



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

NOT REPORTABLE

Case no: 596/2021

In the matter between:

SIMFUMENE SWELI

Plaintiff

and

**MEC FOR THE DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE**

Defendant

JUDGMENT

ZILWA AJ

[1] On 11 February 2021 the Plaintiff instituted a civil claim against the Defendant allegedly based on defamation. The Defendant raised two special pleas. The first special plea was to the effect that the Plaintiff's claim has prescribed owing to the failure to institute the action within 3 years as prescribed by Sections 10, 11, 12 and

15 of the Prescription Act.¹ The second special plea was in respect of non-compliance with Section 3 (1) of the Institution of Legal Proceedings Against Certain Organs of State.²

[2] In reaction to the second special plea, on 19 April 2021, the Plaintiff launched an interlocutory application for condonation. That application was fully opposed and, after all the papers were exchanged, a hearing date was obtained in the opposed motion court. The hearing came before my sister, Justice Dawood, on 10 February 2022 where an order was issued referring the matter to the trial court for the determination of the issue of condonation which was to be determined together with the special plea of prescription.

[3] The Plaintiff proceeded to secure a trial date and on the day of the hearing the parties, by agreement and in terms of Rule 33(1) of the Uniform Rules, agreed, prepared and submitted a stated case in terms of which the two special pleas fell for determination. I was satisfied that the issues identified by the parties were capable of being decided by way of a stated case. Application for separation was accordingly granted and the matter proceeded on the basis of the agreed statement of issues.

THE STATED CASE

[4] To avoid prolixity I do not recite the entire stated case, but shall instead give a synopsis of those agreed facts (quoted *verbatim*) which are relevant for the adjudication of the separated issues, in the following manner:

¹ 68 of 1969

² Act 40 of 2002

- i) *On 19 September 2016, Plaintiff was the school principal of the Upper Tabase Junior Secondary School.*
- ii) *The Plaintiff was one of panelists who conducted interviews to fill vacancy of Administration Clerk at the school.*
- iii) *The other panelists who conducted the said interviews were employees of the Defendant.*
- iv) *The Plaintiff left the said process of interviews before its finalization.*
- v) *One of the candidates, inter alia, Zonwabe Mbuzi, was selected by the remaining members of the panel.*
- vi) *The appointment of Ms Mbuzi at the school was challenged and it was set aside on 29 August 2017.*
- vii) *On 15 November 2017 the Plaintiff penned a letter to the Director of OR Tambo inland, alleging that he had strong beliefs that his signature was forged and his name used to perpetuate the interests of the officials who were present to the process, the said letter is annexed hereto marked annexure '**KP1**'.*
- viii) *The Plaintiff's statutory notice in terms of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State was issued 10 November 2020, more than two and half years after the cause of action arose, the notice is attached hereto marked annexure '**KP2**'.*
- ix) *The summons were issued on the 18th February 2021, the return of service is attached hereto marked '**KP3**'.*

- x) *The Plaintiff's action is premised on defamation, as a result of the fraudulent forgery of his signature by the Defendant's employees on the scoring sheet for the interview panel.*
- xi) *The matter was referred to trial court by Madam Justice Dawood on the 10 February 2022, for the determination of the issues of the special plea of non-compliance with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.*

[5] The Plaintiff's case can be summarized as follows:

- 5.1 He was one of the panelists who conducted interviews for the filling of the vacancy of Administration Clerk but he withdrew his participation before they could be finalized. After the appointment of one Ms Mbuzi, he suspected that some irregularities might have occurred which included usage of his name and signature improperly.
- 5.2 After his suspicion he proceeded to lodge a complaint at the Defendant's offices at Botha Sigcau Building in Mthatha. He escalated his complaint to the Provincial Offices in Bhisho after failing to get positive results from the local office.
- 5.3 In August 2018 he approached the South African Police Services ('SAPS') and opened a case of suspected fraudulent conduct by Defendant's employees for investigation. On 5 September 2019 he was

called by SAPS to come and verify the signatures appearing on the score sheets of panelists.

5.4 On 10 November 2020 he received a police docket containing statement of one Ms Nomquphu revealing that she was the one who improperly signed on his behalf without his knowledge and consent.

5.5 He became aware of all the facts giving rise to his cause of action in September 2018 when he was informed by the members of the SAPS that there might be forgery of his signature during interview process. He received all the facts giving rise to his cause of action on 10 November 2020 upon receipt of police docket from the members of SAPS.

[6] The parties agreed that a special plea of prescription should be dealt with first for a simple reason that – if it is upheld - there would be no need to proceed to determine the second special plea as it would automatically suffer the same fate, as prescription is one of the elements to be considered to succeed. Conversely, if the special plea of prescription fails, the Court will proceed to make a determination on the condonation application.

[7] After the hearing of oral arguments on 7 November 2023 the parties were directed to deliver supplementary heads of argument (with the Plaintiff and Defendant delivering by 17 November 2023 and 14 November 2023 respectively) covering, *inter alia*, their understanding and submissions on the effect of the words

'becoming aware of all the facts' and 'receiving all the facts', as submitted by the Plaintiff.

[8] The Plaintiff delivered his heads timeously whereas the Plaintiff delivered his 3 days later and no explanatory affidavit delivered accompanying them.

Prescription

[9] Section 12(1), (2) and (3) of the Prescription Act read:

'(1) Subject to the provisions of 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.' (My underlining)

[10] Clearly, the above provisions seek to strike a fair and reasonable balance between, on the one hand, the need for a cutoff point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently and, on the other, the need to ensure fairness in those cases in which a rigid application of prescription legislation

would result in injustice. It is trite that, in interpreting section 12(3) of the Prescription Act, the injunction in section 39(2) of the Constitution must be mental flagged. Due regard must be had on the right entrenched in section 34³ of the Constitution⁴.

[11] The question to be interrogated is whether the Plaintiff had the entire set of facts which he needed to prove in order to succeed with his claim. The Plaintiff's version as summarized in the stated case is that he became aware of all the facts giving rise to his cause of action in September 2018 whereas he received all the facts giving rise to his cause of action on 10 November 2020 when he received a police docket containing a statement of one Ms Nomquphu which revealed that she was the person who improperly used his signature without his consent.

[12] Juxtaposing, reading and understanding in context the Plaintiff's assertions of becoming aware of all the facts and receiving all the facts, it appears to me that he was only able to know the identity of the debtor only in November 2020. As at September 2018 the Plaintiff did not know all the facts in the sense that he only knew that someone might have forged his signature but it is not apparent that he knew that the perpetrator was Ms Nomquphu, as alleged. For this reason his cause of action could not have been complete by September 2018.

³ **34 Access to courts**

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

⁴ 108 of 1996

[13] Assuming that the Plaintiff decided to institute an action in September 2018 without knowing the identity of the person responsible for this alleged forgery, clearly he could not have been in a position to successfully pursue the Defendant vicariously. Even on evidence, it was not going to be possible for him to provide a name that would justify the cause against the Defendant. Without the knowledge of entire set of facts as contemplated in section 12(3) of the Prescription Act no debt may become due.

[14] Unfortunately, the Defendant, as onus bearer, on this issue has not succeeded in convincing me and proving that the Plaintiff would have been able to successfully pursue his claim against the him vicariously without knowing that the person who forged his signature was one of the Defendant's employees who was performing her duties within the scope of her employment.⁵

[14] In **Truter and Another v Deysel**⁶ the Supreme Court of Appeal dealt with the meaning of the phrase '*debt due*'. It had the following to say:

'For the purposes of the Act, the term debt due means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.' (My underling)

⁵ See : Mtokonya v Minister of Police 2018 (5) SA 22 (CC) para 181

⁶ 2006 (4) SA 168 (SCA) at para 16

[15] In paragraph 19 of **Truter** the following appears:

"Cause of action' for the purposes of prescription thus means

' . . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved'. [My underlining]

[16] My view is that a cause of action should mean the combination of facts that are material for the Plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action, being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault. *In casu* not all these elements were in existence as at September 2018.

[17] Last but not least, in the case of **Minister of Finance and Others v Gore NO⁷** the Supreme Court of Appeal, in paragraph 17, said the following:

'This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action.'

[18] In paragraph 18 of **Gore** (*supra*) the court went on to say:

⁷ 2007 (1) SA 111 (SCA)

'The defendants' argument seems to us to mistake the nature of knowledge that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified.'

[19] In paragraph 19 of **Gore** the court clarified the legal position when it went on to say:

'It is well established in our law that:

- (a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.*
- (b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.*
- (c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.*

It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less, is vehemently controverted allegation or subjective conviction.'

[20] In the light of the above authorities it is my considered view that the circumstances of this case do not suggest that the Plaintiff's claim had prescribed. Our law is that the statutory prescription periods are meant to protect Defendants from undue delay by Plaintiffs who are laggard in enforcing their rights. On the facts

before me, to conclude that the Plaintiff was dilatory and delayed would be inapt, to say the least. It would therefore be most surprising if he were to be non-suited for delay. In my view, that is not what our law contemplates.

[21] This now brings me to the second special plea of non-compliance with Act 40 of 2002.

Condonation : Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002

[22] As indicated above the application for condonation that was initially launched was ultimately referred for trial. It is also before me for determination and I proceed to do so.

[23] The prayers in the notice of motion have been formulated as follows:

1. *That the late service of Section 3 statutory notice to the Superintendent General of the Department of Education prior to the institution of action against the respondent be and is hereby condoned.*
2. *That the applicant be granted leave to proceed with his action pending before this Honourable Court under Case No. 596/2021.*
3. *That the respondent be ordered to pay costs of this obligation.*
4. *That this Honorable Court grants such relief and all alternative relief.'*

[24] It is apposite to set out the relevant provisions of section 3 of the Act in order to appreciate the point taken by the Defendant and the basis upon which condonation may be sought to overcome a failure to give notice. Section 3 reads:

'(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 ss (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 s 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 s 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 ss (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 para (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.'*

[25] It is common cause that the Defendant has not taken any issue about unreasonable prejudice he has suffered because of the failure to comply with the Act. The issue of prescription has already been dealt with above and the only issue remaining for determination is whether good cause exists for the failure to give notice within the prescribed time.

[26] The Plaintiff has dealt with good cause in paragraphs 37 to 45 of his founding affidavit and in summary he re-iterates that his cause of action became complete when he received Ms Nomqupho's statement confirming that she is the one who forged the signature. The Defendant has dealt with the Plaintiff's averments in his answering affidavit contending that the latter should be deemed to have acquired knowledge as he could have acquired it by exercising reasonable care as envisaged in section 12(3) of the Prescription Act. *Mr Malunga* argued on behalf of the Defendant that the mere fact that the Plaintiff laid a criminal charge with the SAPS on 26 August 2018 after realizing that the appointment has been made notwithstanding the fact that he withdrew his name as one of the panelists, should have completed his cause of action. I disagree. With respect, this contention is not sustainable as it fails to differentiate between the criminal charge laid on the basis of the suspicion the Plaintiff harboured in August 2018 and the disclosure that the Plaintiff received from the SAPS (through the contents of the docket) on 10 November 2020 that the person who forged his signature was Ms Nomqupho.

[27] *Mr Malunga* further argued that the Plaintiff should have done more by requesting documentation. *Mr Pangwa* who appeared for the Plaintiff argued that it

cannot be correct to say that the Plaintiff folded his arms and did nothing. He referred to annexure AA2 of the answering affidavit which reveals that the Plaintiff even wrote a letter on 22 February 2018 calling upon the Department '*open another hearing or platform where the issue of misrepresentation is going to be probed*'. Proper reading of the letter point to one direction, namely, that the Plaintiff did not know the identity of the person who forged his signature and that he was calling for this issue to be probed further.

[28] In the case of **Premier of the Western Cape Provincial Government NO v Lakay**⁸ the Supreme Court of Appeal dealt with the issue of good cause as follows:

'[17] The second question on which a court must be satisfied is that 'good cause' exists for the failure by the creditor to give the notice. The minimum requirement is that the applicant for condonation must furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess his/her conduct and motives: Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352H – 353A, quoted in the context of the 2002 Act in Madinda's case. Beyond that, each case must depend on its own facts. As Innes CJ said in Cohen Brothers v Samuels 1906 TS 221 at 224 (in the context of an application for leave to prosecute a lapsed appeal, but the remarks are equally appropriate to s 3(4)(b)(ii) of the 2002 Act):

'In the nature of things, it is hardly possible, and certainly undesirable, for the Court to attempt to [define good cause]. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits and decide in each case whether good cause has been shown.' (My underlining)

⁸ 2012 (2) SA 1 (SCA) at para 17

[29] *In casu*, I am satisfied that the Plaintiff has proffered a sufficient explanation that has enabled me to fully understand as to how the failure to give notice timeously came about. Accordingly, I am satisfied that the Plaintiff has made out a proper case for the condonation sought.

[30] In the circumstances both special pleas should fail.

Costs

[31] The general rule is that costs should follow the result. This also applies to proceedings of this nature, especially where the Defendant has opposed the application. I find no reason in the present case to depart from that principle and none was also given during argument.

In the result I make the following order:

1. Both special pleas are hereby dismissed.
2. That the late service of the section 3 statutory notice as contemplated in Act 40 of 2002 be and is hereby condoned.
3. That the Plaintiff is hereby granted leave to proceed with his main action.
4. That the Defendant be and is hereby ordered to pay costs of the special pleas.
5. That the Defendant (Respondent in the interlocutory application) be and is hereby ordered to pay costs of the application.

H ZILWA
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For Plaintiff : Adv Malunga

Instructed by : Changfoot Van Breda Inc. c/o Potelwa & Co., Mthatha

For Respondents : Mr Pangwa

Instructed by : Caps Pangwa & Associates, Mthatha

Date Heard : 07 November 2023

Date Delivered : 05 December 2023