REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES / NO (3) REVISED: YES / NO DATE: 27 SEPTEMBER 2022 AJ THUPAATLASE	**CASE NO. 2021/7425**

In the matter between:

TEBOGO EDWIN NOOE **PLAINTIFF**

And

MINISTER OF POLICE **FIRST DEFENDANT**

THE DPP **SECOND DEFENDANT**

REASONS FOR JUDGMENT

Thupaatlase AJ

Introduction

[1] The plaintiff issued summons against both the first defendant (Minister of Police) and second defendant (The Director of Public Prosecutions) for damages arising from alleged unlawful arrest, detention, and malicious prosecution.

[2] The summons was met with a special plea alleging that the plaintiff has failed to send a notice within the prescribed period, in that the plaintiff failed to comply with the provisions of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, No. 40 of 2002[1] (the Act). The contention was that such notice was served out of time. In terms of the Act such notice must be served within a prescribed period of six months from the date on which the debt became due as prescribed by Section 3(2) of the Act.

[3] The Act also provides for a procedure to be followed where there is allegations of non-compliance with the stipulated time periods. Such procedure for condonation is laid down in Section 3 (4) (2)[2] of the Act. It is clear from case-law that there is unanimity about the approach to be followed when dealing with such applications. See for example cases of ***Madinda v and Minister of Safety***[3]***, Minister of Security v De Witt and De Wet***[4] ***v Minister van Veiligheid en Sekuriteit***[5]***.***

[4] The issue of condonation did not arise in this matter. This is so because no such application was before the court. This aspect is mentioned merely because it was suggested by counsel for the defendants during argument that the plaintiff should have applied for condonation.

[5] The Plaintiff submitted that it was unnecessary to take such a procedural step because the notice was served within the prescribed period.

[6] At the commencement of the proceedings it was agreed between parties that a special plea should be adjudicated before the trial on the merits could commence. The court was therefore required to rule on the special plea.

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[1] 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 (b) the organ of state in question has consented in writing to the institution of that her or its intention to institute the legal proceedings in question; or 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] (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] 2008 (4) SA 312 (SCA)

[4] 2009 (1) SA 457 (SCA)

[5] 2008 (5) SA 418 (C)

[7] After arguments were presented on both sides, the court gave an *ex temporae* judgment and ruled in favour of the plaintiff and dismissed the special plea. The defendant subsequently requested reasons for such a decision and what follows are such reasons.

Common cause facts

[8] In order to put the matter in a proper context and to show the reasons why the special plea was dismissed it is perhaps apposite that the sequence of events be narrated in much more details. The following facts are common cause between the plaintiff and the defendants that:

8.1. The plaintiff was arrested on the 16/03/19. This was after the plaintiff was pointed out by the complainant in a criminal complaint. The arrest was executed without a warrant of arrest.

8.2. The plaintiff appeared in court on the 18/03/2019 and was remanded in custody for a bail hearing. He was subsequently released on bail on 01/04/2019.

8.3. The criminal charges against the plaintiff were withdrawn on the 26/08/2020.

8.4. The plaintiff through his legal representative served a Section 3 Notice on the Provincial Police Commissioner on the 26/10/2020 and on the Minister of Police on 11/11/2020. A similar notice was served on the second defendant on 27/10/2020.

8.5. The summons was subsequently served on the first defendant on 18/02/2021 and on the second defendant on 19/02/2021. The defendants filed a plea in response to the summons. The plea incorporated a special plea.

[9] As already alluded the essence of the special plea was that there was non-compliance with the provisions of Section 3 of the Act. The defendants contended that the notices were served out of time. According to the defendants the debt became due on the day the plaintiff was arrested and that the computation of the six-month period started to run from that date.

[10] The plaintiff contends that the notices were served within the time period prescribed by the Act. The mainstay of his argument was that the debt became due after the charges were withdrawn.

[11] At the commencement of the proceedings counsel for the defendants abandoned special plea as it relates to the second defendant. She conceded that notice was served within the prescribed period. This was relating to the claim of malicious prosecution.

The Law

[12] It will be prudent to canvass the legal position in order to understand why I dismissed the special plea raised by the first defendant. This is also important as there are two decisions in this division that have dealt with the same legal point raised by the defendant, and each court came to a different conclusion. This will also help to explain why I decided to follow one decision and not the other.

[13] In respect of the phrase 'debt arising' guidance is sought from the various decisions dealing with the same phrase in the context of Prescription Act[6]. The court shall borrow liberally from those decisions in its discussion of the issues raised. The phrase is not defined in the Prescription Act nor in the Act.

[14] In the case of ***Mtokonya v Minister of Police***[7] the court stated that:

'' *Section 12 (3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from '' the facts from which the debt arises''. Case law is to the effect that the facts from which the debt arises are facts which a creditor would need to prove in order to establish the liability of the debtor''*.

[15] In the case of ***Minister of Finance v Gore NO***[8] the court commented as follows:

"*This Court has in a series of decisions emphasised that time begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights''.*

[6] No. 68 of 1969
[7] [2017] ZACC 33; 2018 SA (5) 22 (CC) at para. [36]
[8] [2006] ZASCA 98; 2007 (1) SA 111 (SCA) at para [17]

[16] In another case that dealt with the question as to when debt is due and when prescription starts to run against the debtor is ***Yellow Star Properties 1020 (Pty) Ltd v MEC: Department of Development Planning and Local Government, Gauteng***[9] the court commented as follows:

"It may be that the applicant had not appreciated the legal consequences which flowed from the facts but its failure to do so does not delay the date of prescription.''

[17] In the case of ***Eskom v Bojanala Platinum District Municipality***[10] the court stated that:

"*If such a construction were to be placed on the provisions of section 12(3) grave absurdity would arise. These provisions regulating prescription of claims would be nugatory and ineffectual. Prescription would be rendered elastic and contingent upon the claimant subjective sense of legal certainty. On this contention every claimant would be entitled to have certainty before debt it seeks to enforce becomes or is deemed to be due. A claimant cannot blissfully await authoritative, final, and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises''.*

[18] It is trite law that legal certainty is not a requirement. The plaintiff only needs minimal facts. As stated in the case of ***Johannes G Coetzee and Another v Le Roux and Another*** [11] the SCA per Molefe AJA stated as follows after considering a number of authorities including some quoted in this judgment and concluded as follows:

"These numerous authorities cited indicate that the exercise to determine and distinguish a question of fact from a question of law when determining whether prescription has started to run, is not an easy task that should be dealt with mechanically. It cannot simply be predetermined on the basis of previous cases. Zondo J appreciated this difficulty when he stated as follows in Mtokonya: '' The distinction between a question of law and fact is not always easy to make. How difficult it is will vary from case to case''.

[9] [2009] ZASCA 25; 2009 (3) SA 577 (SCA) at para [37]
[10] 2003 JDR 0498 (T) at 11-12
[11] 969/2020) ZASCA 47 (8 April 20220) at para [23]

[19] As already stated the first defendant based her argument in an unreported judgment of this division. I was urged to follow the decision. The case in point is ***Mataboge and Another v Minister of Police and Another*** (16/17654) delivered on 25/08/2017). The court held at para [17] that:

'' *In Makhwelo v Minister of Safety and Security Spilg J analysed previous cases on the question when the date of a debts is due. The learned judge concluded that where all the facts giving rise to the debt were known and were not dependent on the state of mind of the offending authority, the debt is due on the date the offending conduct was committed. Unlawful arrest falls within this category''.*

[20] At para [18] of the judgment the following is further stated:

'' *Spilg J held further that in a case of a claim for bodily injury the debt only becomes due when the identity of the wrongdoer can be reasonably ascertained. The claim for general damages in this case arose on the same day as the arrest and the Plaintiffs knew who the offending authority is, that is the First Defendant's servants. The claim also arose on 18 April 2013*[12]*''.*

[21] It is at this juncture that I respectfully differ from the ***Mataboge*** judgment. It is my humblest view that a proper reading of the ***Makhwelo v Minister of Safety and Security***[13] does not support the conclusion reached in ***Mataboge***. I shall attempt to show the reason why I hold such a view.

[22] As in this case, the courts in ***Makhwelo*** and ***Mataboge*** were required to decide whether Section 3 notice was defective for having been served outside the prescribed period of six months. The court in the former concluded that the debt became due upon withdrawal of charges against the plaintiff whereas in the latter the debt was found to have been due at the time of his arrest. It is my view that the conclusion that the debt was due at the time of arrest is untenable and if it prevails will present serious difficulties in practice. This may even implicate section 34 of the Constitution[14].

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[12] ***Mataboge*** at para [18]

[13] 2017 (1) SA 274 (GJ)

[14] Access to courts

34 Everyone has a 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

[23] The court in ***Makhwelo*** undertook a review of decisions dealing with this subject and in the course of its analysis it stated as follows:

"As to the first requirement of knowledge of the material facts: It is difficult to appreciate that at the time of the arrest or even during detention the suspect would have sight of the docket in order to form a view that the arresting officer did not have reasonable suspicion that an offence had been committed. The officer may have received a fabricated complaint from alleged eyewitnesses who were intent on falsely incriminating the suspect for their own ends. Accordingly, the complainant would not know at the time of arrest whether the arresting officer was reasonably relying on the accounts of a complainant who turned out to be fabricating events (in which case the claim would lie against the complainant and not the police), or whether the arresting officer in fact did not have reasonable suspicion that the suspect had committed the offence. Since the docket is not available to an accused until the investigation is completed and is presented with the indictment; it is most likely that the identity of the complainant or the evidence that was available when the arrest was made would be known to a would-be plaintiff. Without that knowledge a plaintiff cannot assume that the arresting officer was acting unlawfully when effecting the arrest rather than that the complainant had falsified a charge against him''[15].

[24] The court continued to further demonstrate the difficulties faced by such a plaintiff, in claims of unlawful arrest and detention by stating the following:

'' *Unique considerations are involved in cases of wrongful arrest and detention because other delicts involve either physical injury, damage to or loss of property or involve objectively ascertainable failure to comply with formalities that render the action unlawful, and which are not dependent on the outcome of criminal proceedings (e.g., Slomowitz). In the case of arrest and detention there is*

[15] ***Makhwelo*** at para [55]

deprivation of liberty and loss of dignity which will be justified if there is conviction. It is difficult to appreciate how a debt can be immediately claimable and therefore justiciable-which is the second requirement for a debt being due (see Deloitte Haskins) – prior to the outcome of the criminal trial, or prior to charges being dropped or otherwise withdrawn[16]*''.*

Analysis

[25] The question that the court needed to answer was when did the 'a debt become due' in terms of Section 3(2) of the Act where the claim is one for unlawful arrest and detention. In order to resolve the issue, it is imperative to correctly classify the claim. The claim is for wrongful deprivation of liberty and arrest and therefore *actio iniuriarum.*

[26] It is under the Aquilian action that ***Mataboge*** appeared to have relied in order to conclude that the debt became due at the time of arrest. However, as already determined the factual matrix points to the action being *actio iniuriarum*. The debt became due when the charges were withdrawn. The court in ***Mataboge*** referred to *'in a case of a claim for bodily injury the debt only becomes due when the identity of the wrongdoer can be reasonably ascertained'*[17]*.* In the particulars of claim there is no reference to bodily injury or injuries suffered by the plaintiff.

[27] In a claim for damages for malicious prosecution the 'debt' becomes due when all the elements required to prove a malicious prosecution are established. This point was conceded by counsel for the defendant in respect of the second defendant. It is my view that by parity of reasoning the same should follow with regard to claim based on unlawful arrest and detention. I agree with Spilg J in ***Makhwelo*** that '*Unique considerations are involved in cases of wrongful arrest and detention*'.

[28] The objective knowledge of unlawfulness as a result of lack of reasonable suspicion on the part of the arresting officer, who arrest without a warrant of arrest only manifests after acquittal, or withdrawal of charges. This so because during the trial the arresting officer can still justify his action and show that he acted reasonably. See also ***Human v Minister of Safety and Security***[18].

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[16] ***Makhwelo*** at para [58]
[17] See footnote 12 above
[18] 2013 JDR 2302 (GNP)

[29]. The Act was enacted in order to alert an organ of State to a contemplated action against it. It cannot be expected that whenever police effect an arrest, then immediately a notice be given. The deluge of such notices will render the process unmanageable and impossible to administer. This could not have been the intention when the Act was enacted. The possibility of court rolls getting overwhelmed by condonation applications cannot be discounted. That will render the administration justice ineffectual. The system is already experiencing backlogs. The rationale for the enactment of the Act will be nugatory

[30] I am fortified in my view by what the court stated in ***Mohlomi v Minister of Defence***[19] that notices similar to the one required by Section 3(1) have been part of our 'statutory terrain' for a long time and reason for:

"demanding prior notification of any intention to sue such an organ of government is that with its extensive activities and large staff, which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide before getting embroiled in litigation at public expense, whether it ought to accept or endeavour to settle them''.

[31] I therefore conclude that at the time of an arrest and detention, the plaintiff did not have all the facts giving rise to the debt. The arrest and detention is a continuous act. I refer to the case ***of Unilever Bestfoods Robertson (Pty) Ltd v Soomar***[20] the court stated as follows:

"***Lemue's*** *case indicates what one at least of the policy considerations is: a court hearing a malicious prosecution case should not be called on to prejudge the findings of the criminal court. Equally in my view, it is clear that an accused should not be allowed to launch what amounts to pre-emptive strike against a prosecution pending against him by suing the complainant for damages".*

[32] The ***Unilever*** decision which was quoted with approval by Spilg J further states as follows:"

Because he knew all the facts necessary to establish this claim (on the assumption that I have made that he has a claim) more three years before the proceedings commenced, the only basis he can resist a plea of prescription is by pointing to an

[19] 1997 (1) SA 124 (CC) at para [9]
[20] 2007 (2) SA 347 (SCA) at para [27]

essential element of his cause of action which only came into existence less than three years before the institution of the proceedings" – my underlining. The court stated in the same paragraph that*: "While a prosecution is actually pending its result cannot be allowed to be pre-judged in the civil action. A different reason for the rule was given by Solomon J in Bacon v Nettleton (supra). He said (at 142-3):*

"The proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution determined by his discharge"[21]*.*

[33] It is clear from the facts that the investigations conducted by the police formed the basis on which the decisions were taken to arrest the plaintiff without a warrant and to ultimately to prosecute him, until the matter was withdrawn. The facts to sustain the claims that his arrest and detention were unlawful and therefore actionable only became known to him when the charges were withdrawn. Until that time the plaintiff could not be launch any action against the first defendant.

[34] I find further support from the case of ***Thompson v Minister of Police***[22] where it was held that:

"*In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, while a prosecution is actually pending its result cannot be all owed to be prejudged by civil action (Lemue v Zwartbooi supra at p.407). The action therefore only arises after criminal proceedings against the plaintiff have terminated in his favour or where Attorney-General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest as happened in in the present case. The proceeding from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharged". – my underlining*

[21] ***Unilever*** at para [25]
[22] 1971 (1) SA 371 (E) at 372

[35] It is my considered view that if the contention of the defendant was to be upheld, then it will be contrary to the law as it stands and will militate against the practical application and implementation of the notice as contemplated in the Act.

[36] Although generally a cause of action in delict arises when the wrongful act is committed or wrongful omission occurs, it is clear that that there are deviations from the general rule. The plaintiff in this case was not dilatory. Furthermore, in the case of wrongful arrest and detention without a warrant the plaintiff must prove that the arresting officer had no reasonable suspicion that he had or was going to commit a schedule offence. The plaintiff must also be able to quantify the damages suffered[23].

[38] The position would have been different if the claim was based only on unlawful or wrongful arrest. In that case the delict is committed by the illegal arrest of the plaintiff without the due process of the law, i.e., the injury lies in the arrest without legal justification, and the cause of action arises as soon as that unlawful arrest has been made, and, in order to comply with the requirements of section 3 of the Act, the envisaged notice must be served within six months of the debt becoming due. A clear distinction must be made between an unlawful arrest where no prosecution does not ensue and where a prosecutorial decision is taken to prosecute, and charges are eventually withdrawn.

[39] In the latter scenario, the proceedings from arrest to acquittal and or any other outcome like a subsequent withdrawal by the prosecution must be regarded as continuous, and as such no action for personal injury done to the accused person will arise until such time that the plaintiff gains 'knowledge' which is an essential element of his cause of action.

[40] In the light of the conclusion that I have reached, it is unnecessary to consider the alternative argument, whether the 'once and for all rule' finds application in this case, safe to state that the rule is part of our common law. See ***MEC for Health Gauteng v DZ obo WZ.***[24] It is my view that the rule was properly applied in this case.

I accordingly make the following order:

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[23] ***Makhwelo*** at para [54]

[24] [2017] ZACC; 2018 (1) SA 335 (CC) at para

a. That the notice of intention to institute legal proceedings against the first defendant in terms of Section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 was given within the prescribed period of six months.
b. The first defendant to pay the costs.

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Thupaatlase AJ

Appearances

For the plaintiff: L Matsiela

Instructed by: Dudula Incorporated

For the defendant: L Liphoto

Instructed by State Attorney- Johannesburg

Date of hearing: 29 & 30 August 2022

Date of Judgment (Ex temporae): 30 August 2022

Date of written reasons: 27 September 2022