

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 45040/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

SENYATSI ML
SIGNATURE

22-12-2021
DATE

In the matter between:

MTHEMBU SYDNEY XOLANI

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

Delivered: By transmission to the parties via email and uploading onto Case Lines
the Judgment is deemed to be delivered. The date for hand-down is deemed to be
22 December 2021

SENYATSI J:**INTRODUCTION**

- [1] This case highlights the importance of applying for condonation of late filing of prescribed notice in terms of the rules of court when litigation is launched against certain organs of the State.
- [2] In a suit for damages for wrongful arrest and malicious prosecution of the Plaintiff, at hearing the parties applied to separate the issues for determination. The special pleas filed on behalf of the Defendants were ordered by court to be dealt with and if the pleas were not successful then the merits would be dealt with at a later date.

BRIEF BACKGROUND

- [3] The Plaintiff was arrested without a warrant by police on 27 July 2015. He remained in custody until 3 December 2015 when charges of robbery were withdrawn against him.
- [4] Summons was issued and served on the National Commissioner of the South African Police Service on 25 January 2019 and on the second Defendant on 12 February 2019.
- [5] On 8 March 2019 notice of intention to defend was filed on behalf of the Defendants by the State Attorney.
- [6] On 25 May 2020 summons was served on the Provincial Commissioner of South African on the State Attorney on 5 October 2021.
- [7] Before summons was issued and served, notice of intention to institute legal action had been sent on behalf of the Plaintiff on the National Commissioner and the Provincial Commissioner of the South African Police Services on 8

November 2018. On 9 November 2018 the Plaintiff served another notice of intention to institute legal proceedings on the National Director of Public Prosecutions.

[8] In the plea, the Defendants raised the following special plea:

- (a) The Plaintiff's claim has prescribed as contemplated in the Prescription Act 68 of 1969 ("the Prescription Act");
- (b) Non-compliance with section 2(2) of the State Liability Act 20 of 1957 ("State Liability Act") read with section 3 of Judicial Matters Amendment Act 8 of 2017 ("the Judicial Matters Amendment Act") by the Plaintiff;
- (c) Non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 ("the ILPACOS Act");

[9] As already stated, these special pleas were ordered to be separated from the merits and be dealt with at the hearing of the matter.

[10] At the hearing of the matter the court was not provided with a formal application for condonation of late filing of section 3 notice in terms of the ILPACOS Act. The submissions were made on behalf of the Plaintiff through heads of argument.

ISSUES

[11] The issues to be determined was whether the claim has prescribed as contended by the Defendants and whether non-compliance with section 3 of the ILPACOS Act without a formal condonation application is fatal to the case.

LEGAL PRINCIPLES, THE APPLICATION THEREOF TO THE FACTS AND REASONS FOR THE JUDGMENT

PRESCRIPTION

[12] I first deal with the applicable principles on prescription. Prescription as a defence is part of our law and is recognised in our democratic dispensation.

[13] The time lines within which actions must be instituted are regulated by the Prescription Act sections 12(1), (2) and (3) of which provide as follows:

“When prescription begins to run

(1) Subject to the provisions of subsections (2) and (3), 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 which does not arise to have such contract 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.”

[14] Our Constitutional Court has dealt with prescription on a number of cases where it was recognised as part and parcel of our law. In *Road Accident Fund and Another v Mdeyide*¹ the court emphasised the principle on the timelines imposed by the Prescription Act and said the following:

¹ 2011(2) SA 26 ()

“the vital role time limits play in bringing, certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods legal disputes would have the potential to be drawn out for indefinite periods of time bridging about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have likely to suffer as time passes because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must- follow from sound reasoning based on the best available evidence.”

[15] Section 11 (1)(a) of the Prescription Act provides that prescription shall be three years in respect in respect of ordinary debts unless any other legislation provided differently.²

[16] In cases where a special plea of prescription is raised each cas must be decided on its own merits.³ It is also irrelevant, for the prescription period to start running, that the creditor must have knowledge of his or her actionable claim.⁴

[17] The facts from which a debt arises will differ from case to case or from debt to debt. The facts from which a debt arises in case of, for example, a claim for

² See *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC)

³ *Trinity Asset Management (Pty) Ltd v Grindstone Investment 132 (Pty) Ltd* [2017] ZACC 32; 2017 (12) BCRRR 1562 (CC); 2018 (1) SA 94 (CC) para 36

⁴ See *Mtokonya v Minister of Police*, supra para 36.

defamation and the facts from which a debt arises from a claim for wrongful arrest will differ.⁵

[18] The Plaintiff's counsel referred this court to the case of *Makate v Vodacom*⁶ where the court said the following in relation to section 12 of the Prescription Act:

"[87] Since the coming into force of the Constitution in February 1997, every court that in interprets legislation is bound to read a legislative provision through the prism of the Constitution. In *Fraser*, Van der Westhuizen J explained the role of section 39(2) in these terms:

'When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of the section 39(2) of the Constitution. This Court has made it clear that section 39(2) fashions a mandatory constitutional common of stationery interpretation.'

[88] It is apparent from *Fraser* that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

[89] For as this Court observed in *Fraser*:

⁵ See *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 (6) BCLR 703 (CC) para 19.

⁶ (CCT 52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC;)

‘Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights.’

[90] It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2) ... because the operation of section 39(2) does not depend on the wishes of litigants. The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. The duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights.”

[19] In *Links v MEC for Health Northern Cape*⁷ in considering the provisions of section 12 of the Prescription Act against the Constitution, the court held as follows:

“[26] The provision of section 12 seek to strike a fair balance between, on the one hand, the need for a cut-off 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 need to ensure fairness in those cases in which a rigid application of prescription.”

⁷ (CCT/29/15) [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC)

[20] A party raising prescription must allege and prove the date upon which the creditor had knowledge of the facts from which the debt arose.⁸

[21] In applying the principles to the facts of this case, it is common facts that summons was served after the lapse of three years, the ultimate day beyond which it was to be served was 3 December 2018. This is so because the Plaintiff was released from custody on 3 December 2015. Counting from 2 December 2015 the three year period would be on 3 December 2018. The defence of prescription must therefore succeed and cannot be ignored simply by reference to the interpretation of the provision with the guidance of section 39(2) of the Constitution because the facts of this case do not support such an interpretation and this were so in all cases, then the defence of prescription would always not be upheld irrespective of the facts of each matter. This in my respectful view, not what the Constitution requires.

NON-COMPLIANCE WITH SECTION 3 OF THE STATE LIABILITY ACT 20 OF 1957

[22] I now deal with the second special defence of non-compliance with section 3 of the State Liability Act 20 of 1957. Section 2(2) provides as follows:

“The Plaintiff or applicant, as the case may be, or his or her legal representation must, within seven days after summons or notice instituting proceeding, and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney.”

⁸ [1978] 2 All SA; 1978(1) SA821 (A): Drennan Maud and Partners v Town Board of the Township of Pennington [1998] 2 All SA 132 (SCA)

[23] Although the provisions of section 2 of the State Liability Act are stated in peremptory terms which means they must strictly be complied with, this is not the only manner that service of the proceedings should be carried out as will be shown later on in this judgment.

[24] Our courts have occasionally dealt with the consequences of non-compliance with the provisions of the section. By way of example in the unreported case of *Molokwane v Minister of Police and Others*⁹ the court held as follows in dismissing the special plea- of non-compliance with section 2(2) of the State Liability Act:

“[17] I do not read, either s2(2) of the SLA (State Liability Act) or s5(1) of Act 40 of 2002 to limit effective service of process by which legal proceedings against the State are limited, exclusively to service on the State Attorney. At first glance, the two provisions seem to be contradictory. Section 2(2) of the SLA required service on the State Attorney, while s5(1) of Act 40 of 2002 required service in the manner prescribed by the rules of court. However, although s2(2) prescribed that such process had to be served on the State attorney within seven days of the process being issued, it did not restrict or prohibit other ways of effective service on the Minister. Moreover, the rules of court did not, at the time prescribe any manner of service when legal proceedings were instituted against the State. The rules provided that process could (‘may’) be served on the State Attorney, it was not mandatory; when read in this context, the tension that seems to exist between the two statutes is diffused.”

⁹ [2021] ZAGPPHC 402 at para 17 (Unreported)

[25] It cannot be denied that despite not having complied with the provisions of section 2(2) of the State Liability Act, the defendants are not alleging that the summons was never served to the Minister of Police, the National Commissioner and the Provincial Commissioner of the South African Police Service. Service was effected and the parties were duly represented by the State Attorney. No prejudice was alleged to have been suffered by such non-service to the Minister. Accordingly, the non-compliance with section 2(2) of the State Liability Act has not caused any prejudice to the defendant. Even if the court is incorrect in holding that view, in any event, the Plaintiff served a copy of summons on 5 October 2019 on the State Attorney who was as already stated, representing both defendants prior to the service of the summons. It follows that the special plea on this ground should fail.

NON-COMPLIANCE WITH SECTION 3 OF ILPACOS ACT

[26] I now deal with the third defence of special plea based on non-compliance with the provisions of section 3 of ILPACOS Act which I consider to be of significant importance in this judgment.

[27] It is important to restate the provisions of section 3 of the ILPACOS Act which provide as follows:

“Notice of intended legal proceedings to be given to the organ of state

3(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 subsection (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 section 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 section 2(2)(a), must be regarded as having become due on the fixed date."

[28] The creditor who fails to comply with the provisions of section 3(1)(2) and (3) is afforded an opportunity if the defendant relies on non-compliance with the notice, to approach court by way of motion proceedings in terms of section 3(4)(9) and ask for condonation for non-compliance with the notice requirements.

[29] Section 3(4) of ILAPACOS Act provides as follows:

“(a) If an organ of state relies on creditor’s failure to serve a notice in terms of subsection 2(9), the creditors 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 condonations regarding notice to the organ of State as the court may deem appropriate.”

[30] Section 3(4)(b) sets out the factors which the court must be satisfied with to decide whether to grant condonation for the failure to serve a notice in accordance with the requirements set out in section 3(2). Numerous judgments have dealt with the interpretation of these provisions and found that these factors need to be read conjunctively.¹⁰

[31] In line with section 3(2)(a) and the principles related in the various judgments the time limits for filing the notice in terms of section 3(2) against the organ of

¹⁰ See *Minister of Agriculture and Land Affairs v CJRabice (Pty) Ltd* [2010] ZASCA 27, 2010 (4) SA 109 (SCA); [2010] 3 All SA 537 (SCA) para 11, and *Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA) para 13.

state is six months. If the creditor is out of time, condonation, as already stated must be sought in terms of section 3(4).¹¹

[32] It is a misdirection for the court to consider condonation application which is not supported by a formal application which is before it.

[33] In the present case, there is no application for combination within the prescripts of section 3(4). No submissions were made on behalf of the Plaintiff as to why such an application was never sought. Counsel for the Plaintiff relied on the notices issued during October and November 2018 As well as the relief for condemnation directed to the Defendants which was never responded to. In accordance with his submission, Counsel for the Plaintiff simply states that for reasons of interpreting The provisions in accordance with section 39(2) of the constitution the special plea on noncompliance with the notice requirements in terms of Section 3(2) must be dismissed. This submission has no legal and factual basis.

[34] A submission was made on behalf of the painting that the notices dated 18 October 2018 which should be regarded as being incorporated in the papers in where it is stated:

“Insofar as this notice/demand has been launched outside the prescribed 6 (six) months period, kindly let us have your indulgence herein”.

This is not enough. In fact, the Plaintiff in his replication to special plea that there has been non-compliance with section 3, simply states that the defendants have failed to notice that the notices were attached to the

¹¹ See *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA); [2008] 3 All SA 43 (SCA) para 8.

summons when service day off was effected. This is not valid ground for dealing with non-compliance with section 3.

[35] The rules of this court make it plain how a notice for condonation must be filed. For completeness sake, I will restate the Rule 6 of the Uniform Rules which provides as follows:

“Application

(1) Save where proceedings by way of petition are prescribed by law, every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(2) When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only

(3) Every petition must conclude with the form of order prayed and be verified upon oath by or on behalf of the petitioner.”

[36] In this case, attaching a notice in accordance with section 3 of the ILPACOS Act is not compliance with rule 6 of the uniform rules of this court because the notice is not an application for condonation.

[37] It is my considered view that the legal representatives of the Plaintiff failed to act in the best interest of the Plaintiff by not seeking condonation of non-compliance with section 3(2) of ILPACOS Act in a separate motion application. Having regard to such failure, there is as correctly submitted on behalf of the Defendants, no application before the court for condonation of

non-compliance with section 3 of ILPACOS Act. Therefore, it follows that the special plea on this point must succeed.

ORDER

[44] The following order is made:

(a) The special pleas on prescription and the non-compliance with section 3 of ILPACOS Act are upheld with costs.

(b) The special plea on failure to comply with section 2 of the State Liability Act is dismissed with costs.

(c) The defendant therefore succeeded with their special pleas save as stated in (b) above.

SENYATSI ML

***Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg***

REPRESENTATION

Date of hearing: 02 August 2021

Date of Judgment: 22 December 2021

Applicants Counsel: Adv Moloji

Instructed by: LP Molohe Attorneys

First Respondent's Counsel: Adv Sikhakhane

Instructed by: The State Attorney