

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates	YES/NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 2893/2019

In the matter between:-

DAVID THABO TLADI

1st Applicant / Plaintiff

JOHANNES SELLO MOTITSE

2nd Applicant / Plaintiff

HENDRIK THABANG MOLAOTSI

3rd Applicant / Plaintiff

and

THE MINISTER OF POLICE

Respondent/Defendant

JUDGMENT

FMM SNYMAN J

Introduction:

[1] This is an interlocutory application for adjudication of the defendant's special plea of prescription. The main actions

deal with claims of alleged unlawful arrests of the 3 plaintiffs, claims for their alleged injuries, treatment and *sequelae* as well as medical expenses.

[2] In a previous interlocutory application, the three matters with case numbers 2890/2019, 2895/2019 and 2893/2019 were consolidated, the merits and the *quantum* were separated in terms of Uniform Rule 33(4) of the Uniform Rules of the High Court and a declaratory order for compliance in terms of **Institution of Legal Proceedings against State Organs Act 40 of 2002** was granted.

[3] The court order dated 4 February 2021 granted by Mr Justice Hendricks DJP (as he then was) read as follows:

3.1. *"The merits of the following matters are consolidated and are to be heard simultaneously under case number 2893/2019 on date to be allocated by the Registrar:*

3.1.1 **HENDRICK THABANG MOLAOTSI vs MINISTER OF POLICE** (Case number 2893/2019);

3.1.2 **JOHANNES SELLO MOTITSWE vs MINISTER OF POLICE** (Case number: 2895/2019);

3.1.3 **DAVID THABO TLADI vs MINISTER OF POLICE** (Case number 2890/2019);

3.2. *The merits and quantum in respect of the following matters are separated in terms of Uniform Rule 33(4) and the quantum of the three matters are postponed sine die to be heard, separately from the merits, at a later stage:*

- 3.2.1 **HENDRICK THABANG MOLAOTSI vs MINISTER OF POLICE** (Case number 2893/2019);
- 3.2.2 **JOHANNES SELLO MOTITSWE vs MINISTER OF POLICE** (Case number: 2895/2019);
- 3.2.3 **DAVID THABO TLADI vs MINISTER OF POLICE** (Case number 2890/2019);
- 3.3. *The merits of the said matters referred to in paragraphs 1 and 2 above shall proceed as one action and the provisions of Uniform Rule 10 shall apply mutatis mutandis with regard to the consolidated actions;*
- 3.4. *The merits of the said matters shall proceed under case number 2893/2019;*
- 3.5. *A declaratory order is hereby issued in matters under the following case number 2893/2019, 2890/2019 and 2895/2019, to the effect that the applicants in all three of the said matters did comply with the provisions of the **Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002**, specifically sections 3(1) and 3(2) in that the Applicants gave notice of their intention to institute legal proceedings against the Defendant/Respondent within six months from the date that the debt became due.”*
- 3.6. *Ordering the Respondent to pay the costs of this application on a party and party High Court scale”.*

I will refer to this order as “*the court order dated 4 February 2021.*”

[4] In this application the applicants / plaintiffs are represented

by Adv BP Geach SC together with Adv FHH Kehrhahn and the respondent / defendant is represented by Adv K Mongale. For ease of reference I will refer to the parties as they are cited in the main action.

[5] The defendant opposes the claims of the plaintiffs (as set out in paragraph [1] above) on the grounds that the plaintiffs' arrests were executed lawfully and in terms of sections 40(1)(a) and 40(1)(b) of the **Criminal Procedure Act 51 of 1977** in that the plaintiffs committed offences in the presence of police officials and that there was a reasonable suspicion that the plaintiffs intended to commit further offences.

[6] The special plea raised by the defendant reads as follows:

"DEFENDANT'S SPECIAL PLEA OF PRESCRIPTION

- 1. The period of prescription in respect of any other debt provided for in section 11(a), (b) and (c) of the **Prescription Act 68 of 1969**, is 3 years.*
- 2. Section 12 on the other hand provides that prescription shall commence to run as soon as the debt is due.*
- 3. Based on the plaintiff's particulars of claim, prescription commenced to run on 22 October 2011 when the plaintiff was allegedly deprived of his liberty by Constables Moloantwa and Boase by arresting and assaulting him.*
- 4. According to the plaintiff, he gave a notice in terms of section 3 of Act 40 of 2002 within 6 months from the date that the debt became due and that despite demand the defendant refused/failed to pay the amount claimed by the plaintiff. In terms of section 11 of the Prescription Act, the plaintiff ought to have instituted his summons within a period of three years,*

which is on or before 23 October 2014, from the time that debt became due.

5. *The plaintiff's summons was served on the second defendant on 26 September 2019, which is more than three years after the date upon which the claim arose or debt became due."*

- [7] Should the special plea be dismissed by the Court, the merits of the claims are to proceed and the 1st, 2nd and 3rd plaintiffs are to prove their claims against the defendant.

Defendant's case on prescription

- [8] The defendant pleads that the plaintiff's claim be dismissed with costs on the basis that the claim has become prescribed as set out above. Adv Mongale argues on behalf of the defendant that the matter has become prescribed on 24 October 2014, which is three years after the date of arrest on 23 October 2011. The summons' were issued on 18 September 2019. On this argument, the cause of action arose on the date of the arrest.

- [9] Adv Mongale further argues that the plaintiffs became aware of the identity of the debtor when they were arrested by the police officials (this is denied by the plaintiffs). She refers to the affidavit made in support of the court order dated 4 February 2021 to support this argument. Adv Mongale argues that the plaintiffs were taken to the police station, the plaintiffs claim that there was an injustice committed against them with their arrest, and that they subsequently were aware of the identity of the perpetrators committing the

alleged injustice against them. She argues that they did not become aware of the cause of action during consultation, as alleged by the plaintiffs, but during their arrest. The argument therefore is that the plaintiffs could not have become aware of their claim only at such a later stage and during the consultation with their legal representatives, but when they were taken to the police station after their arrests.

- [10] It is also argued by Adv Mongale on behalf of the defendant that one of the arresting officers passed away and as such the laxity in instituting the claim would be to the prejudice of the defendant in defending the claim, should the plea of prescription not be upheld.
- [11] Adv Mongale further argues that the Court should not be bound by the previous court order dated 4 February 2021 which determined that condonation is granted in terms of section 3(1) and 3(2) of the **Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002**. She argues that the condonation as legislatively required, is different than a special plea in defense of the cause of action that gave rise to the plaintiffs' claims.
- [12] Adv Mongale argues that the plaintiffs had have to acquire the knowledge by exercising reasonable care when they were aware of the time of the alleged injustice on 23 October 2011. They did not have to wait to consult an attorney to inform them that they experienced an injustice.

- [13] Adv Mongale argues that the defendant has made out a proper case for the special plea of prescription and prays that the special plea be dismissed with costs.

Plaintiff's case on prescription

- [14] Adv Geach SC argues on behalf of the plaintiffs that the issue of prescription has already been dealt with by this Court in the previous court order dated 4 February 2021 in finding that the notice in terms of section 3 of the **Institution of Legal Proceedings Against Certain State Organs Act 40 of 2002** has been served timeously. As such, the special plea of prescription should be dismissed.

- [15] The argument advanced on behalf of the plaintiffs by Adv Geach SC is that the term "cause of action" cannot have different meanings in terms of the two different acts, namely the **Institution of Legal Proceedings Against Certain State Organs Act 40 of 2002** and the **Prescription Act 68 of 1969**. The argument is that the cause of action has already been determined by this Court in the order given by Hendricks DJP (as he then was) which has the effect that the cause of action is on 19 February 2019 when consultation occurred between the plaintiffs and their legal representatives.

- [16] In the founding affidavit dealing with the application for condonation for the late notice in terms of the **Prescription Act 40 of 2002**, the plaintiffs declare that they did not have

the money to engage the services of an attorney and that the Independent Police Investigative Directorate (IPID) informed the plaintiffs that their claims lied against the individual police officers (constables Moloantwa and Boase) as they acted beyond the scope of their duties when they allegedly assaulted the plaintiffs. It was only during the consultation with their attorneys on 19 February 2019 that the plaintiffs realised that they have a valid claim against the Minister of Police.

[17] It was further stated in the founding affidavit for the condonation application that the defendant deliberately withheld information from the plaintiffs, in failing to provide the content of the dockets investigating the claims of assault as laid against the police officers to the plaintiffs. This application for condonation which resulted in the court order dated 4 February 2021 was unopposed and the factual averments as made in the affidavits were duly accepted by the Court granting the previous order.

[18] The plaintiffs ask that the special plea of prescription be dismissed with costs.

Legal position

[19] Prescription of a cause of action is legislatively determined as follows in sections [11] and [12] of the **Prescription Act** 68 of 1969:

"11 Periods of prescription of debts

The periods of prescription of debts shall be the following:

(a) ...

...

(d) save where an Act of Parliament provides otherwise, **three years** in respect of any other debt.

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.**"

[20] In relation to the question when a debt is regarded as being due, it was found by the Supreme Court of Appeal that the “entire set of facts” should be to the knowledge of the creditor before the cause of action is completed. In the matter of **Holden v Assmang Ltd 2021 (6) SA 345 (SCA)** the following was held in the Supreme Court of Appeal:

“[17] A debt is due, owing and payable within the meaning of s 12(1) of the Prescription Act when the creditor acquires a complete cause of action for the recovery of the debt. What this means is that the entire set of facts which the creditor must prove in order to succeed with his/her claim against the debtor must be in place. In other words, when

everything has happened which would have entitled the creditor to institute action and to pursue his/her claim.”

[21] A cause of action is the date on which a debt came into existence between parties, or the date on which one party caused prejudice to another party.

[22] In the matter of **Fluxmans Inc v Levenson 2017 (2) SA 520 (SCA)** the Supreme Court of Appeal considered the wording of section 12(3) of the Prescription Act (*'A debt shall not be deemed to be due until the creditor has knowledge . . . of the facts from which the debt arises . . . '*) in the context of whether the creditor's knowledge of an agreement's invalidity was a fact that had to be known for the debt to become due. The Supreme Court of Appeal held as follows in paragraph [42]:

“The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription.”

[23] In **Claasen v Bester 2012 (2) SA 404 (SCA)** it was determined that section 12(3) of the **Prescription Act** requires knowledge only of the material facts from which the prescriptive period begins to run and that it does not require knowledge of the legal conclusion (that the known facts

constitute invalidity). *In casu*, the application of the principle is that the plaintiffs would have become aware of the material facts during consultation with their legal practitioners. The plaintiffs state that they did not know whether the claim lies against the Minister of Police, or against the individual police officers. During consultation they were informed of the material facts of their claim, and as such the prescriptive period began to run after the consultation with their legal representatives.

[24] In relation to a claim for *Iniuria* it is stated in **Amler's Precedents of Pleadings** that "*The action is not divisible which means that the same wrongful act cannot give rise to different claims. It is not possible, for instance, to claim separately for general damages for iniuria and for defamation.*" This principle was confirmed by the Constitutional Court in **Le Roux v Dey 2011 (6) BCLR 577 (CC), 2011 (3) SA 274 (CC)**.

[25] Determination of when a prescription period commences to run is, in my view, a question of law. Any question of law must be determined in context of the facts of the matter. In this matter, this Court has regard to the wording of the previous court order dated 4 February 2021 with specific regard to the date that the cause of action arose. In relation to the date that the cause of action arose, the following is held:

“... (*sic-The plaintiffs*) *did comply with the provisions of the*

Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, specifically sections 3(1) and 3(2) in that the Applicants (sic- plaintiffs) gave notice of their intention to institute legal proceedings against the Defendant / Respondent within six months from the date that the debt became due."

[26] The court order dated 4 February 2021 declares that the proceedings that were instituted were done within six months from the date that the debt became due. The cause of action is the same date that the debt became due. This date, depending on the circumstances of each case, can either be the date of the plaintiffs' arrests, or the date that the plaintiff consulted with their attorneys.

[27] The previous court order dated 4 February 2021 declares that the debt became due six months prior to the institution of the legal proceedings. The proceedings were instituted on 18 September 2019. Had the wording of the previous court order dated 4 February 2021 been different, namely that condonation has been granted for the late filing of the notice of intention to institute a claim against the State Organ, the cause of action might be open for debate. The wording of the court order dated 4 February 2021 specifies that action was instituted within six months from the date that the debt became due.

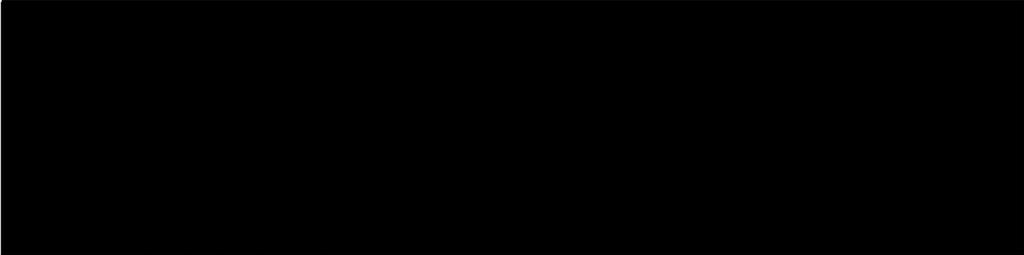
[28] For the reasons mentioned above, the special plea of prescription is bound to be dismissed.

[29] I cannot find any reason why the normal cost order, that cost should follow the cause, should not be granted. The defendant should consequently be ordered to pay the plaintiffs' costs.

Order:

[30] In the premises I make the following order:

- i) The special plea of prescription is dismissed;
- ii) The defendant is ordered to pay the costs of the application.



FMM SNYMAN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

APPEARANCES:**DATE OF HEARING: 26 APRIL 2022****DATE OF JUDGMENT: 25 AUGUST 2022****COUNSEL FOR PLAINTIFF: ADV GEACH (SC) with
ADV KEHRHAHN****COUNSEL FOR DEFENDANT: ADV MONGALE****ATTORNEYS FOR PLAINTIFF: LABUSCHAGNE ATTORNEYS
19 CONSTANTIA DRIVE
RIVIERA PARK, MAHIKENG
2745****ATTORNEYS FOR DEFENDANT: THE STATE ATTORNEYS
1ST FLOOR, MEGACITY
MMABATHO**