REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: **72053/2015**

DELETE WHICHEVER IS NOT APPLICABLE
(1)REPORTABLE: YES / ~~NO~~.
(2)OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3)REVISED.

DATE: 26 FEBRUARY 2024

SIGNATURE:

In the matter between:

ENG CHUN LIU Plaintiff

and

THE MINISTER OF FINANCE First Defendant

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Second Defendant

MINISTER OF POLICE Third Defendant

THE NATIONAL PROSECUTING AUTHORITY OF THE

REPUBLIC OF SOUTH AFRICA Fourth Defendant

JUDGMENT

RUST, AJ

1. The Plaintiff instituted an action against the Defendants claiming damages arising out of the alleged malicious prosecution and/or malicious criminal proceedings against him. On 19 August 2013, the Plaintiff was acquitted on all charges laid against him by the Fourth Defendant.

2. The said action was instituted against the Second Defendant, the Commissioner for the South African Revenue Services ("SARS") on 24 October 2016.

3. On 18 November 2016, SARS raised a special plea to the Plaintiff's particulars of claim, namely that the period of three years has lapsed since the date when the cause of action based on malicious prosecution or proceedings arose and the date when the Plaintiff instituted proceedings for malicious prosecution or proceedings against SARS. The Second Defendant therefore pleaded that the Plaintiff's claim based on malicious prosecution or proceedings has prescribed.

4. The Plaintiff filed a replication to the Second Defendant's special plea, denying that the Plaintiff's claim against SARS became prescribed, and more specifically that –

    4.1 on 19 February 2014, Plaintiff served a notice of intended legal proceedings in terms of section 3 of the Institution of Legal Proceedings

Against Certain Organs of State, Act 40 of 2002 (which notice was notably served both on the Third Defendant and on SARS);

4.2 the aforesaid notice constituted a process as envisaged in section 15 of the Prescription Act 68 of 1969 ("*the Prescription Act*"), whereby the Plaintiff claimed payment of the debt from the debtor, i.e. the Second Defendant;

4.3 accordingly, the running of prescription was interrupted by service of the aforementioned notice;

4.4 in addition and/or in the alternative, Plaintiff on 15 July 2016 served a joinder application (to which the proposed amended particulars of claim, setting out Plaintiff's cause of action against SARS upon its joinder, was appended) on Second Defendant;

4.5 the aforementioned service of the joinder application with amended particulars of claim appended thereto, constituted a process within the meaning of section 15 of the Prescription Act;

4.6 in the premises, the running of prescription was also interrupted by service on the debtor, i.e. Second Defendant of a process, i.e. the application for joinder, whereby the creditor, i.e. Plaintiff claimed payment of the debt.

4.7 Plaintiff therefore pleads that the running of prescription in respect of Plaintiff's claim against Second Defendant was interrupted in terms of section 15 of the Prescription Act, by service of the notice referred to above on 19 February 2014, and/or by means of the application for joinder served on Second Defendant on 15 July 2016.

5. On 17 March 2022, SARS filed an application in terms of rule 33(4) of the Uniform Rules of Court, seeking the separation of their special plea from the Plaintiff's amended particulars of claim against the First to the Fourth Defendants, namely that the period of three years has lapsed since the date when the cause of action based on malicious prosecution or proceedings arose and the date when the Plaintiff instituted proceedings for malicious prosecution or proceedings against SARS.

6. Bokako AJ on 25 August 2022 ordered that the question whether the Plaintiff's claim has prescribed is separated and is to be adjudicated separately from the merits of the claim.

7. The Plaintiff on 7 September 2022 filed amended particulars of claim and an amended replication to the Second Defendant's plea of 14 November 2016. In response hereto, the Second Defendant on 27 February 2023 filed an amended plea, raising a second special plea entitled "*non-compliance with the provisions of section 89 of the Customs and Excise Act*" on the basis of which SARS pleads that the Plaintiff's claim in respect of the seized goods has prescribed and/or become extinct pursuant to the provisions of section 96(1)(a)(i) of the Customs and Excise Act 91 pf 1964.

8. It is common cause between the parties that the Second Defendant has not applied in terms of rule 33(4) for the separation of its second special plea. In this regard, counsel for SARS, Ms Kollapen, submits that, although the separation order of 25 August 2022 has been taken over by subsequent events, both the first and second special pleas are concerned with the question whether the Plaintiff's claim against SARS has prescribed, and that this court is therefore seized with both the first and second special pleas.

9. Rule 33(4) provides as follows:

"If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

10. If made prior to the trial, the application for separation must be made on notice, setting out the grounds for it.[1] At the trial, a court may also *mero motu* order a separation without an application from any party, but this should only be done if it appears to the court that the question of fact or law[2] may conveniently be decided either before any evidence is led or separately from any other issue.

11. In *Denel (Edms) Bpk v Vorster*[3] the Supreme Court of Appeal stated that:

"Before turning to the substance of the appeal, it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed as facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately."

---

[1] *Sibeka v Minister of Police* 1984 (1) SA 792 (W).

[2] The admissibility of evidence is a question of law and can be so decided: *Volker v Maree* 1981 (4) SA 651 (N); not whether it is relevant or material: *Van der Burgh v Guardian National Insurance Co Ltd* 1997 (2) SA 187 (E); *MEC for Public Works, Roads and Transport, Free State Province v Van der Merwe and Others; In re: Van der Merwe v MEC for Public Works, Roads and Transport, Free State Province and Others* [2023] 1 All SA 154 (FB).

[3] 2004 (4) SA 481 (SCA) at par [3].

12. Having given careful thought to the fact that SARS has not brought an application in terms of rule 33(4) for the separation of its second special plea, and that the grounds for such separation are not before this court to consider the notion of appropriateness in the context of the anticipated course of the litigation as a whole, this court cannot determine whether it is convenient to try the issue raised in the second special plea separately. A ruling was therefore made that this court is not seized with the second special plea, the evidence in respect of which may in any event conveniently be presented at the trial.

13. With regard to the special plea that was separated by means of the order of 25 August 2022, with which this court is seized, it is as a point of departure prudent to be reminded that the Plaintiff's claim against SARS is for the following damages suffered as a result of the conduct of the Defendants, as pleaded in the amended particulars of claim:

13.1 The cost reasonably expended by the Plaintiff in defending himself against the charges;

13.2 Damages for *contumelia*, deprivation of freedom and discomfort suffered;

13.3 Payment of interest on the first two items, calculated at the legally permitted rate per annum from date of summons to date of final payment; and

13.4 The return of goods retained, or payment of the value thereof.

14. While paragraph 1.1 of the special plea acknowledges all of the Plaintiff's claims arising out of the alleged malicious prosecution and/or malicious proceedings, Ms Kollapen, seemingly focussed only on the Plaintiff's claim

for the return of the goods retained, or payment of the value thereof, submits the following:

14.1 The goods in question were seized on 19 December 2006. The *causa* arose on the date of the seizure and any claim would accordingly have become prescribed on 18 December 2009.

14.2 By 18 December 2009, the Plaintiff had not instituted any action and only proceeded to join SARS as a party to the action on 24 October 2016. The Plaintiff's claim accordingly was prescribed even before it chose to join SARS as a defendant.

14.3 Even on a conservative interpretation of the facts, any claim the Plaintiff may have had against it, should have been instituted no later than 19 August 2016 being 3 years from the date the Plaintiff was acquitted on all charges. It is common cause that the Plaintiff did not institute the proceedings within the 3 year period from 19 August 2016.

14.4 The Plaintiff's replication seems to allude thereto that, due to the service of the section 3 notice in terms of the Institution of Legal Proceedings Against Organs of State Act on the Minister of Finance (while the notice was in fact served both on the Third Defendant and on SARS, but not on the First Defendant, as submitted by Ms Kollapen), prescription was interrupted in respect of its claim against the Commissioner. The Plaintiff's submission is unsustainable in the main due to the fact that SARS is governed by its own enabling legislation and at its helm is the Commissioner. Whilst SARS reports to the Minister of Finance, it is by no means under the control of the Minister of Finance. SARS is expected to and indeed does act impartially. None of SARS' actions are controlled by nor dictated to by the Minister of Finance and *vice versa*. The section 3 notice is therefore immaterial to SARS.

14.5 It is therefore incorrect and unreasonable to expect the Minister of Finance to communicate to SARS when litigation is instituted against the Minister, especially in circumstances where SARS was not even a party to the main action when same was instituted. Prescription could not be interrupted by service of summons on another party irrespective of the relationship between the parties and more especially where SARS is not a party to the main action when it is instituted. The joinder of SARS only in 2016 further speaks to the fact that there never has nor is there at present any obligation on the Minister or his office to engage SARS on potential litigation, even if same is instituted many years later.

14.6 In the same breathe SARS would have been completely unaware that the Plaintiff had instituted action against the Minister of Finance. In the absence of action taken in terms of section 89 and/or 96 of the Customs and Excise Act, there was no reason for SARS to anticipate any action given the lapse of 10 years from the date of seizure to the date of joinder. The Plaintiff's argument that prescription against SARS was interrupted by virtue of the service of the summons on the Minister of Finance is unsustainable and stands to be dismissed.

14.7 SARS submits that the Plaintiff's claim has prescribed on either a strict interpretation or a liberal interpretation on the date that the cause of action arose and the running of the 3 (three) year period therefrom.

14.8 Ancillary to that is that the relief sought is for restoration of the goods alternatively payment of the value thereof. No claim was made in terms of section 89 of the Customs and Excise Act to goods and as such same have been forfeited to the state.

15. Mr Jacobs for the Plaintiff submits that the Plaintiff was finally acquitted on all criminal charges on 19 August 2013, which is the date on which his claim on the basis of malicious prosecution or proceedings arose. Unless interrupted as contemplated in section 15 of the Prescription Act, the Plaintiff's claim against SARS would have prescribed on 18 August 2016. However, prescription was so interrupted by means of the following:

15.1 the service on 19 February 2014 of the notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002 on SARS (not on the First Defendant, as is submitted by Ms Kollapen); and / or

15.2 the service on 9 September 2015 of the combined summons on the First Defendant.

16. In respect of service of the summons on the First Defendant, Mr Jacobs submits that such service interrupted the running of prescription in respect of the Plaintiff's claim against the Second Defendant, *inter alia* for the following reasons:

16.1. In terms of section 2(1) of the Customs and Excise Act, the Second Defendant is charged with the administration of the Act, subject to the control of the First Defendant. Such envisaged control includes the power to influence the Second Defendant's behaviour, or the course of events. The element of control is legally regarded as a factor of prime importance in determining the existence or otherwise of a master and servant and/or dormant and sub-servient relationship.[4]

[4] Relying on *Colonial Mutual Life Assurance Society (Ptd) v MacDonald* 1931 AD 412 at 433 and 439; *Ongevalle Kommissaris v Onderlinge Versekerings Genootskap AVBOB* 1976 (4) SA 446 at 456H to 457A.

16.2. The officials identified and named in Plaintiff's amended particulars of claim, on whose conduct Plaintiff's claim for malicious prosecution / proceedings is based, at all relevant times were servants of State, as envisaged in section 1 of the State Liability Act 20 of 1957 (as amended).[5] The Second Defendant delegated its powers in terms of section 3 of the Customs and Excise Act, to the mentioned servants of State. In delegating its powers in terms of the Act, the Second Defendant acted under and subject to the control of the First Defendant.[6]

16.3. Both the First and Second Defendants are Organs of State, as contemplated in section 239 of the Constitution.

16.4. On 19 February 2014, the Second Defendant was served with a statutory notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, that identified the aforementioned servants of State on whose conduct reliance is placed for purposes of Plaintiff's action based upon malicious prosecution / proceedings.

16.5. Upon receipt of the aforementioned statutory notice, and when Plaintiff's combined summons was timeously served on the First Defendant on 9 September 2015, both the First and Second Defendants as closely connected Organs of State, knew (because it was expressly communicated or legally implied) and appreciated that:

16.5.1 Plaintiff's claim based upon malicious prosecution / proceedings, was based upon the conduct of the named and identified servants of State;

---

[5] With reference to *Mhlongo and Another N.O. v Minister of Police* 1978 (2) SA 551 (AD) at 566D and further.
[6] Relying on *SARS v Trent Finance (Pty) Ltd & Another* 2007 (6) SA 117 (SCA) at par 3.

16.5.2 Second Defendant had, in terms of section 3 of the Act, delegated its powers to the mentioned servants of State;

16.5.3 In delegating its powers in terms of section 3 of the Act, Second Defendant acted subject to the control of First Defendant;

16.5.4 In exercising control over Second Defendant, First Defendant directly and/or indirectly retained control over the servants of State, on whose conduct reliance is placed for purposes of Plaintiff's claim based upon malicious prosecution / proceedings;

16.5.5 Properly and holistically interpreted, First Defendant was statutorily empowered and entrusted with ultimate control, for purposes of the Act.

16.6 If the aforementioned facts and factors are considered within the context of section 15(1) of the Prescription Act, and the applicable jurisprudence, the timeous service of Plaintiff's combined summons upon First Defendant on 9 September 2015, also interrupted the running of prescription in respect of Plaintiff's claim based upon malicious prosecution / proceedings against Second Defendant.

17. Section 15(1) of the Prescription Act provides as follows:

"The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

18. Mr Jacobs referred the court to *Blaauwberg Meat Wholesalers*[7] where that court held as follows:

"[17] There are, no doubt, a great variety of factual possibilities which may arise in the context of deciding whether s 15(1) has been complied with. It is,

[7] *Blaauwberg Meat Wholesalers v Anglo Dutch Meats (Export)* 2004 (3) SA 160 (SCA) at par [17] – [18].

however, unnecessary to go beyond the facts of this appeal in order to decide its fate.

[18] It is, nevertheless, desirable, because of the approach adopted by the Court a quo, to allude to certain other considerations. The first is that, in the context of s 15(1), though not necessarily in relation to the amendment of pleadings, the existence of another entity which bears the same name as that wrongly attributed to a creditor in a process is irrelevant. That is not the creditor's concern or responsibility. Secondly, an incorrectly named debtor falls to be treated somewhat differently for the purposes of s 15(1). That that should be so is not surprising: the precise citation of the debtor is not, like the creditor's own name, a matter always within the knowledge of or available to the creditor. While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor (not necessarily the named defendant) of process in which the creditor claims payment of the debt. The section does not say '... claims payment of the debt from the debtor'. Presumably this is so because the true debtor will invariably recognise its own connection with a claim if details of the creditor and its claim are furnished to it, notwithstanding any error in its own citation. Proof of service on a person other than the one named in the process may thus be sufficient to interrupt prescription if it should afterwards appear that that person was the true debtor. This may explain the decision in Embling (supra), where the defendant was cited in the summons as the Aquarium Trust CC whereas the true debtors were the trustees of the Aquarium Trust. Service was effected at the place of business of the trust and came to the knowledge of the trustees. In the light of what I have said such service was relevant to proof that s 15(1) had been satisfied and was found to be so by Van Heerden J (at 700D, 701D)."

19. On the basis of the aforementioned legal principles, Mr Jacobs submits that, while the section 3 notice was served on SARS, the combined summons was initially served on the First Defendant, as the true debtor in control of the Second Defendant. Mr Jacobs furthermore referred to the remark in *Dynamic Sports Marine Products*[8] that a prescription defence that may be raised by a party that was not initially cited (in casu Second Defendant), may not succeed because the mentioned party knew not only of the action

[8] *Dynamic Sports Marine Products CC v Gutteridge and Others* [2015] JOL 33364 (GJ) at par 12.

instituted by the Plaintiff against another party with whom the non-cited party had a close nexus, but also because the non-cited party also knew that itself was the employer against whom the claim set out in the summons was aimed at. This legal principle alluded to in *Blaauwberg* and *Dynamic Sports Marine Products* is according to Mr Jacobs applicable *mutatis mutandis* to the facts of the present matter, as the Second Defendant who delegated its powers to the servants of the State concerned, is included in the term "true debtor".[9] Therefore service of summons on the First Defendant also interrupted the running of prescription of the claim against the Second Defendant.

20. In the analysis of the parties' submissions, the special plea was raised only in respect of the Plaintiff's claim for the return of the goods seized, or the monetary value thereof, and SARS seems to have abandoned its special plea in respect of the Plaintiff's other claims against it. The Plaintiff's claims against the Second Defendant are however based upon malicious prosecution and/or malicious criminal proceedings against him, which claims arose on the date of acquittal. The special plea as argued, is therefore not dispositive of the Plaintiff's claims against the Second Defendant, as set out in the amended particulars of claim.

21. Bearing in mind that the order to be made by this court is a final decision which cannot be corrected or altered or set aside by the trial judge, and which is definitive of the rights of the parties, and having considered the submissions on behalf of both parties, this court finds that the prescription of the Plaintiff's claims against the Second Defendant was interrupted as contemplated in section 15(1) of the Prescription Act, by means of the service on 19 February 2014 of the notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002 on SARS, and / or the service on 9 September 2015 of the combined summons on the First Defendant.

[9] Also with reference to *Du Toit v Highway Carriers and Another* 1999 (4) SA 564 (W), at 569 J to 570 D.

I make the following order:

1. The special plea is dismissed with costs.

2. It is declared that the prescription of the Plaintiff's claims against the Second Defendant, as set out in the amended particulars of claim, was interrupted as contemplated in section 15(1) of the Prescription Act 68 of 1969, by means of the service on 19 February 2014 of the notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002 on the Second Defendant, and / or the service on 9 September 2015 of the combined summons on the First Defendant, and that the Plaintiff's claims against the Second Defendant based upon malicious prosecution and/or malicious criminal proceedings against him, have therefore not prescribed.

Appearances:

Counsel for the Second Defendant:	Adv K Kollapen
Instructed by:	Megan Labuschagne Van Zyl Le Roux Inc
Counsel for the Plaintiff:	Adv M Jacobs
Instructed by:	Morne Day Seymore Du Toit & Basson Inc