



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 4673/2005

In the matter between:

CHRISTOPHER PATTERSON

Plaintiff

v

THE MINISTER OF SAFETY AND SECURITY

1st Defendant

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

2nd Defendant

Court: Judge J I Cloete

Heard: 6 May 2013

Delivered: 8 May 2013

JUDGMENT

CLOETE J:

- [1] The only issue to be determined at this stage is whether the plaintiff's claims arising from his alleged unlawful arrest and detention during the periods 2 October 1998 until 5 October 1998 and 27 August 2001 until 3 September

2001 have prescribed in terms of s 11(d) of the Prescription Act 68 of 1969, given that the defendants allege that a period of more than three years elapsed from the date upon which the plaintiff's cause of action arose prior to service of summons upon them.

- [2] The salient facts may briefly be summarised as follows. On 10 September 2004 the plaintiff served a summons under case no: 7595/2004 on the first and second defendants in which he sought payment of damages arising from the aforementioned incidents (the defendants do not dispute that the plaintiff's claim for alleged malicious prosecution arising out of his discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 on 12 September 2003 has not prescribed).
- [3] On 29 November 2004 the defendants delivered both a special plea and a plea. The relevant defences raised in the special plea were that: (a) the claims arising from the incidents of 1998 and 2001 had prescribed; and (b) the plaintiff had failed to comply with s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 in that he had not served the requisite statutory notice on the defendants setting out his intention to institute legal proceedings against them within 6 months from the date upon which the debt became due.
- [4] On 25 April 2005 the plaintiff launched a substantive application in which he sought condonation for his non-compliance with s 3 aforesaid. Along with the prayer for condonation the plaintiff also sought an order that he be granted leave

to proceed with the action already instituted; alternatively leave to institute a fresh action against the defendants; on such terms and conditions regarding notice as the court might deem appropriate. Costs were only sought against the defendants in the event of their opposition to the relief claimed.

[5] In the plaintiff's affidavit filed in support of the application for condonation he set out in detail the events leading up to service of the summons on 10 September 2004. Annexed to his affidavit were copies of the aforementioned summons as well as the special plea and plea delivered by the defendants. In addition the plaintiff dealt comprehensively with the defences raised in the special plea including the defence of prescription. He also set out the reasons for his failure to comply with s 3 and the grounds upon which he contended that the defendants would not be unreasonably prejudiced by such failure. The condonation application was also accompanied by a confirmatory affidavit from the plaintiff's attorney of record.

[6] On 12 May 2005 the defendants filed a notice of intention to abide the decision of the court in the condonation application provided that no costs were sought against them.

[7] On 17 May 2005 Traverso DJP made the following order:

'Having heard Counsel for the Applicant, and having perused Respondent's [sic] Notice to Abide, it is ordered that:

1. *Non-compliance with Sections 3(2)(a), 3(2)(b)(i), 3(2)(b)(ii) of Act No 40 of 2002 is condoned in terms of Section 3(4)(a) and 3(4)(b) of Act No 40 of 2002;*
2. *Leave be granted to Applicant to withdraw the Summons issued in the abovementioned matter.*
3. *Leave be granted in terms of Section 3(4)(c) to institute fresh legal proceedings against First and Second Respondents in the abovementioned matter.'*

[emphasis supplied]

- [8] The plaintiff thereafter withdrew his action in accordance with paragraph 2 of the aforementioned order and tendered the wasted costs incurred.
- [9] On 8 June 2005 the plaintiff served summons in this action on the defendants. It is common cause that the particulars of claim are identical to those annexed to the previous summons (now withdrawn) save that the plaintiff also pleaded the necessary allegations pertaining to his application for condonation and the order granted by Traverso DJP.
- [10] On 30 August 2005 the defendants delivered a plea to the merits of the plaintiff's claim only. All of the allegations made by the plaintiff relating to the application for condonation; the defendants' non-opposition and notice to abide, the terms of the order granted by Traverso DJP; and the plaintiff's allegation that '*all the requirements as set out in Act 40 of 2002 have been complied with by Plaintiff*' were admitted.

[11] Just over seven years later, on 27 September 2012, the defendants delivered a notice of intention to amend their plea in which they sought to again introduce a plea of prescription in substantially the same terms as that raised in their special plea in the initial litigation. The plaintiff objected to the notice of amendment and the defendants brought a formal application for leave to amend. For reasons that are not apparent from the record the plaintiff then withdrew his objection and tendered the wasted costs occasioned by the application for leave to amend.

[12] After delivery of the defendants' amended plea the plaintiff delivered a replication. In essence he pleaded that the first and second incidents of 1998 and 2001 formed part and parcel of one continuous event, commencing on 2 October 1998 and terminating on 12 September 2003, the latter date *'being the date upon which the criminal case was concluded in favour of the plaintiff, presenting the plaintiff with the facts from which the cause of action arose and the debt became due'*. In the alternative the plaintiff pleaded that the order of Traverso DJP of 17 May 2005 *'was not granted to place the Plaintiff in prescription or have the claim of the Plaintiff upon the institution of timeous "fresh" proceedings prescribe, as a consequence of the order'*. Although inelegantly drafted it is clear that what the plaintiff intended to convey was that it could never have been a consequence of the aforementioned order that his claim would nonetheless, and at any later date, be found to have prescribed. In effect this amounts to a plea of *res judicata*.

- [13] The requisites for a sustainable plea of *res judicata* because of an earlier judgment *in personam* are that: (a) there has already been a prior judgment; (b) in which the parties were the same; and (c) the same point was in issue: see *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (TPD) at 179E-F; Erasmus: **Superior Court Practice** at B1-144A-B. The prior judgment must have been final or constitute a decision which has a final effect between the parties based on the merits of the point in issue: see *Rail Commuters' Action Group and Others v Transnet Ltd and Others* 2006 (6) SA 68 (CPD) at 74F-H. No issue can be raised whether the prior judgment was correct or not. Every judgment is presumed correct and can only be challenged on appeal: see *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (AD) at 564C-E.
- [14] Paragraph 3 of the order of Traverso DJP stipulated that leave was granted to the plaintiff in terms of s 3(4)(c) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 to institute fresh legal proceedings against the defendants.
- [15] S 3(4) of the aforementioned Act provides as follows:
- '(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.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.
[emphasis supplied]

[16] Accordingly one of the jurisdictional prerequisites to success in an application of that nature is that the court must be satisfied that the debt has not been extinguished by prescription: see also *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at paragraphs [11] and [33]. Traverso DJP was clearly satisfied that the debt had not prescribed and that the other requirements referred to had been met or she would not have granted the order. In addition the plaintiff did not, of his own accord, institute new proceedings against the defendants three weeks thereafter; he did so pursuant to leave granted by Traverso DJP after having considered and having satisfied herself that the requirements set out in s 3(4)(b) had been met. Not only did the defendants choose not to oppose but to abide the decision of the court in the condonation application; they also took no steps after the order was granted to prosecute an appeal (I express no view as to whether or not in the particular circumstances it would have been open for them to do so, but that is not the point). I disagree with the submission made by the defendants' counsel that Traverso DJP "did not hand down a judgment on prescription"; by clear implication that is precisely what she did. And the defendant's reliance on s 17(1) of the Prescription Act, namely that a court cannot *mero motu* raise the question of prescription, is misplaced, since at no stage did this occur.

[17] The order made by Traverso DJP is clearly a judgment between the same parties and it also relates to the same point in issue. Prescription was

pertinently raised by the defendants in their earlier special plea; that defence was raised and dealt with by the plaintiff in his application for condonation; and at the risk of repetition condonation could not have been granted unless Traverso DJP was satisfied that the plaintiff's claims had not prescribed.

[18] During argument the defendants' counsel submitted that the defendants were perfectly entitled to again raise prescription as a defence in the current proceedings. However that does not mean that it would be successful; and for the reasons set out above it is my conclusion that this defence must fail.

[19] **In the result I make the following order:**

'The defendants' pleas of prescription in terms of Section 11 of the Prescription Act 68 of 1969 as contained in their amended plea filed on 20 November 2012 are dismissed with costs.'

J I CLOETE