



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

CASE NO. 1174/2016

In the matter between:

THEMBILE MGATYELWA

Applicant

and

MINISTER OF POLICE

1st Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

2nd Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

3rd Respondent

LEAVE TO APPEAL JUDGMENT

JOLWANA J

[1] In his application for leave to appeal Mr Mgatyelwa cites a number of reasons why he contends that this Court was wrong in upholding the third respondent's special plea of prescription and ordering him to pay costs. In addition to those reasons on the basis of which he contends that his appeal has a reasonable

prospect of success, he further contends that there is a compelling reason why his appeal should be heard.

[2] I do not intend to recite those grounds of appeal in this judgment. I will also not be regurgitating the reasons for the findings that I made in my judgment. Having carefully considered the grounds of appeal, I will simply focus on whether the test for the granting of the application for leave to appeal has been met.

[3] The test for the granting of an application for leave to appeal was considered and authoritatively restated in *Ramakatsa*¹ as follows:

“... [L]eave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This is Court in *Caratco* concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect of future disputes. However, this Court correctly added that ‘but here too the – merits remain vitally important and are often decisive. I am mindful of the decisions at the high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the leave has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

¹ *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021).

[4] Mr Mgatyelwa was arrested in 2014 which is the date on which his cause of action arose. At the very least in 2015 he would have known who was responsible for the conduct which he alleged was unlawful and injurious to his persona for which he sought to be recompensed. As indicated in my judgment, in the unlikely event that he did not know that for the conduct of the prosecutor concerned the third respondent was liable for the damages claimed, he was told in no uncertain terms by the second respondent that his debtor was the third respondent as far back as 2018. I do not think that any other court would find differently on those objective facts.

[5] Whether or not the cause of action is based on common law or on the statute, that is the National Prosecuting Authority Act 32 of 1998 the prescriptive period remains three years. Therefore, it matters not that Mr Mgatyelwa's claim is based on an alleged breach of a statutory provision as against common law or vice versa. For the reasons set out in my judgment and having considered the facts and the law, the submissions made on behalf of Mr Mgatyelwa and in particular, his reasons for seeking leave to appeal, I am not convinced that a reasonable prospect of success has been established. On the contrary, I am convinced that no court would arrive at a decision different to the one I arrived at on the issue of Mr Mgatyelwa having become aware that for the alleged transgressions of the prosecutor who handled his criminal matter he became aware that he should sue the third respondent in 2018, long before March 2024, in particular, prior to Zono AJ's judgment on the non-joinder special plea raised by the second respondent. Therefore, he has no reasonable prospect of success on appeal.

[6] The last issue is whether there exists any compelling reason for this matter to be considered on appeal. Mr Mgatyelwa contends that there is a compelling reason why the appeal should be heard. He cites the fact that the special plea of

prescription was determined on basis that he was informed of the identity of the third respondent through a pleading filed by the second respondent. It is indeed so that the second respondent raised a special plea of the non-joinder of the third respondent pointing to the third respondent as being liable for the wrongful actions or inactions of the prosecutor who prosecuted him in his criminal case or who handled his criminal matter subsequent to his arrest. The nub of his contention in this instance is that the court, in determining the special plea of prescription as it did, engaged in an interpretative exercise of section 12(3) of the Prescription Act based on a defence pleaded by another party which is the second respondent. He contends that it is the first time in our jurisprudence that section 12(3) of the Prescription Act has been interpreted on that basis.

[7] In making this submission it must be that Mr Mgatyelwa takes the view that the actual interpretation of section 12(3) would differ depending on the circumstances of each case and not on the existence of actual or constructive knowledge of the existence of the debt and/or the identity of the debtor. Therefore, how section 12(3) is interpreted or applied could change depending on a particular factual matrix regardless of the requisite knowledge as to the debt or the debtor having been acquired. I disagree. The difficulty with Mr Mgatyelwa's argument in this regard is that it is at odds with the legal position on the interpretation of section 12(3) as recently confirmed by the Constitutional Court in *Tembani*². In that case Rogers J said:

“Subject to the requisite actual or constructive knowledge by the creditor a delictual debt becomes “due”, within the meaning of section 12(3) of the Prescription Act and section 3(2)(a) of the Institution Act once the debtor's wrongful and deliberate or

² President of the Republic of South Africa and Another v Tembani and Others 2025 (2) SA 371 (CC) para 85-86.

negligent conduct has caused the creditor to suffer damage. That is when the creditor is entitled in law to institute action for the recovery of damages.

In terms of section 12(3) of the Prescription Act and section 3(2)(a) of the Institution Act, this is subject to the qualification that time does not start to run (that is debt is not deemed to be “due”) until the creditor has actual or constructive knowledge of the identity of the debtor and the “facts from which the debt arises ...”

[8] Once a claimant for damages has actual or constructive knowledge of the debt and the debtor the source of that knowledge is immaterial to the question of when does the debt become due. Therefore, Mr Mgatyelwa’s contention that the source of his information bears some relevance on the determination of prescription or the application of section 12(3) of the Prescription Act is incorrect, unsustainable and stands to be rejected. Therefore, his application for leave to appeal even on the basis of a compelling reason for the hearing of the appeal must therefore fail.

[9] In the result the following order shall issue:

1. The application for leave to appeal is refused.
2. The applicant is ordered to pay the costs of the application for leave to appeal on scale B referred to in Rule 67A of the Uniform Rules of Court.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Attorney for the applicant : M. PANGWA

Instructed by : CAPS PANGWA AND ASSOCIATES

MTHATHA

Counsel for the third respondent : A. BODLANI SC

Instructed by : STATE ATTORNEY

MTHATHA

Date heard : 02 July 2026

Date delivered : 20 August 2026