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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

Case No: 5499/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: Yes

DATE: 19 January 2025

SIGNATURE:

In the matter between:-

EUGENE BRONKHORST

FIRST PLAINTIFF

JACOB JACOBUS FRANCOIS MALAN

SECOND PLAINTIFF

AND

THE MINISTER OF POLICE

FIRST DEFENDANT

COLONEL CHRISTOPHER MABASA

SECOND DEFENDANT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 19/01/2026 at 10H:00

JUDGMENT

Mashifane AJ

INTRODUCTION

1. The plaintiffs issued summons against the defendants claiming compensation for damages they allege to have suffered because of the warranted arrest which took place on 22 July 2019 and the unlawful warranted search which was carried out on 23 July 2019.

2. The plaintiffs issued and served their summons and the defendant having entered appearance to defend pleaded to the particulars of claim and raise a special plea of non-compliance with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002¹.

3. The plaintiffs filed a replica to the defendant's special plea and denied that there was a non-compliance alleging that the date upon which the debt arose was the date on which charges were withdrawn against the plaintiff. In the alternative they pleaded that they only acquired knowledge of the relevant facts on 4 December after charges were withdrawn.

4. In their opening address the plaintiffs repeated that the notice in term of Section 3 was issued within six months from the date on which the debt became due. However, at the end of the trial they brought an application for condonation requesting the Court to condone their non-compliance. The application was not opposed by the defendants and judgment was reserved on both application and the action.

SUMMARY OF EVIDENCE

5. First witness was Mr Jacobus Francois Malan, the Second plaintiff in this matter. He testified that on 15 June 2019 he was residing at Hoedspruit within the estate known as Blyde Wildlife Estate² and was the chairperson of the board of directors of estate. He was phoned by the estate manager who informed him that there was a problem at the gate, and he thought it was the police. He went to the gate and

¹ Section 3 notice

² Estate

found the second defendant speaking to the security officer. The second defendant said that he wanted to see Ms Sunby, a resident of the estate.

6. The security officer wanted to see the search warrant and the police said that the second defendant have any warrant. The security officer said that his mother is a prosecutor and he phoned her. The security's mother and the second defendant talked for a long time. The second defendant was in company of two other police officers and only the ether two identified themselves upon request by the witness.

7. The witness then phoned the first plaintiff. The reason he phoned him was because his wife was a lawyer and asked him if he can come and listen to the story. He arrived while the second defendant was still on the phone. The second defendant asked the first plaintiff if he was a lawyer and he said to him that his wife is a lawyer and they can call her for assistance. They realised that they were not going to win and the police asked if they could enter. The answer was that they can't stop them from entering and the police boarded their motor vehicle and left. He denied that they obstructed the police or prevented them from gaining access into the estate.

8. On 19 July 2019 while he was around Bushbuckridge he received a call from the estate manager informing him that there was a group of people who wanted to enter the premises. He phoned the lawyers who then talk with the second defendant and arranged that the witness and the first plaintiff should report at the police station on Monday 22 July 2019.

9. On Sunday he consulted with his legal representative and Monday morning they went to the police station in company of their legal representatives. They were charged with an offence of defeating the ends of justice. He was not certain if they were presented with warrant of arrest, but he testified that their lawyers handled everything. Their rights were read to them and informed of the reason of the charged they were facing. The police demanded the firearm of Mr Frikoff, one the residents of the estate. What the witness knows about this firearm is that at one stage he accompanied Mr Frikoff to the police station to renew his firearm permit.

10. After they were charged at the police station they left to his house and on arrival the police gave the search warrant to his attorney. He was not informed what was the purpose of search and the type of crimes they were suspected of committing or having committed. The first plaintiff was present when the witness' house was searched but they never went to his house. After the search they went back to the police station, and they were detained in the holding cells. They were later taken to court and granted bail of RS000.00 each.

11. Under cross examination he testified that they told the police that they cannot open the gate for them to enter because they do not have powers to do so. When confronted with part their particulars of claim stating that the plaintiffs informed the second defendant and his cohorts that access cannot be granted without the permission of the owner of the stand or without a search warrant his response was that they said he can open it himself, they can't do it for him. When asked why he did not open for the police as they have identified themselves, he answered that the security officer called his mother who is a prosecutor and she advised that the police should have a search warrant.

12. The second witness was Mr. Eugene Bronkhorst. the first plaintiff who at the time of the incident he was one of the residents of the estate. On 15 June 2019 he was summoned to the gate by the second plaintiff and on his arrival the second defendant asked him if he is a lawyer. He replied that he was not but his wife. He basically confirmed the evidence of the second plaintiff.

13. On the morning of 22 July 2019, they went to Hoedspruit police station as arranged between their attorneys and the police. They were charged with an offence of defeating the ends of justice and thereafter left to the estate with the police and their attorneys. On their arrival the house of the second plaintiff was searched. His house was not searched. Nothing unlawful was found. On their way back to the police station the second defendant made a remark that the DFO (Designated Firearm Officer) tipped off the plaintiffs.

14. On 23 July 2019 the second defendant accompanied by the other police officer and divers arrived at the estate and went to conduct a search in the river. He

testified that his house was not searched. His house was situated along the riverbank and he believe that his ownership extend to the middle of the river.

15. The third witness was Ms Rene Roux who at the time of the incident was the Senior Public Prosecutor stationed at Lenyenye Magistrate's court. She was presented with an application for warrant of arrest by the second defendant she signed as a prosecutor. She denied that the warrant of arrest was issued based on affidavit of the second defendant on page 17-18 of the trial bundle. She testified the allegations of racial slur and crimen injuria were not contained in the statement and she gave the police a bench pad to rewrite their statement and once done she then applied for the warrant of arrest.

16. At the later stage the docket was presented to her and she believed there was no case, but the second defendant was not happy, she decided to approach the DPP's office for decision. She fully explained the procedure followed when the warrant of arrest is applied for. She will receive the docket and go through the statements to see if an offence was committed. Only when she satisfied, she will then approach the magistrate in chambers for authorisation of the warrant.

EVIDENCE OF THE DEFENDANTS

17. The first witness for the defendants was Lindiwe Vaneza Mondlane a Constable in the employ of the first defendant who was stationed at Giyani police station. On 22 July 2019 she was went to Hoedspruit SAPS to assist with the arrest of the plaintiffs. The plaintiffs arrived at the police station with their attorneys they were charged and take to court for appearance. Her duty was to complete the notice of rights and read them to the plaintiffs. She informed them that they were arrested. She did not have the arrest warrant with her. The plaintiffs were taken to court and granted bail.

18. The second witness was Thabiso Mangena, a constable in the employ of the first defendant, he testified that on 15 June 2019 he was at Hoedspruit police station when the second defendant and Sergeant Chabalala requested him for a backup. He left with them to Blyde Estate. On arrival they found the security officers at the gate

and the second defendant informed them that they were going to No 3[...] belonging to Charlotte and asked for permission to enter. The security officer said that Charlotte instructed them not to open for police officers.

19. Suddenly appeared a White male who requested for search and arrest warrant. the second defendant told him that they were there to investigate a case and looking for Charlotte. Then appeared the second plaintiff who told them that even if they are police officers, they can't just go in. The first plaintiff said that he was an attorney of Charllotte and requested for appointment certificate which they gave him. He wanted to take photo but they refused. He then started to speak in a South African language that the witness could not understand, and he threw them on the ground.

20. Then many cars driven by White males started to arrive and the second defendant requested that they should withdraw instead of causing trouble. According to him one car blocked the road.

21. The second defendant took the stand and testified that on 15 June 2019 he was in the employ of the first defendant and by then he had 29 years' experience in the South African Police Service. He left Giyani for Hoedspruit SAPS in the company of Sergeant Chabalala. He requested Constable Manganye to accompany them to Blyde Estate to conduct investigation. He was investigating a case of fraud and he wanted to interview Ms Charlotte Sunby who was a resident of the Estate.

22. On arrival at the Estate they introduced themselves to the security officers as police officers and produced their appointment certificates. They informed them that they were there to see Charlotte and security officers then communicated with Charlotte through intercom. She told the security officers that she did not expect any visitors and asked if they have warrant of arrest. They replied that it was not necessary because it was family matter between Charllotte and Nelson.

23. A group of White males arrived having firearms and asked who they were and they replied by saying they are police officers and on demand they produced their appointment certificates. He then said that one man who was sitting in court said that

he was the attorney for the person they were looking for and they can't access the place without warrant. They then told him that they were there not to arrest but to conduct investigations and that with or without warrant they are entitled to enter.

24. The plaintiffs disrespected the police by throwing down their appointment certificates. The first plaintiff went to the state vehicle and sat on top of the bonnet and started to insult them. He phoned the higher authority and was advised to go back and open a case of obstruction of justice which they did. They received legal advice that they should apply for warrant of arrest and they did so. During the course of their investigations, they received an information that there were some firearms on the estate and they had to investigate same.

25. While they were in the process of executing the arrest warrant the first plaintiff's wife phoned and said that they will bring them. On 22 July 2019 they were brought to Hoedspruit police station by their attorneys. Their attorneys refused that they be locked up. They then took fingerprints and they appeared in court which granted them bail.

26. During cross-examination he testified that page 17 and 18 of the trial bundles was an additional statement and in the additional statement you don't repeat what is mentioned in the initial statement. In reply to the statement by the plaintiff's legal representative that Mr. Bronkhorst was not charged with impersonating an attorney, he said that the Public Prosecutor or Senior Public Prosecutor is the senior investigator and decide on the charges.

27. He confirmed that he is the one who applied for arrest and the search warrant. He was not certain whether there was a search conducted on 22 July 2019 at the house of the second plaintiff. During the questioning by the Court, he confirmed that the house of the second plaintiff was searched. He testified that that the attorney present interfered a lot with their search.

COMMON CAUSE ISSUES

28. On 15 June 2019 the second defendant in company of Sergeant Tshabalala and Constable Manganye visited the Estate for the purpose of interviewing Ms Charlotte Sunby in relation to a fraud case in which the complainant was Nelson. Upon arrival at the gate Charlotte was contacted and she asked if they had an arrest warrant. The first plaintiff arrived and requested for a search warrant. He told the police that without a warrant or the permission of the owner of the house he can't grant them a permission. He contacted the first plaintiff who also on arrival shared similar sentiment. Other people arrive at the gate and the police eventually left without gaining access to conduct the investigations.

29. The second defendant proceeded to open a case of defeating the administration of justice and applied for warrant of arrest against the two plaintiffs and Ms Sunby. He further applied for search and seizure warrant against the two plaintiffs. On 22 July 2019 and with prior arrangement with attorneys of the plaintiffs the plaintiffs handed themselves to the police at Hoedspruit police station in company of their legal representatives.

30. The plaintiffs were arrested and charged with the offence of defeating the ends of justice and before appearing in court they were taken to the Estate and the house of the second plaintiff was searched. Nothing incriminating was found. They then returned to the police station and taken to court. They appeared before the magistrate and granted bail of R5000.00 each.

31. On 23 July 2019 the second defendant arrived at the Estate in company of the members of SAPS dog unit and divers. They proceeded to the river bordering the premises of the first plaintiff. The divers searched deep in the water and found nothing. The house of the first plaintiff was not searched.

32. On 04 December 2020 the charges against the plaintiffs were withdrawn with instructions from the office of the Director of Public Prosecutions after the plaintiffs submitted their representations to the DPP. The plaintiffs hand delivered their section 3 notice on 12 May 2021 and served the Provincial commissioner by registered mail on 13 May 2021.

33. In the particulars of claim the first plaintiff did not claim for the alleged unlawful search conducted on 22 July 2019.

ISSUES BEFORE THE COURT

34. The dispute between the parties is whether the arrest and detention of the plaintiff was unlawful, whether the search conducted on 22 July 2019 at the house of the second plaintiff was properly pleaded and its lawfulness. Whether the riverbank forms part of the private property of the first plaintiff and if so whether the search conducted in the river infringed his right to privacy and therefore unlawful.

35. The defendants raised a special plea of noncompliance with section 3 of act by the plaintiffs. The plaintiff applied for condonation and the Court is yet to give judgment on their application. The question before the Court is whether they were late in serving the notice and if yes whether they have made out the case for condonation.

PLEADINGS

36. The plaintiffs pleaded that the first defendant owed a legal duty to the public and, more specifically, to the plaintiffs to *inter alia*, protect all South South African citizens from illegal conduct and prevent any loss, which duties included the following:

- i. the constitutional duty to prevent, combat and investigate crimes and /or the continuation of crimes, and to uphold and enforce the law;
- ii. the duty to ensure the Plaintiffs was not deprived of their freedom arbitrarily and without just cause.
- iii. The duty to protect the Plaintiffs' right to dignity and to ensure that the Plaintiffs' dignity was respected and protected by all members of the First Defendant;
- iv. the duty to ensure the Plaintiffs safety and security, as well as to protect their other rights s contained in the Bill of Rights;

- v. the duty to ensure that the Plaintiffs was not exposed to harm whilst in the custody of the SAPS; and
- vi. the duty to ensure that members of the First Defendant did not unlawfully arrest and detain the plaintiff.

37. The plaintiffs pleaded further that due to their wrongful and intentional unlawful arrest and detention and the execution of the warrant for search and seizure by the members of the first defendant they suffered the following damages:

- a. right to freedom and security of the person as contained in section 12 of the Constitution of the Republic of South Africa, 1996 was wrongfully and intentionally infringed;
- b. right to freedom of movement and liberty as contained in section 2 of the Constitution was wrongfully and intentionally infringed; and
- c. right to dignity as contained in section 10 of the Constitution was unlawfully and intentionally infringed.
- d. the Plaintiff suffered severe public humiliation, being upstanding businessmen and representatives of the community of Hoedspruit, and representing homeowners in the Blyde Wildlife Estate as board members of the Home Owners Association, by the misrepresentations made by the Second Defendant.

38. In respect of the warrant of arrest the plaintiffs pleaded that the application for arrest warrant by the second defendant was false and devoid of truth and the plaintiffs were arrested as a consequence thereof and that the conduct of the second defendant was the dereliction of his duties outlined above.

39. Their pleading in respect of the search and seizure is that on or about the 23 July 2019 the second defendant and his cohorts executed the search and seizure warrants without finding any evidence in support of the false and misleading statements made in lieu of obtaining the warrants.

CONDONATION FOR NON-COMPLIANCE WITH SECTION 3 OF ACT 40, 2002.

40. The plaintiffs applied for condonation of their failure to serve the first defendant with notice in terms of section 3 of Act 40 of 2002 and it was not opposed by the defendants. They also did not make any reference to the special plea or the condonation in their heads of argument. This does not however, imply that they have abandoned their plea or they concede to the application for condonation.

41. In deciding whether the plaintiff should succeed in their application the Court will consider that by pleading a special plea of non-compliance the defendants created a dispute and the fact that the application is unopposed it does not necessarily mean that applicants are automatically entitled to the relief sought.

42. Section 3 of the Act provides 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 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".

43. The claims by the plaintiffs are based on two causes of action independent from each other. The arrest and detention occurred on 22 July 2019. The arrest preceded the search conducted on the same day at the house of the second plaintiff. The arrest and detention were for a specific offence which the defendants allege it was committed on 15 June 2019. The searches conducted on 22 and on 23 July 2019 had nothing to do with the arrest and them too were conducted on two separate days against two individuals.

44. Section 3 (4) (b) of the Act provide for three requirements which must be met before the Court can exercise its discretion to grant application for condonation. The first requirement is that the debt should not have been extinguished by prescription which is not the issue in this matter as the summons were served on the first defendant within a period of three years from the date the debt became due.

45. The second requirement is that good cause exists for the failure by the creditor. In the matter of **NMZ obo SFZ v MEC for Health and Social Development of the Mpumalanga Provincial Government**³ the SCA stated as follows:

³ (Case no 1149/2020) [2021] ZASCA 184 (24 December 2021) paragraph 23

"The second requirement of 'good cause' encompasses the issue of the delay in instituting the claim, the prospects of success of the claim, the explanation advanced, the bona fide's of the appellant and any contribution in the delay by another party other than the appellant".

46. It will be a waste of time and unnecessary for the Court to grant condonation if the applicant has no reasonable prospects of success. The prospect of success on merits should mitigate against applicant's fault. The application for condonation in this matter was brought at the very late stage of the proceedings. The parties have already in their opening address define the issues and the special plea raised by the defendants is one of them. The Court heard evidence on merits and that place this Court in a better placed to decide on prospects of success on merits by the plaintiff. Hence the defendants did not abandon their special plea both condonation and special plea should be decided simultaneously.

47. In respect of the claim for unlawful search the plaintiffs pleaded in their particulars of claim that the search warrant issue on by the Magistrate Lenynye on 10 June 2019 was executed by the second defendant and his cohorts on 23 July 2019. I do not deem it necessary to determine whether or not the search and seizure warrant executed on 23 July 2019 was issued on 10 June or 18 July 2019 for reasons stated below.

48. The evidence of the two plaintiffs is that on 22 July 2019 the house of the second plaintiff was searched on the strength. of the search and seizure warrant. On 23 July 2019 a search was conducted in the river bordering the premises of the first plaintiff. The first plaintiff confirmed during cross examination that his premises were not searched. Though he is of the opinion that his ownership extent to the middle of the river in my opinion what he has is the exclusive right to use and enjoy the river up its middle. He cannot claim privacy on common property accessible to other residents of the estate.

49. In their pleadings under the heading 'damages' the plaintiffs make no mention of damages suffered because of the alleged unlawful search. In their prayers both

plaintiffs pray for damages suffered as a results unlawful arrest and unlawful detention. In their heads of argument, the plaintiff submitted as common cause that the search and seizure warrant was applied for by the second defendant and issued on 10 July 2019 (thought it reads 2010) and executed on 23 July 2019 by the second defendant and other members of the first defendant.

50. It is not disputed that there was a search conducted on the river passing alongside the house of the first plaintiff. It is also not disputed that the second plaintiff did not plead for the alleged unlawful search conducted at his house on 22 July 2019. The Constitutional Court in **Molusi v Vogens N.O and Others**⁴ held:

*"The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone".*⁵

51. It so that it is impermissible for a party to plead a particular case and during the trial seek to establish the other⁶. The trial court is equally not permitted to find a recourse in issues falling outside the pleadings when deciding the case⁷. It was submitted on behalf of the plaintiffs that because the evidence about the search on 22 July 2019 was extensively canvased both in examination in chief and cross examination without objection the Court can therefore decide on it even though it was not explicitly mentioned in the pleadings. I do not agree with his submission. It is acceptable that a party may be allowed to rely on an issue which was not covered by the pleadings, but this cannot be extended to claim which was not pleaded.

52. The arrest of the plaintiffs was based on the warrants issued by the magistrate Lenyenye on 18 June 2019. The plaintiffs claim that the application for the warrants arrest was false and devoid of truth. Their contention is that there was no offence committed and the second defendant was fully aware of that and acted with malice.

⁴ Molusi vVogens N.O and Others 2016 (3) SA 370 (CC) at para 28.

⁵ My emphasis.

⁶ *Minister of Safety & Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA)

⁷ See footnote 4.

53. The second defendant deposed to an affidavit in support of his application for an arrest warrant against the plaintiffs. The affidavit was presented to the public prosecutor who was also called as witness by the plaintiffs. According to their witness first affidavit did not contain the allegations of racial slur and crimen injuria. She then gave the second defendant a bench pad to rewrite the affidavit. It was only after the statement was rewritten that she became satisfied that with the contents and proceeded to approach the magistrate in chambers for a warrant of arrest to be issued. She was also satisfied that the plaintiffs have committed an offence of defeating the administration of justice and on that basis she proceeded to apply for warrant of arrest.

54. In determining whether the arrest warrant was valid or not the Court will have to consider the entire facts of the case including the affidavit deposed to by the second defendant bearing in mind that the plaintiffs allege that the application for arrest warrant was based on false allegation.

55. The second defendant and his colleagues visited the Estate on 10 June 2019 to interview Ms Sunby in relation to fraud case registered at Hoedspruit Police Station. The estate is a security complex with access control at the main gate. It is not possible for anybody to enter the complex without permission using the main entrance.

56. Upon arrival at the gate the security officers employed by the Estate refused the police an access because Ms Sunby did not give her consent and eventually the second plaintiff was summoned to the gate and he also summoned the first plaintiff. They asked for the search warrant from the police and they did not have it. The plaintiff then informed the police that without search warrant or permission by the owner of the house they want to visit they cannot grant them access. According to the plaintiffs they told police that they can enter on their own but they will not open the gate for them.

57. The police could not gain access onto the premises because Ms Sunby refused to give permission and the plaintiffs demanded search warrant. The question

is whether the plaintiffs did refuse the police access into the premises and if yes if that refusal amounted to defeating the ends of justice.

58. The police visited Estate to execute their lawful duties. They could not gain access because access was denied. The plaintiff demanded search or arrest warrant before they could grant the police permission to enter. They refused entry even though they were satisfied that people seeking entry were members of South African Police Service. I do not think the plaintiffs were entitled to deny the police access into the Estate. Entry into the estate should be differentiated from entry into a private home.

59. Section 26 of the Criminal Procedure Act⁸ provides:

"Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof" [My emphasis].

60. The Act refer to any premises and private dwelling. The security estate falls under premises whereas the private houses within the estate falls under private dwelling. It is not a requirement that the police should first obtain the permission or consent of the owner of the private dwelling before they could be granted access into the common property. It is therefore my finding that the plaintiffs knew that without their permission the police cannot gain access into the common property to conduct investigations. The rules of the Estate cannot supersede the law of the country. It does not matter whether Ms Sunby would have granted them permission to enter her house or not.

⁸ Act 51 of 1977

61. The case of the plaintiffs has been that they were arrested on the strength of an invalid arrest warrant. In their heads of argument, the plaintiff submit that Mondlane's evidence is to the effect that she effected arrest without the knowledge of, and without possession of a warrant and it therefore follows that the plaintiffs were arrested without warrant. When confronted with arrest warrant by his legal representative the second plaintiff testified that he thinks it is the document they showed them and went further to say their lawyers did everything.

APPLICATION FOR CONDONATION

62. The plaintiffs having been served with special plea filed a reply and pleaded that the debt became due when the charges were withdrawn on 4 December 2020. In the alternative they pleaded that in the even the Court finds that the debt did not only become due on 4 December 2020, the plaintiffs aver that it was only when the charges against them were withdrawn that they acquired the knowledge of the relevant facts giving rise to the debts, and they could not have acquired such knowledge before 4 December 2020 by exercising reasonable care. The same averment was repeated in their application for condonation.

63. In **NMZ obo SFZ**⁹ supra the SCA in dealing with the requirement of good cause listed to the explanation for the failure and the bona tide of the applicant as some of the factors that the Court should consider in determining application. The first explanation by the plaintiffs is that the debt became due only when the charges were withdrawn against them but if the Court finds against their averment then they only acquired knowledge of the relevant facts on 4 December 2020 when charges were withdrawn.

64. The debt in this matter, it be due to unlawful arrest and detention or unlawful search, became due the day the arrest was effected and search was conducted. The case of the plaintiffs should be differentiated from the case where the plaintiff was arrested and kept in custody until charges were withdrawn. In such cases too, the

⁹ Footnote 1

plaintiff will have to plead malicious arrest in which case the unlawful conduct becomes continuous.

65. The next question is whether plaintiffs acquired knowledge of the relevant facts when charges were withdrawn. The plaintiffs were legally represented during their arrest and appearances in magistrate's court as well as during the first search. Their attorneys were presented with arrest warrant and the search warrant for the search conducted on 22 July 2019. They do not explain how did they get knowledge of the relevant facts by mere withdrawal of the charges. Most importantly, charges were withdrawn after the DPP considered, among others, their representations. They would not have been able to make representation if they did not have knowledge of the relevant facts. They were present on 15 June 2019 when the police were denied access and the charge that followed thereof was defeating the ends of justice.

66. Exhibit D is the annexure to the charge sheet, and it explain the act is alleged to have committed. It reads as follows:

"IN THAT upon or about the 15/06/2019 and at or near Blyde Estate Hoedspruit in the district of Tzaneen the accused did unlawfully and with intent to defeat or obstruct the course of justice, commit an act, to wit, Blocked and refused Police to enter Blyde Estate to conduct investigations which act defeated or obstructed the administration of justice".

67. When this Court take into account that the plaintiffs made representations to the DPP and that charge sheet explained in detail the charge they were facing I do not think they have been bona fide with their submission that they lacked knowledge of the relevant facts in order for them to serve the required notice within six months from the date the debt became due.

68. Having considered the merits of this matter I am not convinced that the plaintiffs have reasonable prospects of success on the claim for unlawful search. The first plaintiff conceded that his house was never searched. The property that was searched on 23 July 2019 was public place and does not form part of his private property. The second plaintiff did not plead for the unlawful search of 22 July 2019.

69. On the claim for unlawful arrest and detention the second defendant did not make a false statement to obtain the arrest warrant. In their own pleadings the plaintiff alleged that the police were refused entry because they did not have a search warrant. I therefore find that they obstructed them from entering the Estate and therefore they lack prospects of success on merits.

70. Further to the above the debt became due on 22 July 2019 and they ought to have possessed knowledge of the relevant facts for the purpose of Section 3 Notice. Withdrawal of the charges does not translate into the knowledge of the facts. In their affidavit and it is the case in their pleadings they could not explain how the withdrawal of the case assisted them in acquiring the knowledge of the relevant facts which they did not have when they made representations to the DPP.

71. I therefore conclude that in both claims the plaintiffs have no reasonable prospects of success on merits and they also failed to satisfy the requirement of good cause. They were not bona fide when alleging that they lacked knowledge of the relevant facts and I make the following order.

ORDER

1. The application for condonation by the plaintiffs is dismissed.
2. The special plea by the defendants that the plaintiffs failed to serve the notice in term of Section 3 of Act 40, 2002 is upheld and the plaintiff's claim is dismissed with costs.

MASHIFANE AJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, LIMPOPO DIVISION
POLOKWANE

Appearance:

For the plaintiffs: Adv R.M Venter

Instructed by Cilliers & Reynders Attorneys

For the defendants: Adv M Ndluli

Instructed by Office of State Attorney, Polokwane

Date of hearing: 28-29 July 2025 and 01-02 September 2025

Last set of heads of arguments received on 14 October 2025