REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO. 1005/2021

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☐

Date: 03 June 2024 KT

In the matter between:

GAOSITWE BUTHOLEZWE MANCHU	**Plaintiff**
and	
THE MINISTER OF POLICE	**First Defendant**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Second Defendant**
GAUTENG PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	**Third Defendant**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS / THE NATIONAL PROSECUTING AUTHORITY	**Fourth Defendant**

JUDGMENT

KT MATHOPO AJ:

INTRODUCTION

[1.] This is an action in which the plaintiff issued summons in this court for damages for unlawful arrest (Claim A), unlawful detention(Claim B), malicious prosecution(Claim C) and a loss of earnings(Claim D). Summons were served on the 20th of January 2021.

[2.] The action was instituted against the Minster of Police ("first defendant"), Minister of Justice and Correctional Services ("second defendant"), Gauteng Provincial commissioner of the South African Police Services ("third defendant") and the National Director of Public Prosecutions or National Prosecuting Authority ("fourth defendant"). The Plaintiff seeks that all the Defendants be jointly and severally liable for all claims.

BACKGROUND

[3.] On the 10th of September 2014, the plaintiff claimed that he was arrested by members of the South African Police Service("SAPS") near Bloubosrand on suspicion of committing robbery with aggravating circumstances. He was taken to Douglasdale police station where he was formally charged and detained. The plaintiff was charged with 5 counts, the most relevant being count 4 in that he was accused of being guilty of the crime of robbery with aggravating circumstances as contemplated in Sections 51(2), 52(2), 52A and

52B of the Criminal Law Amendment Act, 105 of 1997, in that he unlawfully and intentionally assaulted the complainant and then with force take items in her possession utilizing a knife.

[4.] Following a discharge of the remaining counts, the plaintiff was convicted on count 4, sentenced to 10 years imprisonment and declared unfit to possess a firearm.

[5.] The plaintiff appealed his conviction and sentence, which was set aside on 29 January 2019, whereupon he was released from imprisonment on the same date.

PLAINTIFF'S CLAIMS

[6.] The plaintiff's action is comprised of the following salient allegations and claims.

[7.] Claim A: On 10 September 2014, the plaintiff was unlawfully and wrongfully arrested without a warrant of arrest and/or without reasonable cause or grounds.

[8.] Claim B: the plaintiff was unlawfully detained at the Douglasdale police station from 10 to 12 September 2014, thereafter at Johannesburg prison from 12 September 2014 to 12 January 2019. The total period of detention is 1602 days.

[9.] Claim C: The criminal proceedings against the plaintiff, in respect of count 4, were malicious as the second defendant had no reasonable grounds or cause to believe that the plaintiff committed the offence or that there were prospects of a successful prosecution. Accordingly, their conduct amounts to malice.

[10.] Claim D: the loss of earnings as a result of the unlawful depravation.

[11.] The plaintiff further averred that proper notice of the proceedings was served on the defendants in term of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 2002 ("Institution of Legal Proceedings Act").

DEFENDANTS SPECIAL PLEA'S

[12.] The defendants, well advised, abandoned their first and fourth special pleas' concerning the State Liability Act 20 of 1957 and the plaintiff's lack of *locus standi* as he was alleged to be an illegal immigrant with a fraudulent asylum seeker permit.

[13.] The second special plea – the plaintiff's failure to comply with the requirements of section 3 of the Institution of Legal Proceedings Act. Specifically, the plaintiff neglected to provide proper notice to the defendants within 6 months from the date on which the debt he sought to recover became due.

[14.] The third special plea – the unlawful arrest and detention claims prescribed in terms of section 11(d) read with section 12 of Prescription Act 68 of 1969 ("Prescription Act"). The plaintiff's unlawful arrest claim arose on 10 September 2014, thus prescribed on 09 September 2017 and the unlawful detention claim older than three years prior to service of summons had become prescribed.

[15.] In replication, the plaintiff claims that the arrest and detention were continuous, therefore the unlawful arrest and detention claim arose on 30 January 2019 whereafter he served his demand in terms of section 3 of the Institution of Legal Proceedings Act on 20 June 2019. Concerning the issue of prescription, the plaintiff, amongst the claims being continuous, further pleaded, invoking section 12(3) of the Prescription Act that he had no knowledge of the right to claim against the defendants and only became aware of the defendants and the facts giving rise to the debt following consultation with his attorney of record, in 2019.

PROCEEDINGS

[16.] At the hearing, the parties initially sought to proceed by way of a stated case in terms of Uniform Court Rule 33(1) and (2), however, the parties failed to meet each other and an application was made and granted in terms of Rule 33(4), for the two remaining special pleas to be separated and solely adjudicated.

[17.] The parties further agreed that the following was common cause: the date of arrest – 10 September 2014; the plaintiff was never granted bail and was released from detention on 29 January 2019; the section 3 letter of demand in

terms of Institution of Legal Proceedings Act was served on 20 June 2019 and summons was served on all defendants on the 20th of January 2021.

[18.] The plaintiff testified in respect of the special pleas and confirmed his arrest, including its details, and the date of release aforementioned. During his detention he was legally represented from his second appearance at the criminal trial and appeal, with the mandate, in his own words, to get him out of prison and custody. He never discussed the institution of a civil claim against the Defendants with his legal representatives at the time. Following his release, around February 2019, he was advised by his friend's girlfriend to seek legal assistance for a civil claim. He thereafter consulted with his attorney and gained knowledge of his right to sue.

STATUTORY FRAMEWORK

[19.] The debts that are the basis of the plaintiff's claims each qualify as "debts" within the scope defined in section 1(1)(iii) by the Institution of Legal Proceedings Act.

[20.] To the extent relevant, s 3 of the Institution of Legal Proceedings Act provides as follows:

''(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 intentions 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 proceeding(s) –

(i) Without 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 section 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 subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.''

[21.] Section 11(d) of the Prescription Act provides that the period of prescription shall be:

"save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[22.] Section 12 of the Prescription Act provides as follows:

*"**12 When prescription begins to run***

(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."

WHEN DOES PRESCRIPTION BEGIN TO RUN FOR THE UNLAWFUL ARREST AND DETENTION

i. Continuous wrong

[23.] For purposes of these proceedings, the court is only called upon to determine when the prescription began to run for the claims of unlawful arrest and unlawful dentition.

[24.] The plaintiff pleaded multiple causes of action, each giving rise to a different debt.

[25.] It is the plaintiff's case that prescription began to run after his conviction and sentence were set aside on 29 January 2019. In replication to the special plea, the plaintiff stated that:

[25.1.] His arrest was at all times linked to his detention which was continuous; and

[25.2.] The arrest and detention amounted to deprivation of liberty and personality interest which constituted a continuous wrong until his release;

[26.] The plaintiff's argument appears to be that their claim for unlawful arrest and subsequent detention should be considered as a continuous transaction, not complete until the outcome of their criminal prosecution, which resulted in the setting aside of his conviction and sentence. The contention is that his arrest and detention, though separate legal processes, are interconnected and should be viewed as part of a single ongoing wrong.

[27.] However, this position is in contrast to the established principles that there is a distinction between a single completed wrongful act and a continuous wrong in the course of being committed. While a single wrongful act may give rise to a single debt, a continuous wrong is seen as generating a series of debts arising moment by moment as long as the wrongful conduct persists.[1]

[1] Barnett v Minister of Land Affairs 2007 (6) SA 313 (W) at para 20 and 21

[28.] In this context, the courts indicate that an unlawful arrest is not inherently a continuing wrong, nor is it necessarily linked to any subsequent unlawful detention. Arrest and detention represent a separate and distinct legal process. While both involve the deprivation of an individual's liberty, this shared outcome does not merge them into a single legal process. [2] Each may be considered a distinct cause of action, with its own legal implications and limitations. Thus, in a case of unlawful arrest and detention, the debt arises from the moment of his arrest and each day in detention constitutes a new debt as long as the wrongful conduct endures.[3]

[29.] This reinforces that the plaintiff's claim should be analysed as based on separate causes of action, rather than as a single continuous transaction.

[30.] The position would be different had the Plaintiff pleaded malicious arrest or depravation of liberty which differs from unlawful arrest or depravation. In instances of unlawful arrest or depravation, the defendant or someone acting on their behalf unjustifiably causes the deprivation; malicious deprivation of liberty occurs under the pretence of a legitimate judicial process where an abuse of state legal mechanisms to deprive a plaintiff of their liberty. Therefore malicious depravation is executed, not by the defendant, but through the mechanisms of the state through a valid judicial process. Similar to malicious prosecution, The plaintiff would have to allege and prove that the defendant initiated this deprivation without reasonable and probable cause and with malicious intent. If the deprivation leads to a criminal prosecution, the plaintiff must also show that the prosecution failed to succeed in their claim. [4]

[2] Raduvha v Minister of Safety and Security and Another (CCT151/15) [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) (11 August 2016)

[3] Lombo v African National Congress 2002 (5) SA 668 (SCA) at para [26] and Minister of Police v Yekiso 2019 (2) SA 281 (WCC) at para [19].

[4] Neethling and Potgieter Law of Delict 8 ed (2020) at 398-399.

[31.] For the arrest and detention of the plaintiff to be considered a continuous transaction, *viz*, a continuous wrong from the arrest to the conclusion of criminal proceedings, the plaintiff would have needed to allege or plead the elements necessary for malice and lack of reasonable and probable cause. However, the plaintiff presented his case for unlawful arrest and detention separately and distinctly, without any allegations of malice or animus *iniuriandi*, unlike his claim for malicious prosecution where he specifically pleaded the relevant elements.

[32.] Therefore, the Plaintiff's claims for unlawful arrest and detention do not constitute a continuous wrong.

ii. <u>Section 12(3) of the Prescription Act</u>

[33.] The plaintiff further relied upon the provisions of section 12(3) of the Prescription Act alleging that during the period of his arrest and detention he was not aware or in a position to establish whether he had a cause of action, further, that had no knowledge that he had a right of claim against the defendants.[5] His awareness or knowledge of the claim only came after he consulted with his attorney in 2019 and only became aware thereof, following "…*consultation with his attorney of record on the 2019*".[6]

[34.] Prescription, subject to statutory limitations, commences running as soon as the debt is due or immediately claimable.[7] This occurs when all the necessary facts that a creditor must prove to succeed in their claim against a debtor are established, or in simpler terms, when everything has occurred that would

[5] 001-64 – Replication at para 6.4.2
[6] 001-64 – Replication at para 6.4.2
[7] Section 12(1) Prescription Act No 68 of 1969

allow the creditor to take legal action and pursue their claim.[8] In a delictual claim, as in this instance, the requirements of 'fault' and 'unlawfulness' are not factual components of a cause of action; rather, they are legal conclusions that should be deduced from the facts that have been determined.[9]

[35.] More specifically, in instances of unlawful arrest and detention, the minimum necessary facts needed to succeed in such claims include that the defendant or their agent deprived the plaintiff of their liberty, which is prima facie wrongful.[10]

[36.] It is trite that a party invoking the defence of prescription bears the onus to prove and establish such defence. If a defendant claims that a debt has been prescribed, it bears the evidentiary burden to prove the plea. This includes establishing the date when the plaintiff became aware of the debt (whether through actual knowledge or constructive knowledge). Only if the defendant has made a prima facie case does the burden shift to the plaintiff.[11]

[37.] For a debt to become due and for the prescription period to begin according to section 12(3) of the Prescription Act, it is necessary for the creditor to be aware of both the identity of the debtor and the underlying facts from which the debt arises.

[38.] Notably, section 12(3) does not mandate that the creditor must be cognizant of the debtor's actions being wrongful and legally actionable before the debt can be considered due or before prescription can commence. This distinction

[8] Truter and Another v Deysel [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at paras [15] to [19]
[9] *ibid* at [16]
[10] Zealand v Minister of Justice and Constitutional Development 2008 (4) SA 458 (CC) at para 25; Minister of Finance and Others v Gore NO (230/06) [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) at para 17
[11] Gericke v Sack 1978 (1) SA 821 (A) at 825H; Macleod v Kweyiya [2013] ZASCA 28; 2013 (6) SA 1 (SCA) para 10

is crucial as it pertains to legal interpretations or conclusions rather than factual awareness[12]. On this issue, Justice Zondo noted in ***Mtokonya v Minister of Police***[13](**Mtokonya**) that :

"[36] 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 the facts which a creditor would need to prove in order to establish the liability of the debtor."

[39.] in ***MEC for Health, Western Cape v M C***[14], the Supreme Court of Appeal outlined how knowledge should be applied as follows:

"[8] Once the facts from which a debt arose (primary facts) have been determined, the enquiry turns to the plaintiff's knowledge of the primary facts. Section 12(3) therefore brings into play a further set of facts. They inform the determination of when the plaintiff had actual knowledge of the primary facts or objectively should reasonably have had knowledge thereof. Although there may be some overlapping of facts, it is important to bear in mind that these are distinct enquiries."

[40.] In the context of section 12(3), actual knowledge refers to the creditor's subjective awareness, while with respect to the deemed knowledge, the constitutional court in ***Le Roux and Another v Johannes G Coetzee and Seuns and Another***[15] held that:

[12] Links v Member of the Executive Council, Department of Health, Northern Cape Province 2016 (4) SA 414 (CC) at para 47

[13] 2018 (5) SA 22 (CC) at [36] and [62] to [63]

[14] MEC for Health, Western Cape v M C (1087/2019) [2020] ZASCA 165 (10 December 2020)

[15] Le Roux and Another v Johannes G Coetzee and Seuns and Another 2024 (4) BCLR 522 (CC) at para 40; Brand v Williams 1988 (3) SA 908 (C) at 916

"[175] For purposes of section 12(3), a creditor's knowledge includes knowledge which he may reasonably be expected to have acquired. In the absence of justification, knowledge of non-material facts may therefore be sufficient to lead the court to conclude that the creditor had constructive knowledge as envisaged in the proviso to sub-section (3). A creditor will be deemed to have had knowledge of the identified facts at the time when a reasonable person in the position of the creditor would have deduced the material facts from which the debt arose, or if it was reasonable for a person in the position of the creditor to have made such enquiries relevant to ascertaining the material facts.[136]

[176] Accordingly, while the test for reasonable care for purposes of section 12(3) is objective, what is reasonable is measured against the standard of a reasonable person with the characteristics of the creditor. It is crucial to emphasise that, by reason of the nature of the enquiry envisaged in section 12(3), the enquiry is fact-specific. In other words, what is reasonable must be determined in the context of the factual circumstances of each case. Consequently, it serves very little purpose to seek guidance in the decisions of other cases."

[41.] In ***Drennan Maud & Partners v Pennington Town Board*** Olivier JA stated[16]:

"Section 12 (3) of the [Prescription] Act provides that a creditor shall be deemed to have the required knowledge 'if he could have acquired it by exercising reasonable care'. In my view, the requirement 'exercising reasonable care' requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of

[16] Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA) at 209F-G

those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises"[17]

[42.] In matters of unlawful arrest and detention, the relevant material facts to be considered from a creditor's pleaded claim include the acts or omissions that pertain to wrongfulness or unlawfulness. It is not necessary for the creditor to know that these material facts legally support a conclusion of wrongfulness or unlawfulness; it is enough to have actual or deemed objective awareness of facts that could be characterized as wrongful or unlawful. The legal consequences must be derived from these facts. Therefore, the prescription period is not delayed until the creditor fully appreciates the extent of their rights[18]. To hold otherwise would undermine the purpose of the Prescription Act, which aims to protect litigants from delays caused by litigants who do not enforce their rights promptly. [19]

<u>DISCUSSION</u>

[43.] As previously mentioned in this judgment, the plaintiff's claims do not constitute a continuous wrong that would delay the start of the prescription period until the conclusion of his criminal proceedings. Therefore, prima facie, the plaintiff's claim for unlawful arrest began when immediately after he was arrested and deprived of his liberty on 10 September 2014 by members of the SAPS. Regarding his detention, the prescription began to run each day of his detention, as each day constituted a new and separate debt as long as the wrongful conduct continued.

[44.] In his replication and constrained to his described claim, the plaintiff invoked section 12(3) of the Prescription Act to assert that he did not know he had a

[17] *Ibid* at 209F-G
[18] Le Roux (supra) n15 at 170 - 171
[19] Minister of Finance and Others v Gore (supra) n10 at para 16

right to claim against the defendant. He further asserted that due to his detention, he was not aware, nor in a position to determine, whether he had a cause of action. According to his version, he only became aware of such a right or cause of action after consulting with his attorney, following a friend's girlfriend's advice to seek legal assistance, after his conviction and sentence were set aside in 2019.

[45.] In determining whether the defendants have met their burden of proof, it is acknowledged that they face difficulties when the facts are exclusively within the plaintiff's knowledge. In such cases, although the defendants' burden does not shift[20], less evidence is required to establish a prima facie case than would typically be necessary in other circumstances. [21]

[46.] The plaintiff states that he was first legally represented from his second court appearance. He had legal representation throughout the criminal trial and his detention, with the primary mandate on his version being to secure his release from prison. He was also represented by Legal Aid South Africa during his appeal.

[47.] The plaintiff's incarceration did not prevent him from instructing an attorney to investigate or initiate a civil claim. He does not claim that he was denied access to legal representation or hindered by any superior force as outlined in section 13(1)(a) of the Prescription Act. [22]

[20] Macleod(supra) n11 at para 10
[21] Gericke (supra) n11 at 827 E – G.
[22] Skom v Minister of Police and Others (285 & 284/2014) [2014] ZAECBHC 6 (27 May 2014) at para 7

[48.] At most, the Plaintiff was unaware that he had a legal remedy against the defendants throughout his arrest and detention. However, his lack of knowledge regarding the right to claim, the cause of action, or the appreciation of wrongfulness constitutes a legal conclusion, not the material facts required to support it.

[49.] In respect of his actual knowledge, the plaintiff averred that he had no knowledge of who the defendants would be. Objectively, a reasonable person in the plaintiff position would have deemed knowledge of the identity of debtors as police officials and the facts, including the acts and/or omissions from which the debts arose. There is no evidence that he could not have acquired such knowledge by exercising reasonable care.

[50.] For the aforementioned reasons, I am satisfied that the plaintiff knew the identity of the defendants and the facts from which the debt arose on 10 September 2014, regarding the arrest and each day of his continued detention.

[51.] Therefore, following the civilian method of calculation[23], the summons needed to be served by midnight on 09 September 2017 to interrupt the running of the prescription for the unlawful arrest claim. Since the summons were served on 20 January 2021, the debt was extinguished by prescription.

[52.] Consequently, I find that Claim A has been extinguished by prescription, and the defendants' special plea regarding this claim is upheld.

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[23] Kleynhans v Yorkshire Insurance 1957 (3) SA 544 (A)

[53.] The plaintiff's claim for unlawful detention arose on 10 September 2014, as he was detained from his arrest until his release on 29 January 2019.

[54.] Since each day of detention constitutes a new and separate debt for the purposes of section 11(d) of the Prescription Act, the unlawful detention prior to 21 January 2018, three years before the service of summons on 20 January 2021, is extinguished by prescription. However, the plaintiff's claim for unlawful detention from 21 January 2018 onwards has not been prescribed.

[55.] I therefore find that the defendants' special plea regarding the prescription of the plaintiff’s unlawful detention before 21 January 2018 is upheld.

COMPLIANCE WITH SECTION 3 OF THE INSTITUTION OF LEGAL PROCEEDINGS ACT

[56.] The primary purpose of a section 3(1) notice under the Institution of Legal Proceedings Act is expediency, enabling the relevant organ of state to conduct thorough investigations into the claim. This process allows the organ of state to decide whether to settle the claim or contest the proposed legal action.[24]

[24] Mohlomi v Minister of Defence (CCT41/95) [1996] ZACC 20; 1996 (12) BCLR 1559; 1997 (1) SA 124 at para 9 ; reaffirmed in Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd (293/09) [2010] ZASCA 27; 2010 (4) SA 109 (SCA) at para 13

[57.] The plaintiff’s notice was served on 20 June 2019. He is required to serve such notice within six months from the date on which the debt became due. The notice was not served within six months from the date when the debt for the unlawful arrest became due, which was on 10 September 2014.

[58.] Regarding the claim of unlawful detention, the notice needed to be served within six months from when each day's debt became due or in other words, each day of detention. Since the plaintiff served his notice on 20 June 2019, he has only complied with section 3(2) for debts arising six months prior to that date, from 20 December 2018 to the date of his release on 29 January 2019.

[59.] In terms of section 3(4)(b)(i) of the Prescription Act, the plaintiff is barred from applying for condonation for debts that have been extinguished by prescription, which includes the claim for unlawful arrest and the unlawful detention claim prior to 21 January 2018.

[60.] The effect of the plaintiff's non-compliance with the Institution of Legal Proceedings Act and the debts extinguished by prescription is that, without any application for condonation, he only has a valid claim for unlawful detention from 20 December 2018 to 29 January 2019.

[61.] The plaintiff’s counsel argued that if the court finds that the claims for unlawful arrest and detention constituted a continuous wrong, making the debts arise only on the date of his release on 29 January 2019, then the notice under section 3 was timely as it was served on 20 June 2019. Furthermore, it was

argued that if the court finds differently, it is empowered to condone the late service under section 3(4) of the Institution of Legal Proceedings Act, which would only apply to the portion of the debt not extinguished by prescription, from 21 January 2018 to 29 January 2019.

[62.] Section 3(4) of the Institution of Legal Proceedings Act states that where an organ of state relies on a creditor's failure to serve notice in accordance with section 3(2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

[63.] Compliance with the provisions of section 3(2) of the Institution of Legal Proceedings Act is statutory, and applying to a court for condonation requires a formal application supported by an affidavit. Section 3(4) specifies that the court must be satisfied that the three requirements under section 3(4) are met before it can exercise discretion to condone.[25]

[64.] A party must apply for condonation as soon as it realizes that such non-compliance needs to be addressed. This realization may occur when the notice is served, when objections are received[26], or later when a defendant’s special plea is filed, at which point a prudent litigant would promptly apply for condonation to avoid accusations of unreasonable delays[27].

[25] Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd (supra) n24 at para 11
[26] Madinda v Minister of Safety and Security, Republic of South Africa (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008)
[27] Minister of Public Works v Roux Property Fund (Pty) Ltd 779/2019) [2020] ZASCA 119 (1 October 2020) at para 29

[65.] In cases involving statutory time frames, non-compliance is a jurisdictional issue that must be resolved before the court can consider the dispute. If statutory provisions are not followed, the court lacks jurisdiction unless condonation is granted, making an application for condonation mandatory unless otherwise specified. Without such an application, the court cannot assist a party.[28]

[66.] Since the defendants' plea was served around 20 April 2021, the plaintiff has failed to apply for condonation under section 3(4) of the Institution of Legal Proceedings Act, and no such formal application is before this court. The request for condonation is therefore made from the bar, without any satisfactory explanation of good cause or assurance that the defendants would not be unreasonably prejudiced.

[67.] Therefore, in light of the above, it is found that, having failed to apply for condonation under the provisions of the Institution of Legal Proceedings Act, this court is neither invited to be satisfied[29] nor able to exercise its discretion to condone the non-compliance.

[68.] The special plea regarding non-compliance with the Institution of Legal Proceedings Act concerning the unlawful arrest and unlawful detention (for debts prior to 20 December 2018) is upheld.

[28]Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others (2002) 23 ILJ 1282 (LC) at para 13; South African Transport And Allied Workers Union (SATAWU) and Another v Tokiso Dispute Settlement and Others (JA 117/13) [2015] ZALAC 12; [2015] 8 BLLR 818 (LAC); (2015) 36 ILJ 1841 (LAC) (5 May 2015) at para 19; Chauke and Others v Minister of Police and Others (15017/2017) [2022] ZAGPJHC 609 (29 August 2022)

[29] Madinda v Minister of Safety and Security (supra) n26at para 8.

COSTS

[69.] The plaintiff had ample opportunity to reconsider his approach once the special plea was raised but failed to take the necessary remedial steps to apply for condonation under section 3(4) of the Institution of Legal Proceedings Act, as he should have. Therefore, given that the defendants have been successful in prosecuting their special pleas, it is well-established that the general rule regarding costs is that the successful party is entitled to them. Consequently, there is no reason why the defendants in this matter should not be awarded costs.

ORDER

[70.] In the result, I make the following order:

1. The defendants' special plea of prescription concerning Claim A is upheld.

2. The defendants' special plea of prescription to Claim B is upheld concerning the plaintiff's detention prior to 21 January 2018.

3. The Defendants' special plea regarding the plaintiff's non-compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, in respect of claims A and claim B, for debts prior to 20 December 2020, is upheld.

4. The plaintiff is to pay the costs on a party and party scale.

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KT MATHOPO, AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

<u>APPEARANCES:</u>

On behalf of the plaintiff: JMV Malema and L Mashilane

Instructed by: TJP Attorneys

Bloemfontein

On behalf of the defendant: Adv. R Rathidili SC and N Badat

Instructed by: State Attorney, Johannesburg

Date of hearing: 06 March 2024

Date of judgment: 03 June 2024