on a special case in terms of Rule 33 of the Uniform Rules of Court.

B. The stated case

[2] The facts and questions of law agreed upon by the parties are the following.

“Statement of agreed Facts.

1. The plaintiff is Zwelandile Alfred Gcam- Gcam an adult male of Nzabe Administrative Area, Tsolo.
2. The First defendant is the **Minister of Police** who is sued vicariously in his capacity as the official head of the South African Police Service.
3. The other officers are cited in their official capacities as they were acting within the course and scope of their employment as police officers.
4. The Plaintiff sues for unlawful arrest and detention at the hands of the police.
5. The plaintiff was arrested on the 6th June 2009 on various charges including armed robbery, murder and other related charges.
6. He applied for bail but same was refused.
7. His trial commenced on 6th June 2011 until he was convicted on 20 November 2012.
8. On 23 November 2012 he was sentenced as follows: -
 - 8.1 Conspiracy to commit robbery -10 years.
 - 8.2 Robbery with aggravating circumstances -18 years;
 - 8.3 Murder of Amanda Sibeko - life imprisonment: and
 - 8.4 Murder of Mthobeli Ndamase - 15 years.
9. After sentencing the plaintiff applied for leave to appeal and such leave was refused.
10. The plaintiff petitioned the Supreme Court of Appeal and was granted leave to appeal to the Supreme Court of Appeal.
11. On the 2 March 2015 while still in custody the plaintiffs appeal was heard by the Supreme Court of Appeal with the judgment reserved.

12. On 25 March 2015, the Supreme Court of appeal found in favour of the plaintiff upholding the appeal and setting aside both convictions and sentences imposed on the plaintiff.
13. On the 18 May 2015 the plaintiff issued a statutory notice to the Minister of Safety and Security in terms of the Institution of Legal Proceedings Against Certain Organ of State Act 40 of 2002 (statutory notice).
14. The statutory notice was issued almost six (6) years after the date of arrest and almost three months after his release on appeal.
15. The plaintiff has to date not made any application for condonation as he insists that the notice was issued on time.
16. The plaintiff instituted the current proceedings against the defendants on 27 February 2018.
17. The plaintiff's action was instituted almost nine (9) years from the date he was first arrested and within three (3) years of his appeal being successful.
18. The defendant has raised 3 special pleas to the plaintiff's particulars of claim namely
 - 18.1 Non-compliance with Act 40 of 2002 (the Act).
 - 18.2 That the plaintiff's action has prescribed; and
 - 18.3 That the plaintiff's action is bad for non-joinder.
19. The matter is now set down for the determination of the special pleas.
20. **Act 40 of 2002 (the ACT)**
 - (i) The plaintiff's case is that the cause of action (being the unlawful arrest and detention) arose on 18 May 2015 when the conviction and sentence were set aside.
 - (ii) The defendant's case is that the cause of action if any arose on 06 June 2009 when the plaintiff was arrested and detained. It is the defendant's case that the failure by the plaintiff to apply for condonation should result in the plaintiff being non-suited.
21. **Prescription**
 - (i) It is the plaintiff's case that the debt (being the unlawful arrest and detention) in terms of the Prescription Act arose on 25th March 2015 when the conviction and sentence were set aside.

- (ii) The defendant's case is that the debt (being the alleged unlawful arrest and detention) in terms of the Prescription Act arose on 6 June 2009 when the plaintiff was arrested and detained.
- (iii) the defendant's case is that the plaintiff's claim/ action prescribed after three (3) years from the date of arrest.

22. **Issues to determine**

This court is called upon to decide the following:

22.1 When does prescription start to run?

22.2 When does a debt, for purposes of a claim for unlawful arrest and detention, become due?

23. **Parties' contentions**

The parties agree that prescription starts to run when the creditor (Plaintiff) becomes aware / has knowledge of the existence of the debt.

24. The plaintiff's case is that he became aware of the debt on 25th March 2015 the date on which the appeal; succeeded.

25. The defendant contends that prescription starts to run immediately upon the arrest of the plaintiff /creditor being 6 June 2009." (sic)

C. **Rule 33 of the Uniform Rules of Court**

[3] The issue between the parties is predicated in Rule 33 and therefore it is important to briefly deal with the its provisions Rule 33 provides.

"33 Special cases and adjudication upon points of law

- (1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.
- (2) (a) Such statement shall set forth the facts agreed upon, the questions of law and dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.

(b) Such a special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

(c)...

(3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if provided at a trial.

(4) ...

(5) When giving its decision upon any question in terms of this rule the court may give such judgement as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof.

(6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence.”

[4] The primary aim of Rule 33 is to facilitate expeditious disposal of litigation. Rule 33(2)(a) requires that the statement agreed upon between the parties by way of a special case submitted to court ‘*shall set forth the facts agreed upon, the question of law in dispute between the parties and their contentions thereon*’. Rule 33(1) and 33(2)(a) demand that in the special case there must be a question of law that the parties require the court to decide on the agreed facts and in the light of their contentions which must be set forth in their agreed statement. Rule 33(5) clearly states that the decision of the court is required to be upon any question or questions of law that the parties have submitted to the court for a decision. A court that is called upon to decide a special case under Rule 33 is required to decide the question of law presented to it and has no right to travel outside the four corners of the agreed statements and decide a different question that it wishes the parties had submitted to it to decide but did not or that it may wish the parties had included as one of the

questions of law they had submitted to it to decide but did not³. This court is therefore, bound by the facts and the questions of the law decided upon the parties.

D. Argument

[5] The plaintiff contended that the debt or cause of action (unlawful arrest and detention) arose on 25 March 2015 when the convictions and sentences were set aside. The plaintiff relied on the provisions of section 12 of the Act and *Malgas and Others v Minister of Justice and Correctional Services*⁴, in so arguing. The plaintiff argued that the cause of action was incomplete whilst he was in custody because the High Court had ‘found justification for the arrest and detention by finding guilty.’(sic) The plaintiff alluded to the findings in *Malgas* as a justification that the cause of action became complete and by extension prescription started to run, when the SCA set aside the convictions and sentences against him. Further relying on *Makhwela v Minister of Safety and Security*⁵, the plaintiff argued that the notion that in unlawful arrest and detention cases, prescription should start running on the day of arrest is not without problems.

[6] The defendant on the other hand argued that prescription started to run from the date that the plaintiff was arrested and follows logically that the statutory notice ought to have been served within six months of the debt being due, i.e. 6 June 2009, which is the date of arrest. The defendant premised his submission on the *Minister of Police v Zamani*⁶. The defendant submitted that both special pleas should succeed.

E. Legal position

[7] This court is asked to determine when extinctive prescription started to run. Extinctive prescription is dealt with in section 12 of the Act and reads as follows:

“12 When prescription begins to run

³ see *Mtokonya v Minister of Police* 2017 (11) BCLR 1443 (CC); 2018(5) SA 22 (CC) at paras. 13 to 16.)

⁴ Gauteng Division; Case number A147/2024 delivered on 2nd November 2024

⁵ (2017 (1) SA 274 (GJ) para 55 to 58 and *Minister of Police and Another v Yekiso* 2019 (2) SA 281 (WCC) para 19)

⁶ 2023 (5) SA 263 (ECB) paras 12 -17

- (1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
- (2) if the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (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 exercising reasonable care.”

[8] The provisions of section 12 have been the subject of various courts. The Constitutional Court in *Mtokonya v Minister of Police* said the following:

“[32] Section 12 (1) makes provision for the general rule. That is that prescription commences to run as soon as the debt is due. However, it says that this is subject to three exceptions which are to be found in subsections (2), (3) and (4). The first exception, in subsection (2) is that prescription does not commence to run against a creditor if the debtor willfully prevents him or her “from coming to know of the existence of the debt” until he i.e. creditor “becomes aware of the existence of the debt”. So, under subsection (2) it is not every time a creditor does not know of the existence of the debt that prescription does not commence to run. It is only in those cases where the debtor is willfully preventing or has willfully prevented the creditor from “coming to know of the existence of the debt”. One cannot therefore use the exception in subsection (2) to say that in all cases in which a creditor does not know of the existence of a debt prescription does not commence to run.

...

[34] The second exception, in subsection (3) is that a debt is not deemed to be due until the creditor has knowledge of two things. The first is knowledge of the identity of the debtor. The second is knowledge “of the facts from which the debt arose”. However, this exception is itself subject to another exception provided by way of the proviso in subsection (3). The exception reads “Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”. So, if a debtor delivers a

special plea of prescription and the creditor seeks to meet it by saying prescription did not run because, before a certain date, he did not have knowledge of the identity of the debtor or of the facts from which the debt arose, the debtor can come back and say: but you could have acquired that knowledge before that date if you had exercised reasonable care but you failed to exercise such care and, therefore, prescription did commence to run before that date”.

...

36. Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from “the facts from which the debt arises”. Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor.⁷” (Footnotes omitted and emphasis added.)

[9] The court further had regard to ‘whether knowledge that the conduct of the debtor is wrongful and actionable is a knowledge of a fact’. The court concluded as follows “in my view, therefore, what the applicant said he did not know about the conduct of the police, namely, whether their conduct against him was wrongful or and actionable was not a fact and, therefore, falls outside of section 12(3). It is rather a conclusion of law Knowledge that the conduct of a debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact. Therefore, such knowledge falls outside the phrase “knowledge of facts from which the debt arises” in section 12(3). The facts from which a debt arises are the facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor.”⁸

F. Analysis

[10] The first exception in subsection (2) referred to, does not apply in this instance because the debtor (defendant) did not in any way prevent the creditor (plaintiff) from knowing the facts upon which the claim is premised. The plaintiff’s

⁷ Supra; at paras 32-34

⁸ *ibid* para [44]-[45]

argument is not that he was unaware that he had a claim against the defendant and those responsible for his unlawful arrest and detention. The plaintiff, in the stated case, states that he knew the debt to have arisen on 25 March 2025 and does not say he did not know about it or was prevented by the defendant from knowing it. Therefore, the provisions of subsection (2) are not in issue.

[11] In respect of the second exception in subsection (3), the plaintiff had knowledge that the defendant was his debtor. The issue to be decided, as between the parties encapsulated in the stated case, is whether the plaintiff became aware of the facts founding the debt on 25 March 2015 when acquitted by the SCA. The onus is on the defendant to establish the defence of prescription.⁹ In discharging the onus, the defendant argued that in cases of unlawful arrest and detention, prescription begins to run on the day of arrest.

[12] In *Truter and Another v Deysel, Van Heerden JA*, dealing with when a debt is due and payable said;

“[16] I am of the view that the High Court erred in this finding. For the purposes of the ACT, the term ‘debt due’ means a debt, including a delictual debt, which is owing and payable. A debt is due in the sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.

[17] In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts;

‘A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual

⁹ *Gericke v Sack* 1978(1) SA 821 (AD) at 827H.

and legal conclusions, namely A causative act, harm, unlawfulness and culpability of fault'

[18] ...

[19] "Cause" of action' for purposes of prescription thus means

'... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved.'" (footnotes excluded and emphasis added). The reasoning in line with Truter what the Constitutional Court said in Mtokonya. The latter case is a final word on the issue.¹⁰

[13] Wrongful arrest consists in the wrongful deprivation of a person's liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required. To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee, deprived him of his liberty. All that is required of the plaintiff is to establish an act of arrest on the part of the defendant or its employees once the arrest is established, then it is incumbent upon the defendant to establish grounds of justification or the lawfulness of the arrest. The liberty of an individual is paramount and has been observed even prior to our constitutional era.

In Minister of Justice v Hofmeyer, the court held "The plain and fundamental rule is that every individual's person is inviolable. In action for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are *prima facie* illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds of justification of the infraction."¹¹

[14] In Zamani, Van Zyl DJP, also dealt with the legal principle that proof of awareness of wrongfulness on the part of the plaintiff is not a requirement in instances of unlawful arrest, suffice for the plaintiff to establish that he had been

¹⁰ 2006 (4) SA 168 (SCA) at para 16-19

¹¹ 1993 (3) SA 131 (AD) at 153 D-E, see also Reylant Trading (Pty) Ltd v Shongwe [2007] All SA 375 (SCA) at [4] and [6]

unlawfully deprived of his liberty by either the defendant or those acting in his stead. He stated thus.

“It is consequently unnecessary for the plaintiff to allege wrongfulness, and the burden of proof in respect thereof at trial is on the defendant once the plaintiff has proved, or it has been admitted, that the defendant was arrested and detained. It is for the defendant to allege and prove the existence of grounds of justification. The reason lies in the plain and fundamental rule that every individual's liberty is invaluable. In *Zealand versus the Minister of Justice and Constitutional Development* Langa CJ explained it as follows:

“This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification ..., it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the constitution.¹² (emphasis added).”

[15] It is worth restating what is said in *Zealand*, that ‘it was sufficient for the applicant simply to plead that he was unlawfully detained. This he did. The respondent then bore the burden to justify the deprivation of liberty, whatever form it may have taken¹³. The plaintiff did not have to wait for his release from custody to institute a civil claim against the defendant. He may have done so himself or through his attorney while in custody. Furthermore, all he was required to plead is that he had been wrongfully arrested and detained by the defendant or his agents. Van Zyl DJP summed it up correctly by saying that ‘the fact that the plaintiff is not required to allege and prove the absence of justification for his or her arrest and detention, means that the facts from which it must be concluded that authority for arrest of the

¹² *Ibid* Para 14

¹³ *Ibid* para 24

plaintiff did, or did not exist, are not material facts from which the delictual debt is said to arise.’¹⁴

[16] In addition to having knowledge of the identity of the debtor as discussed above, subsection 12(3) requires the creditor to have knowledge of ‘the facts from which the debt arises.’ The facts in this matter which were known or ought to have been known by the defendant are that his arrest was unlawful even before his trial began. As previously stated, an arrest or detention is *prima facie* wrongful. It is not necessary to allege or prove wrongfulness. It is incumbent upon the defendant to allege and prove the lawfulness of the arrest or detention. Therefore, the defendant did not have to wait for the outcome of his appeal. Suffice for him to have alleged that his arrest and detention were wrongful. The contention by the plaintiff that he acquired knowledge of all the relevant facts when he was acquitted on appeal is misplaced.

[17] The plaintiff in terms of the stated case “sues for unlawful arrest and detention”. The cause of action in the matter of *Malgas* is reflected in the judgment thus ‘... the appellants instituted an action against the respondent (the Minister) for their wrongful detention and deprivation of liberty.’ It is trite that unlawful arrest and unlawful detention are two distinct causes of action. An arrest may be lawful but the subsequent detention be unlawful. *Malgas* does not concern unlawful arrest. *Malgas* deals with unlawful detention and deprivation of liberty. I do not appreciate the difference between unlawful detention and deprivation of liberty as was contended for in *Malgas*, on the peculiar facts of that case because to me those are the same. Wrongful deprivation of liberty consists in a person being deprived of his physical freedom without justification. To succeed in an action based on wrongful deprivation of liberty, the plaintiff must prove that the defendant himself, or a person acting as his agent or servant, deprived him of his liberty. The same requirement obtain when dealing with unlawful detention. As a rule, every interference with physical liberty is *prima facie* (in the absence of a ground of justification) wrongful.¹⁵ The test, therefore, is the same as in unlawful detention. All the plaintiff, in *Malgas* needed to plead, was that he was wrongfully deprived of his liberty and not wait for

¹⁴ *Ibid* para 15.

¹⁵ Law of Delict; Neethling & Potgieter; 8th Edition at pages 396-397 and the authorities cited therein

the outcome of the appeal. In that instance, it would have been incumbent upon the defendant to prove the ground(s) of justification, in other words it would have to allege and prove the lawfulness of his detention. The same principles dealt with above as enunciated in Mtokonya, Zealand and Zamani (the latter to the extent that it followed the principles in Mtokonya and Zealand, as it was bound by them), ought to have been followed by the court in Malgas due to the *stare decisis* principle. This court cannot, as a result follow the Malgas decision.

[18] Similarly, with respect Makhwelo supra, has been incorrectly decided in so far as it states that “(i)n the case of any arrest and detention there is a deprivation of liberty and loss of dignity which will be justified if there is a conviction.” It is difficult to appreciate how a debt be immediately claimable and therefore justiciable which is the second requirement for a debt being due (see Deloitte Hasking) prior the outcome of the criminal trial, or prior to charges being dropped or otherwise “withdrawn”. This is in contradiction to what the Constitutional Court said in Mtokonya and authorities referred to above. It is my finding that in this instance, prescription started to run on the day of the plaintiff’s arrest i.e 6 June 2009 and the debt became due on that day because the plaintiff knew that the defendant was the debtor and had knowledge or could have acquired that knowledge, if he had exercised reasonable care. The issue of the statutory notice is intertwined with the running of prescription which started running from 6 June 2009. It follows that the statutory notice should have been issued before the expiry of 6 months period from that date.

[19] Consequently I make the following order:

1. The special pleas raised are upheld.
2. The plaintiff’s claim is dismissed with costs on scale B.

M MAKAULA
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff : Adv Mzileni
Instructed by : Mdledle-Malefane & Ass

For the Defendant : Adv Mnqandi
Instructed by: : State Attorneys

Date heard : 30 January 2025
Judgment delivered : 10 June 2025