



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 47958/2017

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 29 AUGUST 2025

SIGNATURE

In the matter between:

THEMBINKOSI SAMUEL MASOMBUKA

Plaintiff

and

MINISTER OF POLICE

Respondent

Summary: *Extinctive Prescription: Plaintiff instituted action for damages more than four years after his arrest and the commencement of his detention. Particulars subsequently amended. Special plea of extinctive prescription considered. Upheld in respect of the claim based on alleged unlawful arrest and partially upheld in respect of the claim based on unlawful detention. In respect of the claim of*

malicious prosecution, although referred to in oral argument, no special plea had been raised regarding the late introduction thereof.

ORDER

1. The defendant's special plea of prescription against the plaintiff's claim based on unlawful arrest is upheld.
2. Save for a period of 44 days, the defendant's special plea of prescription against the plaintiff's claim based on unlawful detention is upheld.
3. The plaintiff is ordered to pay the defendant's costs in respect of its special pleas.

J U D G M E N T

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 29 August 2025.

DAVIS, J

Introduction

[1] On 14 August 2017 the plaintiff served his summons on the State Attorney, representing the defendant, being the Minister of Police.

[2] The “debt”¹ claimed by the plaintiff was for damages of R1 million allegedly suffered as a result of an arrest which had taken place on 27 March 2013, which is claimed to have been unlawful and as a result of his subsequent detention, which commenced from that day until the plaintiff’s release on 10 October 2014, when he was found not guilty.

[3] Shortly before the trial, the plaintiff amended his particulars of claim, by reformulating it and by introducing a claim for damages based on alleged malicious prosecution.

[4] In both its initial and in its consequentially amended plea, defendant had raised two special pleas. The first was non-compliance with the provisions of the Institution of Legal Proceedings against Organs of State Act² and the second was that of extinctive prescription.

[5] In terms of Rule 33(4) the second plea, that is extinctive prescription, was separated from the remainder of issues and argued *in limine*. The written plea dealt with the issue of prescription generally and although the oral argument extended to include the issue of prescription insofar as it relates to the cause of

¹ Meaning anything owed or due as defined in section 12 of the Prescription Act 68 of 1969.

² 40 of 2002.

action based on malicious prosecution, no formal plea had been raised in that regard.

The salient facts

[6] As with all matters where the issue of prescription features, the chronology of the facts are usually determinative. These can be summed up as follows:

- The plaintiff was arrested on 27 March 2013 at his parental home.
- He was accused of having committed armed robbery on three young ladies, robbery of a cellphone and of having raped one of them.
- The plaintiff was unsuccessful in his bail application and was consequently detained from his date of arrest until his eventual acquittal on 10 October 2014.
- Summons was served on the State Attorney, on 14 August 2017.

[7] The cause of action set out in the original particulars of claim was the following: *“The arrest and detention of the plaintiff was unlawful as the plaintiff was subsequently cleared of all charges against him by a court of law and his arrest and detention was not justified under the provisions of section 40 of the Criminal Procedure Act 51 of 1977”*.

[8] On a beneficial interpretation of the particulars, it appears that allegation was that the arrest took had taken place without a warrant and without a reasonable suspicion that the plaintiff had committed a prescribed offence³.

³ Section 40(1)(b) provides that a peace officer may without warrant arrest “any person ... whom he reasonably suspects of having committed an offence referred to in Schedule 1”.

[9] The matter was set down for trial on 19 May 2025. On 4 April 2025 the plaintiff amended his particulars of claim. The cause of action was pleaded as follows in the amended particulars of claim: *“On or about 27 March 2013, the plaintiff was unlawfully, wrongfully and maliciously arrested by members of the SAPS on false charged of robbery with aggravating circumstances and rape... The plaintiff’s arrest was wrongful and malicious in that (1) he did not commit an offence in the presence of a police officer, (2) there was no reasonable suspicion that he had committed a schedule 1 offence, (3) there was no reasonable probable cause for his arrest, (4) the arresting members of SAPS failed to explain his constitutional rights, (5) the arresting members of SAPS failed to comply with sections (4) and (8) of Police Order G341, (6) there existed less evasive (sic) means upon which the SAPS could have secured the plaintiff’s attendance and appearance at court”*.

[10] In addition to the above, it was pleaded that the plaintiff’s detention after the refusal of bail *“... was as a result of the malicious conduct of members of the SAPS in that ...*

- 10.1 *there were no reasonable and/or objective grounds justifying the plaintiff’s arrest and detention.*
- 10.2 *the arresting members of the SAPS as well as other police officers at Kwaggafontein Police State failed to apply their minds in respect of the plaintiff’s detention and the circumstances relating thereto.*
- 10.3 *the detention was motivated by malice as the charges were false.*
- 10.4 *the members of the SAPS failed to timeously and properly investigate and place relevant information to enable the presiding officer to consider the plaintiff’s bail.*

10.5 *the members of the SAPS violated their own policies and protocols during the identification parade of the plaintiff.*

10.6 *the members of the SAPS suppressed crucial information surrounding the arrest of the plaintiff and placed misleading facts and information before the prosecutor and/or the Magistrate's Court."*

[11] The defendant's consequentially amended special plea, reads as follows:

11.1 *On the 19 May 2017, the plaintiff issued summons and on the defendant, where he seeks payment of damages in the amount of R1 000 000.00 (one million Rand).*

11.2 *The plaintiff's claim against the defendant is premised on the alleged unlawful arrest and detention which occurred on 27 March 2017, being the date on which the plaintiff's claim fell due.*

11.3 *Notwithstanding the foregoing, the plaintiff only served summons on the defendant on the 14 August 2017, approximately four (4) and half years, which is outside the three (3) years period in which the plaintiff had, to institute these proceedings.*

11.4 *In the premises, the defendant contends and avers that the plaintiff's claim has prescribed in terms of section 11(d) of the Prescription Act 68 of 1969."*

The law

[12] As a general rule, prescription begins to run as soon as a debt is due⁴.

[13] A debt shall, however not be deemed to be due until the creditor has acquired knowledge “*of the identity of the debtor and of the facts from which the debt arises*”⁵.

[14] The parties were in agreement that the applicable period of prescription of the plaintiff’s delictual claims, is three years⁶.

[15] It is important to note the distinction between a claim based on a wrongful arrest and a claim based on an arrest that took place maliciously⁷.

[16] In respect of a claim based on unlawful arrest and detention, a plaintiff need only allege that he has been arrested without a warrant (if that was the case) and that his liberty has thereby and from that date been infringed upon⁸. The onus is then on the defendant to prove lawfulness of the arrest (and subsequent detention). If the arrest took place pursuant to a warrant, the onus of proving wrongfulness of the arrest would rest on the plaintiff.

[17] On the other hand, to succeed in a claim for malicious prosecution, a plaintiff has to allege and prove that the defendant had set the law in motion, without reasonable or probable cause had acted with malice and that the prosecution has failed⁹.

[18] The main distinction between the two sets of causes of action is that for a claim based on unlawful arrest and detention, the delict is committed by the

⁴ Section 12(1) of the Prescription Act.

⁵ Section 12(3) of the Prescription Act and see *Minister of Finance v Gore NO 2007 (1) SA 111 (SCA)* at par 17.

⁶ Section 11(d) of the Prescription Act.

⁷ See *Relyant Trading (Pty) Ltd v Shongwe and Another* [2000] 1 All SA 375 (SCA).

⁸ *Ibid* at p 378 and *Zealand v Minister of Justice* 2008 (4) SA 458 (CC) at par 24.

⁹ *Minister of Justice & Constitutional Development v Moloko* [2008] 3 All SA 47 (SCA).

unlawful arrest itself and the outcome of the prosecution is irrelevant. On the other hand, the outcome, however, completes a cause of action based on malicious prosecution, of which malice is also an element¹⁰.

[19] The consequence of the distinction is that a plaintiff, claiming to have been unlawfully arrested, need not wait for his trial to finish before instituting action.

[20] Similarly, a plaintiff also need not wait for the entire duration of his alleged unlawful detention to terminate, before acquiring a cause of action.

When did the extinctive prescription commence running in respect of the plaintiff's claims?

[21] Based on the above, the period of prescription in respect of the alleged unlawful arrest, commenced on the day of arrest, that is on 27 March 2013. On that day, particularly when regard is had to the detail furnished in the plaintiff's original particulars of claim as to how the arrest had occurred and by whom, the plaintiff had full knowledge of the facts relating to this cause of action.

[22] In respect of the period of detention, it has been held that the whole period thereof should not be seen as one continuing wrong. In *Barnett v Minister of Home Affairs*¹¹ the Supreme Court of Appeal has held that the approach should be that such a wrong "... results in a series of debts, arising from moment to moment, as long as the wrongful conduct endures".

[23] The same has been confirmed in respect of a period of alleged unlawful detention¹². Prescription for each day of unlawful detention therefore commences

¹⁰ See *Thompson and Ano v Minister of Police* 1971 (1) SA 371 (E).

¹¹ 2007 (6) SA 31 (SCA) at par 20.

¹² See *Minister of Police v Zamani* 2023 (5) SA 263 (ECB) at 13 and *Minister of Police v Yekiso* 2019 (2) SA 281 (WCC) at par 19. See also *Lombo v African National Congress* 2002 (5) SA 668 (SCA).

running separately as each day of detention passes¹³. These days would have started “passing” since 27 March 2013.

[24] In respect of the claim based on malicious prosecution, the period of prescription would only commence running on the day of the plaintiff’s acquittal, being 10 October 2024.

Have the claims become prescribed?

[25] The three year period of prescription in respect of the claim based on unlawful arrest commenced running on 27 March 2013 and was completed on 26 March 2016. Summons was only served on 14 August 2017. Accordingly, this claim has by that time become prescribed¹⁴.

[26] Applying the same calculation method in respect of the alleged unlawful detention, all but 44 days of that claim has also become prescribed.

[27] There was no consequential amendment to the defendant’s special plea in respect of the claim based on malicious prosecution. Although the period of prescription in respect of that claim would have commenced running on 10 October 2014, the issue of its introduction by way of the amendment in 2025 was not pleaded and I shall therefore refrain from dealing with.

Costs

[28] I find no cogent reason to depart from the customary rule that costs should follow the event.

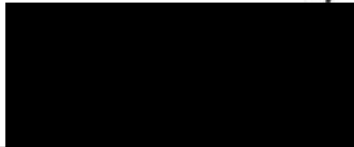
Order

¹³ *Mangasa v Minister of Police* (45105/2021) [2024] ZAGPJHC 1763 (21 February 2024)

¹⁴ In terms of section 11(d) of the Prescription Act.

[29] In the premises, the following orders are made:

1. The defendant's special plea of prescription against the plaintiff claim based on unlawful arrest is upheld.
2. Save for a period of 44 days, the defendant's special plea of prescription against the plaintiff's claim based on unlawful detention is upheld.
3. The plaintiff is ordered to pay the defendant's costs in respect of its special plea


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 19 May 2025

Judgment delivered: 29 August 2025

APPEARANCES:

For the Appellant:
Attorney for the Appellant:

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c/o Moumakoe Attorneys, Pretoria

For the Respondent:

Attorney for the Respondent:

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