



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

NOT REPORTABLE

Case No: 3288/2019

In the matter between:

TREVOR NEL

Plaintiff

and

MINISTER OF POLICE N O

Defendant

JUDGMENT

ELLIS AJ:

[1] The plaintiff instituted action against the defendant, claiming payment in the total amount of R2 500 000 (two million five hundred thousand rand) together with interest and costs, as and for damages as set out in five separate claims and alleged causes of action.

[2] For present purposes, it is appropriate to condense the plaintiff's alleged claims as follows:

- Claim 1: Assault, arising from an alleged incident on 5 September 2016.
- Claim 2: Defamation, arising from an alleged incident on 5 September 2016.
- Claim 3: Assault, arising from an alleged incident on 21 November 2016.
- Claim 4: Defamation, arising from an alleged incident on 21 November 2016.
- Claim 5: Unlawful arrest, arising from the plaintiff's alleged arrest on 21 November 2016.

[3] When the matter came before me, I granted an order *mero motu* and pursuant to the provisions of Uniform Rule 33(4) separating the issues raised by the defendant in the four special pleas from the remaining issues on the pleadings.¹

[4] In respect of the plaintiff's first claim the defendant raised a special plea of prescription as follows:

'FIRST SPECIAL PLEA TO PLAINTIFF'S CLAIM 1

1. The plaintiff's debt as so defined is the correlative of a right of action vested in the plaintiff who is the creditor;-
 - 1.1 in terms of the provisions of section 11(d) of the Prescription Act No 68 of 1969, hereinafter referred to as ("the Act") except where an act of parliament provides otherwise three (3) years in respect of any other debt as set out in chapter 11 of the Act under Prescription of Debts.
 - 1.2 the alleged debt of the plaintiff had commenced when the debt was due; and

¹ '1. The Defendant's 1st - 4th special pleas (paragraphs 1-16) of the Defendant's Plea dated 10 February 2020 are hereby separated from the remainder of the issues for determination.
2.The issues as pleaded in paragraphs 1-24 of the Particulars of Claim dated 15 November 2019 read with paragraphs 17-26 of the Defendant's Plea are postponed *sine die*.'

- 1.3 the plaintiff's claim for alleged wrongful and unlawful, alternatively, malicious assault had become due on 5 September 2016. This is set out in paragraphs 5 to 8 of the particulars of the plaintiff's claim.
2. The plaintiff's summons was served on the office of the Chief Justice in the Eastern Cape Local Division, Port Elizabeth on 20 November 2019 and on the defendant on 21 November 2019, which is more than three (3) years after the date on which the claim arose.
3. In the circumstances the plaintiff's claim is prescribed in terms of the provisions of section 11(d) of the Act.

WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs, such costs to include the employment of counsel.'

[5] The defendant raised an identical special plea of prescription to the plaintiff's second claim, in that the claim for the alleged defamation became due on 5 September 2016, as set out in paragraphs 9 to 11 of the Particulars of Claim. Summons was served on the defendant on 21 November 2019, which is more than three years after the date on which the claim arose. Accordingly, the defendant pleads that the plaintiff's second claim is prescribed and similarly prays for the dismissal of the second claim, with costs.

[6] The defendant's third special plea is pleaded as follows, and strikes at the plaintiff's first to fifth claims:

'THIRD SPECIAL PLEA TO PLAINTIFF'S PARTICULARS OF CLAIM:-

8. In terms of the provisions of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002, hereinafter referred to as "the Act" 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 notice in writing of his or her or its intention to institute legal proceedings in question; or
 - (b) The Organ of State has consented to the institution of that legal proceeding;
 - (i) without notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements as set out in section 3(2) of the Act.
9. In terms of the provisions of section 3(2) of the Act, notice must within six (6) months from the date upon which the debt became due, be served on the Organ of State in accordance with section 4(1) of the Act, which must briefly set out the facts giving rise to the debt and such particulars of the debt which are within the plaintiff's knowledge.
10. The defendant is an Organ of State as defined in section 1 of the Act.
11. The plaintiff has failed to serve any such written notice timeously on the defendant in terms of the Act in respect of all five (5) of the plaintiff's claims, notwithstanding that the plaintiff's claims one (1) and two (2) are prescribed.
12. The defendant has not consented to the institution of legal proceedings in terms of section 3(1) of the Act. The defendant relies upon the plaintiff's failure to serve a notice in terms of the provisions of section 3(4) of the Act.
- 12.1 In terms of the provisions of section 3(4) of the Act, where an Organ of State, like the defendant in this matter, the plaintiff may prior to the institution of legal proceedings, apply to the court having jurisdiction for condonation for such failure and the court may grant leave to the plaintiff to institute such legal proceedings on such conditions regarding the notice to the Organ of State as it may be deemed appropriate by the court.

13. In all the premises, the plaintiff has failed to serve a notice in compliance with section 3(1) and (2) of the Act; and

13.1 Failed to obtain leave to institute such legal proceedings in terms of section 3(4) of the Act.

14. In the circumstances, the plaintiff's claim is unenforceable in law.

WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs, such costs to include the costs of counsel.'

[7] During argument, the defendant abandoned the fourth special plea.

[8] The plaintiff did not file a replication to the special pleas. It is common cause that the causes of action in respect of the first and second claims arose on 5 September 2016 and that the first and second claims became due on 5 September 2016. The date on which prescription started to run was not placed in dispute and it is not alleged that prescription was interrupted at any point. Summons was served on the defendant on 21 November 2019.

[9] Ms. Nel, appearing on behalf of the plaintiff, fairly conceded that considering the common cause timeline, the first and second claims had become prescribed but nevertheless argued that I should exercise my inherent discretion to condone such prescription. She further argued that it would be patently unfair to the plaintiff if the provisions of the Prescription Act² were to prevail, and that the plaintiff would be prejudiced if his claims arising on 5 September 2016 were to be disallowed.

[10] The argument is flawed in law. Prescription is regulated by the Prescription Act. It provides that a debtor has a specific period of time within which to institute a claim and thereby interrupt the running of prescription. If action is not commenced within that

² No. 68 of 1969.

period, the debt will be extinguished by prescription. Failure to institute the action within the required statutory period cannot be condoned. The plaintiff's first and second claims have become prescribed. The first and second special pleas must be upheld as the first and second claims have been extinguished by prescription.

[11] Dealing now with the third special plea. Section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act³ invites a 'creditor' on the receiving end of a point taken that he or she has failed to serve a notice within the prescripts of s 3(1)(a) to apply to a court having jurisdiction for the condonation of such failure. The proper and salutary practice is for such an application to be brought before a motion court and resolved before the matter comes to trial.⁴ If the plaintiff was of the view that he gave proper notice, within the prescribed time period, as contemplated in s 3(2), he should have filed a replication in answer to the special plea. It is common cause that the plaintiff neither applied for condonation in terms of s 3(4)(a), nor filed a replication.

[12] Ms. Nel took the view that an application for condonation is not required, and proposed to testify herself as to the transmission and content of the notice she alleges was sent to the defendant. The difficulty with this proposition is, firstly, that the provisions of the ILPACOSA are peremptory, and after being confronted with special plea of non-compliance it was incumbent upon the plaintiff to take the necessary steps, either by way of an application for condonation or by way of replication, in answer thereto. Secondly, pleadings serve to identify the issues in a matter and the parties are bound to their pleadings. In the absence of a replication, evidence would have been unrelated to the identified issues and would constitute irrelevant matter, which would be inadmissible. Leaving aside for the moment the question whether it would at all be proper for Ms. Nel to testify while she was representing the plaintiff (in my view it would not be) the plaintiff, simply put, has no answer to the defendant's third special plea.

³ No. 40 of 2002, referred to as 'ILPACOSA'.

⁴ *Makwelo v Minister of Safety and Security* [2015] 2 All SA 20 (GJ) discussion generally at paras 23-28.

[13] Mr. Dala, appearing on behalf of the defendant, argued that the plaintiff relies solely on the fact that a purported notice was sent, but that the plaintiff failed to make out a case that there was compliance in any manner with the provisions of s 3 of the ILPACOSA. Despite being confronted with the special plea, the plaintiff made a choice to proceed with the matter contrary to the ILPACOSA, and in the absence of this jurisdictional requirement the plaintiff's claims are unenforceable and fall to be dismissed.

[14] There is no evidence placed before me that the plaintiff had in fact given the required notice in respect of any of his claims, within the prescribed period, as envisaged in s 3(2) of the ILPACOSA. There is no application for condonation in terms of s 3(4) of the ILPACOSA and the defendant did not consent to the institution of the legal proceedings in terms of s 3(1). In the circumstances, the plaintiff's third special plea must be upheld. Having found that the first and second claims have become prescribed, only the third to fifth claims remain. The provisions of s 3(1) are peremptory and a jurisdictional requirement for legal proceedings for the recovery of damages against an organ of State. In the circumstances, the plaintiff's third to fifth claims are not enforceable in law and fall to be dismissed.

[15] The following order will issue:

- 1. The defendant's first and second special pleas are upheld and the plaintiff's first and second claims are dismissed, with costs.**
- 2. The defendant's third special plea is upheld and the plaintiff's third, fourth and fifth claims are dismissed, with costs.**

L ELLIS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Ms. J Nel
Instructed by: Janice Nel Attorneys
GQEBERHA

For Defendant: Adv I Dala SC
Instructed by: State Attorney
GQEBERHA

Date Heard: 8 May 2024

Date Delivered: 16 May 2024