THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1277 /2019

In the matter between:

LINDA HOLDEN **APPELLANT**

and

ASSMANG LIMITED **RESPONDENT**

Neutral citation: *Holden v Assmang Limited* (Case no 1277/19) [2020] ZASCA 145 (5 November 2020)

Coram: PONNAN, MOLEMELA, DLODLO JJA, EKSTEEN and UNTERHALTER AJJA

Heard: 10 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 5 November 2020.

Summary: Prescription Act 68 of 1969 – when prescription started running – result favourable to the plaintiff remains a requirement for the completion of the cause of action in a claim based on malicious proceedings.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Seegobin J, Radebe J and Poyo Dlwati J sitting as court of appeal):

1. The appeal is upheld with costs and the order of the court a quo is set aside and in its stead is substituted the following:
'The appeal is dismissed with costs.'

JUDGMENT

DLODLO JA (PONNAN and MOLEMELA JJA and EKSTEEN and UNTERHALTER AJJA concurring)

[1] This is an appeal against the judgment of the full court of KwaZulu-Natal Division (Seegobin J, Radebe J and Poyo Dlwati J), in terms of which the respondent's appeal against the judgment of Henriques J (sitting as the court of first instance), dismissing the respondent's special plea of prescription, was upheld. The appeal is with the special leave of this court.

[2] The appellant, Linda Holden, is a counselling psychologist registered as such with the Health Professions Council of South Africa (HPSCA). The respondent, Assmang Limited, referred some of its employees to various medical practitioners, including the appellant. On 30 June 2008, the appellant was reported to the HPCSA by the respondent, which accused her of being grossly in breach of her professional ethics. The respondent alleged, inter alia, that the appellant was neither qualified nor competent to even attempt to make a diagnosis in respect of the disease of manganism. The respondent contended that the diagnosis of manganism should only be made by a medical practitioner who

specialised and is experienced in movement disorders of a neurological nature, especially as such disorders relate to manganism.

[3] On 29 September 2008, the appellant filed a detailed response in writing together with supporting documents to the HPCSA. The complaint was dealt with by the HPCSA's Committee of Preliminary Inquiry of the Professional Board for Psychology on 30 October 2009. On 13 November 2009, the HPCSA informed the appellant's senior counsel that the committee had accepted the appellant's explanation and had resolved not to take any further action against the appellant. On 6 August 2012, the appellant instituted an action for damages against the respondent based on malicious proceedings.

[4] The respondent raised two special pleas. The one relevant to this appeal was that the appellant's claim had prescribed. The matter served before Henriques J on 19 November 2014. The special plea was dealt with as a separated issue in terms of Rule 33 (4) of the Uniform Rules of Court. In dismissing the special plea with costs, Henriques J reasoned that the appellant had pleaded a case premised on malicious prosecution and that consequently, the prescriptive period would have started to run only once she was notified by the HPCSA on 13 November 2009 that no further action would be taken against her. With the leave of Henriques J, the respondent appealed to the full court. The appeal to the full court succeeded with costs. The order of Henriques J was set aside and replaced with one upholding the special plea with costs.

[5] Section 12 of the Prescription Act 68 of 1969 (the Prescription Act) reads:

'(1) Subject to the provisions of subsection (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.'

[6] The word 'debt' presents no controversy at all. It was described in *Drennan Maud & Partners*[1] as follows:

'In short, the word "debt" does not refer to the "cause of action", but more generally to the "claim". . . In deciding whether a "debt" has become prescribed, one has to identify the "debt", or, put differently, what the "claim" was in broad sense of the meaning of that word.'

[7] The appellant's case is that her cause of action only arose and prescription only started running after the HPCSA notified her that the respondent's complaint against her had been dismissed and that was on 13 November 2009. It is settled law that prescription begins to run as soon as the debt is due and the creditor knows the identity of the debtor and the facts giving rise to the debt. A creditor who could have acquired the knowledge by exercising reasonable care is deemed to have such knowledge.[2] It has authoritatively been held that knowledge of legal conclusions is not required before prescription begins to run.[3]

[8] In order to succeed, on the merits, with a claim for malicious prosecution, a claimant must allege and prove:

'(a) that the defendant set the law in motion (instigated or instituted the proceedings);
(b) that the defendant acted without reasonable and probable cause;
(c) that the defendant acted with 'malice or *animo iniuriandi*); and
(d) that the prosecution has failed.[4]

[9] The importance of the fourth requirement, which is the only one with which we are concerned in this appeal, lies in the fact that the claim can only arise if the proceedings were terminated in the plaintiff's favour.[5] That is so because a claim for malicious proceedings cannot anticipate the outcome of proceedings yet to be finalised. To hold

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[1] *Drennan Maud & Partners V Pennington Town Board* 1998 (3) SA 200 at 212G-J.
[2] See s 12 of the Prescription Act 68 of 1969 and *Mtokonyana v Minister of Police* supra.
[3] *Mtokonyana v Minister of Police [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC)* para 45-51.
[4] *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; [2008] 3 ALL SA 47 (SCA) para 8.
[5] *Els v Minister of Law and Order* 1993 (1) SA 12 (CC) at 15F.

otherwise would permit recognition of a claim when the proceedings may yet be decided against the plaintiff.

[10] A claim for malicious prosecution can ordinarily only arise after the successful conclusion of the criminal case in a plaintiff's favour. In a criminal matter, such a favourable conclusion in the plaintiffs' favour would occur on acquittal or the withdrawal of the charges. The institution of a civil claim based on a malicious prosecution before such prosecution has been finalised in the plaintiff's favour, may amount to prejudging the result of the pending proceedings. There is no discernible distinction between pending criminal proceedings and proceedings before statutorily created professional tribunals. The HPCSA is such a tribunal. The cause of action applies to both civil and criminal proceedings and not only the latter.[6]

[11] Relying on *Gregory v Portsmouth City Council* (2000) 1 AC 419, the respondent contended that the strict principles of malicious presecution and the requirement that the prosecution must have failed do not apply as the HPCSA is disciplinary body. In that matter Lord Steyn held that the tort of malicious prosecution does not extend to disciplinary proceedings. The HPCSA is an important tribunal. Its decision can have far reaching consequences. For instance, if the appellant was found guilty of being grossly in breach of her professional ethics, she might have lost her licence to practice. A statutory created tribunal, such as the HPCSA, employs the formal machinery of a criminal prosecution, with sanctions that are punitive in nature. It is closely analogous to and bears all of the hallmarks of a criminal prosecution. It is that which perhaps distinguishes it from disciplinary proceedings before say a voluntary association or even a City Council as in *Gregory's case.* Thus, whatever the position may be in those cases need not detain us here. That remains for another day.

[12] In *Thompson and Another v Minister of Police and Another*[7] Eksteen J held correctly as follows:

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[6] *Beckernstrater v Rottcher* 1955 (1) SA 123 (A) at 135A-B.
[7] *Thompson and Another v Minister of Police and Another* 1971 (1) SA 371 (E).

'In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while prosecution is actually pending its results cannot be allowed to be prejudged by the civil action (*Lemue v Zwartbooi,* supra at p .407*).* The action therefore only arises after the criminal proceeding against the plaintiff have terminated in his favour or where the Attorney-General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge. (*Bacon v Nettleton,* 1906 T.H. 138 AT pp 142-3). From this it follows that the plaintiffs' cause of action in respect of the alleged malicious arrest and detention in the present case can only have arisen on the judgment of this court allowing the appeal against their conviction in the magistrate's court, i.e on 29th April 1969. This means that, in giving notice to the second defendant on 20th September, 1968 and issuing summons on 25th October, 1968, they were complying with the provisions of sec. 32 of Act 7 of 1958, and it consequently becomes unnecessary for me to consider whether they were in fact required so to comply or whether the second defendant was acting in pursuance of the Police Act at the time he was alleged to have committed the delict.'

[13] The court of first instance approached this matter in a manner similar to *Mandela v Amsterdam*,[8] which was an appeal from the Magistrates' court in respect of a claim based on the institution of disciplinary proceedings and to which a special plea of prescription was raised. The court characterised the cause of action as a claim for damages for malicious proceedings. It dealt with the special plea raised on the basis of a claim for malicious proceedings. It relied in that regard on the *Thompson* and *Els* judgments.[9]

[14] It is also not correct to contend that the greater part of the appelant's claim ís based on 'contumelia, impugning her professional dignity, reputation and professional confidence'.This mischaracterises the cause of action. The reading of the partiulars of

[8] *Mandela v Amstredam* 2010 JDR O951 (ECG).
[9] See footnotes 10 and 12 supra.

claim and the respondent's plea thereto makes it clear that the whole cause of action is based on malicuois proceeedings.

[15] In arriving at its conclusion, the full court appeared to place reliance on the judgment of Froneman J in *Kruger v National Director of Public Prosecutions*.[10] The full court stated:

'In the most recent judgment of the Constitutional Court in Kruger . . . Froneman J for the majority of the court held as follows at paragraph 78:

". . . To prove malicious prosecution, the plaintiff here needed to establish only (a) lack of reasonable and probable cause and (b) intent to injure (*animus injuriandi*). Only these two facts are relevant to this case as they are 'the facts from which the debt arises.' Of these only, the creditor needs to have knowledge for prescription to start running in terms of section 12(3). A plaintiff does not need to know the further facts that establish the absence of reasonable probable cause and intent to injure.'"

[16] Importantly, that observation by Froneman J must be placed in its proper context. Froneman J was writing in response to the judgment in that matter of Zondo DCJ. The Deputy Chief Justice, with reference to the judgment of this court in *Moleko*, had set out the four elements or requirements for an action for malicious prosecution.[11] He then added, 'the requirements in (a) and (d) need not detain us because they are not in issue'. Requirement (d) is what has occupied our attention in this appeal. Froneman J was thus restricting himself to requirements (b) and (c), which, for convenience, he had labelled (a) and (b) respectively. Froneman J therefore did not purport to restrict the requirements for an action based on malicious prosecution to only the two that he was considering, as appears to have been supposed by the full court. On the contrary, Froneman J stated the following:

'Did Mr Kruger's claim prescribe? The only question to ask is whether the facts known to him on the day the charge was withdrawn were sufficient to ground the likely inference that there was no reasonable and probable cause for his prosecution and that his prosecution proceeded with intent to injure on the part of the public prosecutor.'[12]

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[10] *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 (6) BCLR 703 (CC).
[11] See paragrapgh 8 and footnote 4 supra.
[12] Id para 81.

[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 succed 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 persue his/her claim.[13]

[18] I conclude that from the aforegoing it is clear that the appellant's cause of action only arose and prescription only started to run when the HPCSA notified the appellant that the respondent's complaint against her had been dismissed. That was on 13 November 2009. It was only then that the appellant would have been able to establish the fourth and final requirement for an action for malicious prosecution. It follows that as at the date of summons, the claim or debt had not prescribed.

[19] The following order is made.

1. The appeal is upheld with costs and the order of the court a quo is set aside and in its stead is substituted the following:

'The appeal is dismissed with costs.'

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DLODLO JA

JUDGE OF APPEAL

[13] Footnote 4 para 16.

Appearances:

For appellant:	A JA Rall SC
Instructed by:	Linda Payne Attorneys, Pietermaritzburg Symington De Kock Attorneys, Bloemfontein
For respondent:	H C Bothma
Instructed by:	Edward Nathan Sonnenbergs, Pietermaritzburg Webbers Attorneys, Bloemfontein