



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appeal case number: A138/2022

Court a quo: 13823/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: 13 February 2024 Signature: _____

In the matter between:

SELLO JONAS MAKENA

Appellant

and

MINISTER OF POLICE

1st Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

LT COL SHIMI JOHANNES MOJELA

3rd Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] At the core of this appeal is the appellant's application for condonation in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The court *a quo* dismissed the application but granted the appellant leave to appeal to the full court of this division.

[2] The issue for determination by this appeal court is crisply, whether the court *a quo* was correct in its finding and more specifically whether its reliance on the judgment of ***Mtokonya v Minister of Police*** 2018 (5) SA 22 (CC) was legally well founded and justified.

[3] It was submitted that the facts in ***Mtokonya*** are distinguishable from the current matter.

B. BACKGROUND:

- [4] It is common cause between the parties that the Appellant was arrested on 12 July 2014 and appeared in court for the first time on 14 July 2014. The matter was then postponed for a bail application to 21 July 2014. The Appellant was granted bail and paid the amount of R2000.00.
- [5] The Appellant was prosecuted by the public prosecutor in the employment of the Second Respondent and was acquitted in terms of section 174 of the Criminal Procedure Act 51 of 1977 on 14 May 2018.
- [6] The Appellant, also a police officer, was throughout and at all relevant times legally represented as from July 2014 until the date of his acquittal, and it appears even thereafter.
- [7] In preparation to sue the respondents, a notice in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 was served on the first and second respondents on 23 October 2018.
- [8] The appellant thereafter issued summons against the respondents on 28 February 2019 for unlawful arrest and detention, malicious prosecution, past loss of income, loss of future employability, legal costs and general damages.
- [9] An application for condonation for the late filing of the appellant's notice in terms of section 3(1) of the Institution of Legal Proceedings against Organs of State Act, 40 of 2002 was dismissed by the court *a quo*.

[10] This was because as the court *a quo* found, by the time the condonation application was made, the claim for unlawful arrest and detention itself had already prescribed. At any rate, the notice was supposed to have been served within 6 months from the date on which the debt arose.

[11] As to when the debt arose, the parties hold starkly divergent views, namely:

11.1 The appellant avers that the debt only arose when he was acquitted on 14 May 2018.

11.2 The respondents on their side argued that the debt arose as early as 12 July 2014 when the appellant was arrested, or at the latest on 21 July 2014 when the appellant was released on bail. This would have resulted in the claim prescribing on 11 July 2017 or at the latest on 20 July 2017.

[12] It is common cause between the parties that the notice was served on the respondents on 24 October 2018, regard being had to the respondent's date stamp confirming receipt thereof. It is the appellant's view the notice was served on time and whereas the respondent's view is that service was not timeous.

C. ANALYSIS

[13] The Constitutional Court in *Mtokonya v Minister of Police*¹ had to decide on the issue of extinctive prescription, whether section 12(3) of the Prescription Act 68 of 1969 requires a creditor to have knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable before prescription may start running against the creditor.

[14] In *Mtokonya* as in *casu*, the applicant had instituted action against the respondent for damages for wrongful arrest and detention by the South African Police Service. The appellant had been arrested and released about 5 days later without being charged. Two years and ten months later he had a discussion with a neighbour who is a lawyer. It was then when he realised that he had a possible claim against the respondent for unlawful arrest and detention. Summons was served against the defendant 9 months later. The respondent's plea of prescription was upheld, through the Supreme Court of Appeal and confirmed by the Constitutional Court.

[15] The Constitutional Court held that:

*"...the knowledge that section 12(3) requires a creditor to have is "knowledge of facts from which the debt arises". It refers to the "facts from which the debt arises". It does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy."*²

¹ Mtokonya v Minister of Police 2018 (5) SA 22 (CC).

² Ibid para 37.

[16] The appellant avers that the debt only arose when he was acquitted and that he could not institute the claims while the criminal charges were still pending. It is noteworthy that the appellant admits that he was throughout aware of the fact that he was unlawfully arrested and detained.³

[17] The appellant's contention that the cause of action entitling him to take legal action against the respondent only from the date of his acquittal on 14 May 2018 does therefore not enjoy any judicial support in the light of the decision in ***Mtokonya***.

[18] The fact that the appellant was himself a police officer militates against any assertion that he was completely oblivious of the wrong that had been perpetrated against him by his fellow officers on behalf of the 1st respondent.

[19] Contrary to submissions made by appellant's counsel, there is no factual basis on which to distinguish the decision in ***Mtokonya***.

D. CONCLUSION

[20] We therefore find that the decision by the court *a quo* dismissing the applicant's application for condonation for the late giving of the notice in terms of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 cannot be interfered with. The appeal accordingly fails and the following order is made:

³ Founding affidavit para 4.3 and 4.4

The appeal is dismissed with costs.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

I agree.

H. Kooverjie

Judge of the High Court

Gauteng Division, Pretoria

I agree.

L. Retief

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 22 November 2023

Date of Judgment: 13 February 2024

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 13 February 2024.