

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

Case No: 73418/2016

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

DATE **15 February 2024**

SIGNATURE.....

In the matter between:

PETER THEMBEKILE MALGAS

First Plaintiff

ALFRED DISCO BIYELA

Second Plaintiff

BOSWELL JOHN MHLONGO

Third Plaintiff

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Defendant

SPECIAL PLEA J U D G M E N T

MAKHOPA, J

- [1] In June 2004 the North West High Court convicted and sentenced the plaintiffs for a number of serious charges. They were sentenced to life imprisonment.
- [2] The defendant is the minister of justice of correctional service cited in terms of the State Liability Act, 20 of 1957.
- [3] In order to prosecute their leave to appeal, the plaintiffs approached the Mahikeng Justice Centre for assistance.
- [4] The centre required the transcript, which transcripts the centre could not provide itself with. The centre asked the plaintiff to make their own arrangements to obtain the records.
- [5] The family and friends of the plaintiffs paid for the transcripts during August 2006. A complete and judicially approved transcript could only be provided to the plaintiffs during October 2012.
- [6] In 2015 the constitutional court set aside the conviction and sentence of plaintiffs. The plaintiffs were released from custody in 2015.
- [7] The main action seeks an order declaring that the detention of the plaintiffs was wrongful, and that the defendant is liable in delict for the said wrongful detention and deprivation of liberty. The issues of quantum is to be postponed *sine die*.
- [8] The matter has been set down for trial from 12 February 2024 to 23 February 2024 and on the first day of trial the defendants sought to pursue the special plea which formed part of its plea to the amended particulars of claim.

[9] The defendant's special plea is set out as follows in paragraphs 1.6 – 1.12 of the defendant's special plea of prescription.

"1.6. The plaintiffs instituted legal proceedings against the Defendant by way of a Summons and which action was instituted on 6 October 2016.

"1.7 The said action was instituted after the lapse of a period of more than 3 (three) years from the date on which the Plaintiffs' debt became due and/or their cause of action arose and which debt became due in October 2012 as per the Plaintiff cause of action.

1.8 The plaintiffs' claims against the Defendant have thus become prescribed in terms of the provision of Section 11 and 12 of the Prescription Act 68 of 1969.

1.9 In the alternative to the above , and in the event the Plaintiffs rely on the provisions of Section 13 of the Prescription Act *supra*, then and in that event the defendant avers that the First Plaintiff was released from custody on 15 March 2015 and he had a period of 1 (one) year to issue Summons against the Defendant.

1.10. The Defendant avers further that Second and Third Plaintiffs were released from custody on 25 June 2015 and they had a period of (one) year from the date of their release to issue to issue Summons against the Defendant.

1.11 The Plaintiff issued Summons against the Defendant on 4 October 2016 and caused them to be served on 6 October 2016 and this after the lapse of a period of 1 (one) year from the respective dates on which they were released from custody.

1.12 The Plaintiffs' claim against the defendant have become prescribed in term of the provisions of Section 13 of the Prescription Act and consequently their claim stand to be dismissed with cost"

[10] In a nutshell it is submitted on behalf of the defendant that, the cause of action in respect of the alleged delict prescribed in February 2010, alternatively on 12 October 2015.

- [11] The plaintiffs action was only instituted and served on the defendant on the 18th September 2016 and 6 October 2016, respectively.
- [12] The defendant relies on the decision of *Mtokonya v Minister of Police*¹ and argues that the plaintiffs knew the identity of the debtor on or before February 2007, alternatively 12 October 2015 and knew the facts from which their debt arose on either of the two dates.
- [13] It is again submitted on behalf of the defendant that since the plaintiffs knew of the facts from which their debts arose at very least in November 2006 and or latest 12 October 2012. The plaintiffs therefore were fully aware of the identity of the defendant and the facts from which their debt arose.
- [14] Again counsel for the defendant refers the court to the decision in *Truder v Dyse*² and contends that the plaintiffs cause of action arose in November 2006 alternately their debts became due on 12 October 2012.
- [15] Finally it is submitted on behalf of the defendant that a debt or claim does not become due when the facts from which it arose are known to the claimants.³
- [16] The plaintiffs disagree that the debts was due in 2012 when the State provided the full record of proceeding to the plaintiffs.
- [17] On behalf of the plaintiffs it is submitted that it was only upon the vitiation of the plaintiffs convictions and sentence by the constitutional court in 2015 that the debts became due.

¹ (2017) ZA CC 33.

² (2006) SA17 (SCA).

³ *Eskom v Bojanala Platinum District 0498 (T)* at para 16 and *Minister of Police v Gove* (2006) ZASCA 98.

- [18] In *Uniliver Bestfoods Robertsons (Pty) Ltd v Sooma*⁴ the Supreme Court of Appeal quoted De Villers C J in the *Lemue* case with approval when he said ‘while a prosecution is actually pending its result cannot be allowed to be prejudged in the civil action’.
- [19] I agree with the decision in *Makhwelo v Minister of Safety and Security*⁵ at para 58 the court said the following “*In the case of arrest and detention there is a deprivation of liberty and loss of dignity which will be justified if there is a 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.*”
- [20] I am therefore of the view that the plaintiffs delictual claim against the defendant was only fully complete in 2015 when the Constitutional Court ruled in their favour.
- [21] I am furthermore of the view that the plaintiffs could not have been expected to have prejudged the outcome of the appeal at the Constitutional Court.
- [22] In addition, it is my view that when the plaintiffs instituted action against the State in 2016, their claim has not prescribed.
- [23] The plaintiffs ask for a special cost order against the defendant because of raising the special plea many years after the summons have been issued.
- [24] The defendant did not sufficiently address the court on the request for a punitive cost order but merely argued that the defendant has a right to raise the special plea.

⁴ 2007 (2) SA 347 (SCA) at Para 25.

⁵ 2017 (1) SA 274 (GJ)

[25] It is indeed so that the defendant has a right to raise the special plea during the trial.

[26] In respect of the special plea raised by the defendant I make the following order:

26.1 The defendant special plea of prescription is dismissed with cost of two counsel.

**MAKHOPA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD AND RESERVED JUDGMENT: 13 February 2024

JUDGMENT HANDED DOWN ON: 15 February 2024

Appearances:

For the Plaintiffs: Adv L de Klerk SC with Adv D Thaldar (instructed by) Gildenhuis Malatji Incorporated

For the Defendant Adv G Shakoane SC with Adv D D Mosoma (instructed by) State Attorney Pretoria.