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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
(Coram: Holderness, J)**

Case No.: 124422/2020

In the matter between:

KONWABA NGWANE

Plaintiff

And

THE MINISTER OF POLICE

First Defendant

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

Second Defendant

JUDGMENT SPECIAL PLEA - DELIVERED THIS 8TH DAY OF OCTOBER 2025

HOLDERNESS, J

INTRODUCTION

[1] This judgement is solely in respect of the special plea of prescription raised by the first defendant in respect of the plaintiff's claim for damages, arising from his allegedly unlawful arrest on 11 April 2017, and his subsequent detention.

[2] The 'debt' claimed by the plaintiff is for damages in the amount of R3 million allegedly suffered because of his arrest on 11 April 2017, which he alleges was unlawful, and because of his subsequent detention for each day until his release from custody on bail on 17 July 2018.

[3] In the special plea filed on its behalf, the first defendant contends that in terms of sections 11(d) and 12(1) of the Prescription Act, 68 of 1969 (the Act), claims of this nature are subject to a three year prescription period within which the plaintiff is required to effect service of the summons, calculated from the date on which the debt became due. According to the first defendant the debt fell due on 11 April 2017.

[4] On 2 October 2020, after the expiry of the three-year prescription period commencing on the date of the plaintiff's arrest, summons was served on the first defendant.

Evidence for the first defendant

[5] The first defendant led the evidence of Warrant Officer Ayonda Ndaba (W/O Ndaba), the investigating officer on the charge brought against the plaintiff.

[6] Warrant Officer Ndaba has been a member of the South African Police Services for 22 years and was, at the time of the arrest, stationed at Delft Family Violence, Child Protection and Sexual Offences Unit (FCS), and held the rank of Sergeant.

[7] W/O Ndaba arrested the plaintiff on the 11 April 2017, at his church in Mfuleni. At the time of the arrest, he was accompanied by the complainant, a 10-year-old girl, and her mother. According to his testimony, W/O Ndaba introduced himself to the plaintiff as Sergeant Ndaba from the FCS and informed him that he is investigating a case of alleged rape. In the presence of the complainant and her mother, W/O Ndaba, pointed at the plaintiff and asked the complainant if he is the man she alleged had raped her. She confirmed that it was. W/O Ndaba informed the plaintiff that he was arresting him on the charge of rape of a minor. W/O Ndaba thereafter transported the plaintiff to Mfuleni police station, where he was detained.

[8] It is common cause that the arrest was effected without a warrant.

[9] W/O Ndaba read the plaintiff his rights. The plaintiff thereafter signed a Notice of Rights in terms of the Constitution (Section 35 of Act No. 108 of 1996) (the Notice), which document formed part of the joint trial bundle and was handed up and marked as exhibit "A".

[10] The reasons for the plaintiff's arrest and detention appear clearly from this Notice, where it is recorded that he was charged with rape. The document was completed on 11 April 2017 at 17h30. In paragraphs 3 and 4, the rights of the plaintiff as detainee are clearly set out. W/O Ndaba confirmed that, after the notice was completed and signed, he handed a copy thereof to the plaintiff. The plaintiff was thereafter detained in custody at the Mfuleni Police Station.

[11] On 12 April 2017, the plaintiff was interviewed by W/O Ndaba to correctly record his name and address, to formally inform him and to ensure that he understood the charge against him, and to ascertain whether he wishes to give a statement regarding the charges against him. He was informed that it is his right to not give a statement.

[12] It appears from the warning statement, which was handed in as exhibit B, that the plaintiff was interviewed at 10h00 on 12 April 2017, where he was informed that

he was involved in an investigation of a rape committed against the victim on 10 April 2017 at 16h00 hours at his home at 6[...] B[...] Squatter Camp. It is further recorded that the plaintiff is a male aged 33 years old, and that he was unemployed at the time. The plaintiff signed the warning statement in two places.

[13] It further appears from the statement and was confirmed in evidence by W/O Ndaba that the plaintiff gave a voluntary statement to the effect that he had sent the victim and other children to buy cooldrinks, and that he did not rape her. A further document, introduced into evidence as Exhibit "C", was the DNA reference sample collection kit in respect of the saliva/buccal sample collected from the plaintiff on 12 April 2017.

[14] The plaintiff's first appearance in the Blue Downs Magistrates court was on 13 April 2017.

[15] At the first appearance the charge sheet was introduced into evidence as exhibit 'D'. It appears therefrom that the plaintiff was charged with the rape of the minor complainant, N[...] P[...], who was 10 years old at the time. W/O Ndaba confirmed that the plaintiff was informed by the prosecutor of the charges at the first appearance.

[16] It is common cause that the plaintiff appeared in court again on 5 May 2017, for a bail hearing. Bail was refused by the magistrate.

[17] In cross-examination, when questioned about what further steps, he took to investigate the charges against the plaintiff, W/O Ndaba stated that his role was to collect evidence and to present the evidence to the court, for the court to determine whether the plaintiff was guilty of the charge laid against him. He confirmed that on 17 July 2018, approximately 13 months after his arrest, the plaintiff was granted bail on appeal to the High Court.

[18] W/O Ndaba confirmed that on 17 April 2019, the plaintiff was acquitted on the charge of the rape and discharged on the same day. The first defendant did not call any further witnesses.

Evidence for the plaintiff

[19] The plaintiff thereafter gave evidence and confirmed that at the time of his arrest W/O Ndaba explained to him that he was being arrested for the rape of a minor child, who, together with her mother, had accompanied W/O Ndaba to the church where the plaintiff was arrested.

[20] According to the plaintiff he told W/O Ndaba that 'he knew nothing about raping the child', and that he did not know why he was being arrested. He said that he felt very hurt when he was arrested, as he did not commit the offence with which he had been charged.

[21] The plaintiff's evidence was that he sold his house in the B[...] informal settlement to obtain the services of an attorney to 'find out what had happened'.

[22] The plaintiff confirmed that he was eventually released on bail on 12 July 2018, on appeal to the High Court, and stated that he was in custody for 15 months before his release. He confirmed further that he was found guilty and discharged on 17 April 2019.

[23] When asked 'when he acquired knowledge that a wrong had been done to him, and that he had a claim against the defendant', the plaintiff said that he became aware thereof when the case ended and the court found him not guilty.

[24] The plaintiff testified further that he went to see his cousin and explained to him that he had lost his house and did not have a place to stay. His cousin informed him that he knows of an attorney who can help him. He did not state when he met with his cousin, or how soon these events transpired after his discharge. His cousin was not called to testify. He consulted with this attorney, who is the same attorney as his current attorney of record, who advised him to lodge a claim. He stated that, before consulting with his attorney, he did not know that he had a right of recourse against the defendant because of his arrest and detention.

[25] In cross-examination, the plaintiff stated that W/O Ndaba had not explained anything to him, and that he complied with the taking of his fingerprints and signing

documents as was required of him. It was pointed out to him by Mr. Manuel, who appeared on behalf of the first defendant, that it was never put to W/O Ndaba in cross examination that the charges were never explained to him, nor was it put to him that the statement noted in the warning statement was not correct, as testified by the plaintiff in his evidence.

[26] The plaintiff confirmed that, at the first court appearance, he was informed of the charge against him and of the identity of the minor complainant. He further confirmed that save for one occasion, when the trial was postponed due to his attorney being absent, he was legally represented at all court appearances including at the bail hearing until the time of his discharge.

[27] In re-examination he confirmed that he did discuss the wrongfulness of his arrest with the attorney that represents him in the criminal proceedings. After questioning by the court, the plaintiff indicated that he only discussed the wrongfulness of the arrest with his former attorney when the case was finalised.

When does prescription begin to run for the unlawful arrest and detention?

[28] In terms of section 11(d), as read with section 10(1) of the Act, the period of prescription for delictual debts is three years, 'save where an Act of Parliament provides otherwise'. It starts to run, according to section 12(1), 'as soon as the debt is due'. In terms of section 12(3) of the Act, however, the debt is deemed not to be

due, 'until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises' or until he or she could have learnt of those circumstances 'by exercising reasonable care'.

[29] In terms of s11(d) of the Act, prescription for an unlawful arrest claim ordinarily begins to run the moment the arrest occurs (when the claimant is deprived of liberty). The 'debt' is due once the cause of action is complete (i.e. all material facts are present).

[30] Each day of an unlawful detention is treated as giving rise to a separate debt or cause of action, that is prescription in respect of each day runs from that day. If an individual is detained over a period, some days might have prescribed, others not.¹

[31] This accords with the approach adopted in *Lombo v African National Congress*² and with the concept of a continuous wrong as set out in *Barnard and others v Minister of Land Affairs and others*³, namely:

'In accordance with the concept, a distinction is drawn between a single, completed wrongful act - with or without continuous injurious effects, such as a blow against the head – on the one hand and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment as long as the wrongful conduct endures. (See e.g. *Slomowitz v Vereeniging Town Council* 1996 (3) SA 317 (A); *Mbuyisa v Minister of Police, Transkei* 1995 (2) SA 362 (TK); *Unilever Best Foods Robertsons (Pty) Ltd and others v*

¹ *Lombo v African National Congress* 2002 (5) SA 668 (SCA) at para 26 and *Minister of Police v Yekiso* 2019 (2) SA 281 (WCC) at para 19.

² *Lombo v African National Congress supra* at para 26.

³ *Barnard and others v Minister of Land Affairs and others* 2007 (6) SA 31 (SCA) at para 20.

Soomar and another 2007 (2) SA 347 (SCA) at para [15].’

[32] In the replication to the first defendant’s special plea of prescription, the plaintiff pleaded that, in terms of s 12(3) of the Act, prescription only began to run when he was discharged or acquitted on the charge of rape on 17 April 2019, when he ‘gained knowledge of the identity of the debtors and the facts from which the debt arose.’

[33] The plaintiff’s case appears to be on all fours with that of *Manchu v Minister of Police and Others (Manchu)*⁴, where the plaintiff, relying upon the provisions of section 12(3) of the Act, alleged that during the period of his arrest and detention he was not aware or in a position to establish whether he had a cause of action, further, that had no knowledge that he had a right of claim against the defendants. His awareness or knowledge of the claim only came after he consulted with his attorney in 2019 and only became aware thereof, following ‘...consultation with his attorney of record on the 2019’.⁵

[34] The court in *Manchu*⁶ observed that prescription, subject to statutory limitations, commences running as soon as the debt is due or immediately claimable.⁷ This occurs when all the necessary facts that a creditor must prove to succeed in their claim against a debtor are established, or in simpler terms, when

⁴ *Manchu v Minister of Police and Others* (1005/2021) [2024] ZAGPJHC 535 (3 May 2024).

⁵ *Manchu* at para 33.

⁶ *Manchu* at para 34.

⁷ Section 12(1) Prescription Act No 68 of 1969.

everything has occurred that would allow the creditor to take legal action and pursue their claim.⁸

[35] The court emphasised, citing *Truter and Another v Deyssel supra*⁹, that ‘in a delictual claim, as in this instance, the requirements of ‘fault’ and ‘unlawfulness’ are not factual components of a cause of action; rather, they are legal conclusions that should be deduced from the facts that have been determined.’

[36] In delictual actions for unlawful arrest and detention, the minimum necessary facts needed to succeed in such claims include that the defendant or their agent deprived the plaintiff of their liberty, which is *prima facie* wrongful.¹⁰

[37] This issue was dealt with squarely by the apex court in *Mtokonya v Minister of Police*¹¹ (*Mtokonya*) where Justice Jafta stated that ‘*the purpose served by s 12(3) is to prevent the commencement of prescription being delayed by the negligent inaction of the creditor who faces no impediments to instituting legal proceedings. The legitimate purpose served by provisions of a limitation such as s 12(3) is founded on public policy and is underpinned by two principles. The first is the interest of the state which requires that there should be a limit to litigation. The second is that the law helps the vigilant and not those who slumber.*’

⁸ *Truter and Another v Deyssel (Truter)* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at paras [15] to [19].

⁹ *Truter* at para 16.

¹⁰ *Zealand v Minister of Justice and Constitutional Development* [2008] ZACC 3; 2008 (4) SA 458 (CC) at para 25; *Minister of Finance and Others v Gore NO* (230/06) [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) at para 17.

¹¹ 2018 (5) SA 22 (CC) (2017 (11) BCLR 1443; [2017] ZACC 33) at para 145.

[38] In *Mtokonya* the court further observed¹² that ‘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.’

[39] Regarding 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*¹³ the Supreme Court of Appeal 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”.

[40] Prescription for each day of unlawful detention therefore commences running separately as each day of detention passes. These days would have started passing since 11 April 2017, the date of the plaintiff’s arrest and the first date of his detention following his arrest 2017.¹⁴

¹² At para 36.

¹³¹³ *Barnett v Minister of Home Affairs* 2007 (6) SA 31 (SCA) at par 20.

¹⁴ 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).

[41] For a claim based on unlawful arrest and detention, the delict is committed by the unlawful arrest itself, and the outcome of the prosecution is irrelevant.¹⁵ Therefore a plaintiff, claiming to have been unlawfully arrested, need not wait for his trial to finish before instituting action.

Does service of notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002 interrupt prescription?

[42] My Bembe, who appeared for the plaintiff, contended for the first time during argument, that the Notice to Institute Civil Proceedings in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the s 3 Notice), sent to the National Commissioner of the South African Police Services on 16 September 2019, interrupted prescription, as contemplated in section 15(1) of the Act. This was not pleaded in replication to the first defendant's special plea of prescription

[43] The heading for section 15 of the Act is 'Judicial interruption of prescription'. Section 15(1) provides that the running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

¹⁵ *Zealand v Minister of Justice* [2008] ZACC 3; 2008 (4) SA 458 (CC) at par 24; *Minister of Justice & Constitutional Development v Moloko* [2008] 3 All SA 47 (SCA).

[44] 'Process' is not defined in the Act, however guidance can be obtained from s 15(6) which stipulates that 'for the purposes of this section, 'process' includes a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.'

[50] The question which then arises is whether such statutory notice or letter of demand constitutes a 'process' within the meaning as contemplated in section 15.

[45] Mr Bembe could not refer at the hearing to any authorities in support of the proposition that a s 3 Notice interrupts prescription. As the Court intended to deliver judgment on the special plea the next day, he was requested to send to my registrar any authorities on which he sought to place reliance by no later than the following morning.

[46] On 7 October 2025 Mr Bembe emailed to my registrar the judgment in *Liu v Minister of Finance and Others*¹⁶ in which the court granted the following order¹⁷:

'It is declared that the prescription of the Plaintiff's claims against the Second Defendant, as set out in the amended particulars of claim, was interrupted as contemplated in section 15(1) of the Prescription Act 68 of 1969, by means of the service on 19 February 2014 of the notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 on the Second

¹⁶ (72053/2015) [2024] ZAGPPHC 174 (29 February 2024).

¹⁷ At para 22.

Defendant, and / or the service on 9 September 2015 of the combined summons on the First Defendant, and that the Plaintiff's claims against the Second Defendant based upon malicious prosecution and/or malicious criminal proceedings against him, have therefore not prescribed.'

[47] Mr Bembe omitted to copy Mr. Manuel in the email and the handing down of this judgment was therefore delayed, to afford Mr. Manuel an opportunity to consider the judgment and to deliver a note or any other authorities in this regard.

[48] Mr. Manuel later that day sent a copy of the judgment of *Seleka and Others v Minister of Police and Others*¹⁸, where Makgoba J held the view that a section 3 notice in terms of Act 40 of 2002 are such documents which do not commence legal proceedings.

[49] Having considered the reasoning in both judgments, neither of which are binding on this court, I find myself in agreement with Makgoba J. In my view the notice is a procedural prerequisite to sue an organ of state — it is not part of the institution of legal proceedings itself and does not constitute a 'judicial' interruption of prescription' as contemplated in section 15(1), nor is it 'process' within the meaning envisaged in s 15 (6). It simply alerts the organ of state to a potential claim so that it can investigate or settle before litigation.

¹⁸ *Seleka and Others v Minister of Police and Others* (288/2013) [2014] ZAGPJHC 417; 2015 (4) SA 376 (LP) (8 December 2014)

[51] In the *Liu* judgment declaratory relief was granted which, in my respectful view, was not supported by adequate reasons or binding authority.

[52] It appears that the statutory s 3 Notice pertains to pre-litigation, rather than litigation. The objectives underpinning such notice are to notify the organ of state of the proposed claim, to facilitate inquiry and potential resolution and to assist the relevant organ of state in preparing for any lawsuit. Such notice does not initiate legal action. Legal proceedings are initiated solely upon the service of a summons, application, or other initiating process.

[53] If s 3 notices interrupt prescription; it would engender ambiguity. Questions which arise may include: What is the duration of the interruption? Does the prescription period restart after the expiration of the notice period? Such uncertainty would, in my view, undermine the Act's objective of providing legal certainty and ensuring that litigation is not unduly delayed.

[54] Section 15(6) explicitly defines 'process' solely as a document that initiates legal proceedings for the purpose of interrupting prescription. On a purposive interpretation of this subsection, it is apparent that the s 3 Notice fails to meet this condition. It merely alerts the organ of state to possible future action or application proceedings.

[55] In the circumstances I find that the section 3 notice sent to the first defendant did not interrupt the running of prescription against the plaintiff.

Evaluation

[56] Mr. Manuel, who appeared on behalf of the first defendant, contended, correctly in my view, that the commencement of prescription is not reliant upon the plaintiff having knowledge of the legal consequences of the facts.

[57] In *Mtokonya* the Constitutional Court affirmed the earlier SCA decisions in which it was held that section 12(3) requires only knowledge of material facts, and that prescription is not delayed until the creditors became aware of the full extent of their rights. Put differently, knowledge of the minimum or essential facts suffices to meet the threshold envisaged in s 12(3). Knowledge of legal conclusions is not required before prescription begins to run.¹⁹

[58] In *Phala v Minister of Safety and Security and Another*²⁰ (*Phala*) the Court observed that in the Free State Division, as well as other Divisions of the High Court,

¹⁹ *Mtokonya* at para 50, where the court referred to the SCA decision of *Yellow Star Properties 1020 (Pty) Ltd MEC*

²⁰ *Phala v Minister of Safety and Security and Another* (6779/2007) [2022] ZAFSHC 263; [2023] 1 All SA 227 (FB) (12 October 2022) at para 57.

it has consistently been held that prescription for unlawful arrest will in principle commence when the act of arrest is completed.

[59] The court in *Phala*²¹ found that according to the well-established principles relating to prescription of claims for unlawful arrest and detention, prescription does not only start to run when the criminal prosecution is finalised, as is the case in a claim for malicious prosecution.

[60] In *Mtokonya* the Constitutional Court went so far as to say²²:

‘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. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high.’

[61] In the present matter the plaintiff, at the date of his arrest, had full knowledge of how and in what circumstances the arrest was affected, the alleged crime which he was being arrested and the identity of the complainant. He knew he was being

²¹ At para 43.4.

²² At para 63.

arrested by the South African Police Services and the reasons for his arrest and subsequent detention.

[62] As contended on behalf of the first defendant, the plaintiff was legally represented by 3 May 2017, at his second court appearance. By that stage, and certainly at the latest by 15 June 2017, when the opposed bail application was heard, the facts giving rise to his arrest and detention would certainly have been known to the plaintiff.

[63] It is accordingly clear that on 11 April 2017, alternatively by 15 June 2017, the plaintiff had full knowledge of the essential facts underlying his cause of action in respect of the unlawful arrest and detention. The debt claimed by him for damages in this regard accordingly prescribed on 10 April 2020 *alternatively* on 14 June 2020.

[64] In the circumstances the plaintiff's claim A against the first defendant for unlawful arrest has prescribed.

[65] Applying the same method of calculation in respect of the alleged unlawful detention, the plaintiff's claim for detention for each of the days during the period from 11 April 2017 to 1 October 2017 has similarly prescribed.

[66] There is no reason why costs should not follow the result.

Order

1. The first defendant's special plea of prescription against the plaintiff's claim based on unlawful arrest, Claim A, is upheld.
2. Save for the period from 1 October 2017 to 17 July 2018, the first 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 first defendant's costs in respect of its special plea.

M HOLDERNESS

JUDGE OF THE HIGH COURT

Appearance

For the Plaintiff:	Mr. Bembe
As instructed by:	M Sodaka Attorneys Inc
For the Defendant:	Mr. L Manuel
As instructed by:	The State Attorney