



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO. 1174/2016

In the matter between:

THEMBILE LUCAS MGATYELWA

Plaintiff

and

NATIONAL MINISTER OF POLICE

1st Defendant

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

2nd Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

3rd Defendant

JUDGMENT

JOLWANA J

[1] The broader issue for determination in this judgment is prescription and more specifically whether or not the plaintiff was aware of the third defendant, *qua* debtor, within the prescriptive period of three (3) years. The issue of prescription has been separated from the other issues in terms of the order granted by this Court in terms of rule 33(4) of the Uniform Rules of Court.

[2] To the extend relevant, and for a proper appreciation of the various contentions pertinent to the determination of the issue of prescription, a brief synopsis of the

protracted history of this matter is apposite. In April 2016 plaintiff instituted action proceedings against the first and second defendants claiming delictual damages consequent to his alleged unlawful arrest and detention. Both defendants defended the action raising various defences including some defences which are not relevant for present purposes, and the non-joinder of the third defendant which is now central to the issue of prescription referred to hereinbefore.

[3] In various places in his initial particulars of claim, plaintiff alleged that after his arrest and on the occasion of his appearance in court on 10 September 2014 a warrant officer Xhala (Xhala) who had arrested and detained him, placed before a prosecutor at Libode magistrate's court the docket in that matter for a decision on the release of the plaintiff or his further detention. Plaintiff further alleged that the prosecutor had a legal duty to read the said docket in order to assess the prospects of releasing him on warning and his eligibility to be released on bail. Plaintiff further alleged that the said prosecutor had a duty to inform the magistrate who presided over his case at that early stage that there was no sufficient information in the docket justifying his further detention. Both warrant officer Xhala and the prosecutor concerned breached the said legal duty as a result of which he held both the first and second defendants liable for the damages he suffered resultantly.

[4] The second defendant amended her plea and, *inter alia*, raised a special plea of the non-joinder of the third defendant. In essence, the said special plea was that the role played by the prosecutor in opposing bail and the prosecution of the plaintiff notwithstanding, plaintiff had not cited the National Director of Public Prosecutions (NDPP) as defendant in his action. Therefore, so alleged the second defendant, the summons was bad for the non-joinder of the NDPP. The plea in which the second defendant's special plea of the non-joinder of the NDPP was raised was served on

the plaintiff's attorneys on 13 August 2018. This much was common cause between the parties.

[5] The plaintiff's replication to, *inter alia*, the second defendant's special plea of the non-joinder of the NDPP is dated 3 December 2018 but the acknowledgement stamp thereon bears the 01 November 2017 as the date of receipt. This does not make chronological sense and is clearly an error in the date stamp. I understood both counsel to accept that the said replication was, as a matter of fact, served on the office of the state attorney in December 2018. In his replication to the second defendant's special plea of the non-joinder of the NDPP, plaintiff pleaded that the NDPP has no direct and substantial interest in the determination of his claim. He further elaborated that the National Prosecuting Authority could not be adversely affected by a court order which might be granted and therefore he denied that there was non-joinder of the NDPP. He thereupon applied for the dismissal of the said special plea.

[6] The special plea of the non-joinder of the NDPP together with other issues which fell for determination at that stage ultimately served before my colleague Zono AJ who, for various reasons fully canvassed in his judgment which he delivered on 19 March 2024, upheld the said special plea. He thereupon issued an order granting plaintiff leave to join the NDPP in his damages claim, "*if so, advised within fifteen (15) days*" of that judgment. Indeed, plaintiff embarked on that process which culminated in the plaintiff's particulars of claim being amended to join the NDPP as the third defendant in his action.

[7] The joinder of the NDPP birthed his special plea of prescription, the issue that I am now called upon to determine. The NDPP's special plea is set out as follows:

- “1. In his particulars of claim, the plaintiff avers that the delictual conduct on which his claim is found was committed between September 2014 and 11 March 2015.
2. The plaintiff’s amended summons and particulars of claim was served upon the third defendant [NDPP] on 24 March 2024.
3. The third defendant contends that the cause of action on which the debt is claimed by the plaintiff arose on 11 March 2015.
4. The plaintiff’s debt or debts have prescribed by reason of section 12(1) read with 11(d) of the Prescription Act, 1969 (ACT No. 68 of 1969) the Prescription Act). Sections 11 and 12 of the Prescription Act provide that:

11. Periods of prescription of debts

The periods of prescription shall be the following –

...

- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

12. When prescription begins to run

The prescription shall be the following –

- (1) Subject to subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully 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.

(4) ...

(5) The plaintiff's amended particulars of claim by which prescription was purportedly interrupted was served upon the third defendant [NDPP] on 24 March 2024 more than three years from the date on which the plaintiff's cause and/or causes of action had arisen and after the debt and/or debts in issue had prescribed."

[8] In his replication to the NDPP's special plea, plaintiff denied that the debt of the NDPP to him prescribed. His denial as set out in his replication was on the basis that it was the court *vide* the judgment delivered on 19 March 2024 which, after considering the evidence presented to it by the second defendant, found that the prosecutor who allegedly failed in her legal duty was in the employ of the NDPP. In the relevant part of his replication plaintiff makes his case in this regard as follows:

"2.2 On 11 March 2024 the Court considered the said evidence of the second defendant together with the oral evidence found that the third defendant is an employer of the Public Prosecutor concerned as a result thereof the Court ordered that the third defendant should be joined as a party in these proceedings.

2.3 In the light of the aforesaid, the plaintiff has no knowledge of the identity of the debtor (third defendant) in these proceedings prior the 11th March 2024 alternatively the 19 March 2024 in terms of Section 12(3) of the Prescription Act 68 of 1969 alternatively prior to the 19th of March 2024 when this Court ordered the third defendant to be joined as a party in these proceedings.

3. In the premises the plaintiff had no knowledge of the identity of the debtor (third defendant) prior to the 11th of March 2024 alternatively the 19th day of March 2024 when this Honourable Court granted an order joining the third defendant as a party in

these proceedings, therefore the plaintiff's claim against the third defendant has not been extinguished by prescription."

[9] Plaintiff has also pleaded, as an alternative to his contention that the NDPP's debt to him has not prescribed, that the order of the 19 March 2024 upholding the second defendant's special plea of the non-joinder of the NDPP and granting him leave to join the NDPP amounts to an intervention by the NDPP. On this basis plaintiff contends that prescription does not arise against the NDPP. I have difficulties in understanding plaintiff's pleaded case in this regard. Plaintiff elected to join the NDPP who then finds himself before court as a result of being joined by the plaintiff. I fail to understand why the NDPP should be precluded from raising any defence he considers relevant including that of prescription. The basis of this plea and the argument relating to it are completely misplaced and are accordingly unsustainable.

[10] This brings me to the only viable argument raised by plaintiff to ward off the NDPP's special plea of prescription. The NDPP presented evidence on prescription by calling Ms Ndika, the prosecutor who dealt with the plaintiff's criminal case in 2014 in the Libode magistrates' court. Her evidence was that she attended to the criminal case initiated by the state against plaintiff. The NDPP was only served with the summons in this matter in March 2024 which was the reason for the NDPP raising the special plea of prescription. With reference to the second defendant's special plea of the non-joinder of the NDPP, Ms Ndika testified that plaintiff was served with the plea in which that special plea was canvassed on 13 August 2018 to which plaintiff replicated. In his replication plaintiff disputed that the NDPP ought to be joined as third defendant in his damages claim on the basis that the NDPP had no direct and substantial interest in his damages claims.

[11] She further testified that plaintiff knew that he was being prosecuted by the NPA as far back as 2014 during his court appearances. Thereafter, plaintiff instituted his damages claims against the first and second defendants but he failed to also cite the NDPP. He was, however, told by the second defendant through the latter's pleading that to the extent that he made certain allegations about what the prosecutor did or did not do, the NDPP ought to have been joined. In this fashion plaintiff was told that for the actions or inactions of the prosecutor who dealt with his criminal case, his debtor was the NDPP as the employer of the prosecutor concerned.

[12] Plaintiff testified that in 2014 he was 55 years old and had stopped schooling in standard 4. He further testified that he only got to know that he has a potential claim against the NDPP in 2024. This was after his attorney told him about the decision of the court on the second defendant's special plea of the non-joinder of the NDPP.

[13] Under cross-examination plaintiff testified that at all material times he has always been represented by his current attorneys of record. He admitted that his attorneys of record were told by the second defendant in 2018 to sue the NDPP through a pleading filed by the second defendant. He further confirmed that his replication to that pleading was filed on his behalf by his attorneys in which he contended that he did not need to join the NDPP.

[14] As earlier indicated, the second defendant's special plea of the non-joinder of the NDPP was upheld by the court to the extent that the conduct of the prosecutor who dealt with the plaintiff's criminal case was impugned in the plaintiff's particulars of claim. The fact that plaintiff and his attorneys did not accept the second defendant's advice for them to join the NDPP at that stage in his damages suit would

ordinarily not stop the needle of prescription from running. I will come back to this issue later in this judgment.

[15] As I understood plaintiff's argument, he did not know the identity of the NDPP *qua* debtor since 2015. However, this is not without difficulties as plaintiff made direct allegations impugning the conduct of the prosecutor who dealt with his case shortly after his arrest even before the second defendant raised the issue of the non-joinder of the NDPP. Even if one were to accept that plaintiff did not know that the NDPP was his debtor in 2015 or harboured some doubts about it, he was then advised in 2018 by the second defendant that to the extent that he impugned the conduct of the prosecutor who dealt with his criminal case, his debtor was the NDPP. Therefore, he did become aware of the NDPP being his debtor in that regard following the second defendant's non-joinder special plea which was filed in 2018.

[16] Plaintiff's contention that the non-joinder special plea was raised by the second defendant as her own defence and had nothing to do with the NDPP is similarly fraught with difficulties. It is in fact incorrect regard being had to the Prescription Act. Section 12(3) of the Prescription Act provides that a debt shall not be deemed to be due *until the creditor has knowledge of the identity of the debtor*. This is exactly the contention of the NDPP which is that to the extent that plaintiff did not know the NDPP as his debtor, he was told that the NDPP was his potential debtor in respect of the impugned conduct of the prosecutor concerned in no uncertain terms by the second defendant. Therefore, from 13 August 2018 when the second defendant advised the plaintiff as such through the non-joinder pleading, plaintiff became aware that the NDPP was his debtor. That plaintiff did not accept that information does not mean that he was not informed.

[17] In *Macleod*¹ the court made it clear that the defendant bears the evidential burden to prove a plea of prescription. In that matter the court restated the legal position as follows:

“This court has repeatedly stated that a defendant bears full evidential burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a *prima facie* case.”

[18] In her evidence Ms Ndika who, as I said before, dealt with the plaintiff's criminal case in 2015, confirmed that she took the decision to prosecute plaintiff and other related decisions. She also confirmed that she is in the employ of the third defendant and that she is not employed by the second defendant. This evidence was not challenged, and I understood that to be accepted as factual. Most importantly, she gave evidence about the special plea of the second defendant relating to the non-joinder of the NDPP and pointed out that the said special plea was served upon the plaintiff's attorneys on 13 August 2018. Incidentally, those attorneys are still the plaintiff's current attorneys of record. The question of plaintiff not knowing all along that the NDPP was his potential debtor, which he now accepts cannot arise, at least not after the advice of no less a person than the second defendant who is the Minister responsible for the National Prosecuting Authority that he should join the NDPP as the third defendant in his claim.

[19] Plaintiff's contention as articulated in the plaintiff's written submissions and during oral submissions, the effect of which was that the advice of the second defendant regarding the NDPP being also his potential debtor was contained in the second defendant's plea which is not a party in the NDPP's special plea of

¹ *Macleod v Kweyiya* 2013 (16) SA 1 (SCA) para 10

prescription is splitting the hairs, for lack of a better expression. Firstly, it is worth noting that the said special plea was raised in the same proceedings relating to the same cause of action. Secondly, the fact of the matter is that Ms Ndika testified and in doing so, made reference to the second defendant's non joinder special plea to point out that the plaintiff was told by the second defendant about the NDPP being the debtor and therefore plaintiff did become aware of that at least from that point onwards.

[20] This is exactly the point made by the Constitutional Court in *Molusi*² regarding pleadings. It said:

“The purpose of pleadings is to define issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert* the Supreme Court of Appeal held:

‘A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.’

[21] The NDPP has raised the special plea of prescription on the basis of the age of the debt which arose between September 2014 and March 2015. He has further pleaded that he was only served with the summons in March 2024. He has brought evidence before this Court to deal with plaintiff's replication to that special plea which was to the effect that he did not know the NDPP as his debtor. To answer that, the witness called by the NDPP, Ms Ndika brought evidence which points to the plaintiff

² *Molusi and Others v Vogel N.O. and Others* 2016 (3) SA 370 (CC) para 28.

having been told through his attorneys of record that his debtor was the NDPP in respect the alleged conduct of prosecutors. That evidence has not been cogently gainsaid. In fact, it is common cause that the second defendant, in her non-joinder special plea, told the plaintiff through his attorneys to join the NDPP. Plaintiff admits being told to sue the NDPP and it is evident that instead of joining the NDPP, he elected to resist the non-joinder pleading thus refusing to join NDPP as a party in his damages claims. He changed his mind in March 2024 after the court upheld the second defendant's special plea.

[22] The question is whether the plaintiff's change of mind on that issue negates the information given to him about the NDPP being his debtor in relation to the impugned conduct of the prosecutor concerned. It is apparent that he was told as far back as 2018, in so far as he may, for whatever reason, not have already known before who his debtor was as it relates to the conduct or alleged transgressions of the prosecutor concerned. That put paid to his claim that he did not know the NDPP as his debtor which he now accepts. A party's denial of a third party as a debtor or vacillation thereanent does not interrupt prescription in my view and it cannot negate the information which that party objectively has about the third party being the debtor. In all the circumstances the third defendant's special plea of prescription must succeed. There is no reason why costs should not follow the event.

[23] In the result, the following order is issued:

1. The third defendant's special plea of prescription is upheld.
2. The plaintiff is ordered to pay costs on scale B referred to in Uniform Rule 67A.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the plaintiff : M. PANGWA

Instructed by : CAPS PANGWA AND ASSOCIATES

MTHATHA

Counsel for the defendant : A. BODLANI SC

Instructed by : STATE ATTORNEY

MTHATHA

Date heard : 22 April 2026

Date delivered : 09 June 2026