IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, BHISHO]

CASE NO.: 404/2022

In the matter between: -

MINISTER OF POLICE **APPLICANT**

and

NOMBONISO LILIAN DIKE **RESPONDENT**

JUDGMENT

NORMAN J:

[1] This is an application for leave to appeal, to the Full Court of this Division, against the judgment of this court delivered on 18 July 2023. The National Director of Public Prosecutions who was cited as the second defendant in the action is not party to this application. There are two grounds upon which the application is premised. They are that, the court misdirected itself in not finding that the claim had prescribed and in granting condonation; the judgment of the court is in conflict with the *Mtokonya and Zamani* judgments and that constitutes a compelling reason to grant leave.

Applicant's submissions

[2] Ms Da Silva SC with Ms Sangoni appeared for the applicant and Ms Magadlela for the respondent. At the commencement of the hearing the applicant sought an amendment to its notice of application for leave to appeal in the following terms:

> *"2.2 The common cause facts were that the respondent:*
>
> *2.2.1 was searched, assaulted, arrested and detained by members of the South African Police Service on 16 May 2019;*
>
> *2.2.2 was detained by or at the instance of the members of the service until 27 May 2019;*
>
> *2.2.3 the debt for:*
>
> *2.2.3.1 unlawful assault and search became due on 16 May 2019, this being the date on which the allege assault and search took place; and*
>
> *2.2.3.2 unlawful arrest and detention became due on 27 May 2019, this being the date on which the respondent was released from detention.*
>
> *2.2.4 The Summons claiming damages for unlawful search, assault, arrest and detention was issued on 15 July 2022.*
>
> *2.2.5 The Summons was served on 28 July 2022 more than three years after the respondent was allegedly assaulted, searched and released from detention.*
>
> *2.3 The identity of the debtor was manifest – the Minister of Police.*
>
> *2.4 The facts from which the debtor rose were the assault, search, arrest and detention of the respondent.*
>
> *2.5 Neither possession of the police docket nor receipt of legal advice affected the respondent's obligation to institute a claim within the three years.*
>
> *2.6 The decision of the Constitutional Court in Mtokonya v Minister of Police and Minister of Police v Abongile Zamani could not be distinguished, was binding and fell to be followed.*
>
> *2.7 The respondent's claim for search, assault, arrest and detention had prescribed."*

[3] It was argued on behalf of the applicant that the court needed to satisfy itself on three issues prior to granting condonation, namely, that the claim itself had not prescribed, that there was good cause shown for failure to give notice on time, that the organ of state was not unreasonably prejudiced. On the last point

of prejudice Ms Da Silva conceded that there was no evidence that there was any prejudice on the part of the applicant. It was submitted that on the respondent's version the claim had prescribed when summons was issued and the court misdirected itself in granting condonation. Ms Da Silva submitted that the respondent alleged that she did not know that she could claim for damages for unlawful search, arrest, assault, detention against the respondent. In this regard, she submitted that, applicant accepts without making a concession that before the respondent spoke to her lawyer she had no knowledge that she could claim. She further submitted that even if there was no opposition, on the facts set out by the respondent and based on paragraphs 3 to 6 of the *Mtokonya*[1] judgment, the claim had prescribed. She argued that the judgment of this court is in conflict with both the *Mtokonya* and the *Zamani*[2] judgments and , on that basis alone, leave should be granted. She submitted that the guilt or otherwise of the respondent had no bearing on the claims for arrest and detention.

Respondent's submissions

[4] Ms Magadlela, on the other hand, submitted that the claim against the applicant was brought within three years. She submitted that the unlawful arrest, detention, subsequent prosecution and acquittal is to be treated as one continuous transaction. In this regard, she relied on, *inter alia*, Mothobi *Albert Tlake v Minister of Police and Another*[3], and *Thompson & Another v Minister of Police*[4]. She submitted that based on the lack of knowledge of the respondent,

[1] *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC).
[2] *Abongile Zamani v Minister of Police* (12/2019) [2021] ZAECBHC (12 February 2021).
[3] *Mothobi Albert Tlake v Minister of Police and Another* 3777/2014FASHC 20 October 2017.
[4] *Thompson & Another v Minister of Police* 1971 (1) SA 371 (E).

together with the delays caused by the police in furnishing the information, the claim had not prescribed by the time the summons was issued. She further submitted that the first notice was sent to the applicant on 26 April 2022 and the second one on 26 May 2022. She further submitted that there were no prospects of success on appeal. She submitted that the application should be dismissed with costs on an attorney and client scale.

Discussion

[5] The test for granting leave to appeal is set out in section 17 (1) (a)(i)and(ii) of the Superior Courts Act 10 of 2013 (the Act), that leave to appeal may only be granted where the judge concerned is of the view that the appeal would have a reasonable prospect of success , or where there is some other compelling reason , such as conflicting judgments in the matter under consideration.

[6] First, it must be stated that when dealing with the application for condonation the court had regard to the affidavits filed by both parties. The answering affidavit did not contain any of the facts that were introduced in the amended application for leave to appeal, as contained in paragraph 2 above. Those facts do not appear in the applicant's special plea of prescription. They have been introduced by the applicant for the first time in the application for leave to appeal. On this basis, those new facts cannot be taken into account for the purpose of this application, as this court is now *functus officio.* ***In Firestone South Africa (Pty) Ltd v Genticuro AG***[5], Trollip JA, stated:

> *"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject- matter has ceased."*

[5] 1977 (4) SA 298 (A) at 306 F-G.

[7] The supplementation of an application for leave to appeal with the facts that were non- existent in the answering affidavit is a clear recognition on the part of the applicant that a mere conclusion that a claim has prescribed is not sufficient.[6] There must be alleged facts to support that conclusion, which it failed to do prior to adjudication of the matter[7]. That too, cannot be done at the application for leave to appeal stage.

[8] Second, the applicant referred to the facts quoted in paragraph 2, as "common *cause facts*". That reference is, with respect, not correct, for two reasons: First, they cannot be common cause if they were never placed before court prior to adjudication of the matter. Second, the applicant denied all the material facts alleged by the respondent which related to, inter *alia*, the unlawful search, assault, arrest, detention, prosecution and discharge.

[9] The acceptance by the applicant that the respondent had no knowledge that she could claim prior to her consulting her attorneys goes against his submission that prescription started to run from the date of arrest. The respondent had alleged that she informed her late husband's attorneys on 11 March 2021 of what happened to her and summons was served on the applicant on 28 July 2022. The submission that the action was instituted after three years, goes against this accepted fact. It also goes against what the Constitutional Court found in *Mtokonya* at paragraph 181 where it placed the onus on the applicant to establish his defence of prescription. The

[6] Macleod decision para [10] where the Supreme Court of Appeal stated: *"[10] This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case."*

[7] See para 24 of the judgment.

aforementioned acceptance by the applicant is consistent with the findings of this court.

[10] Courts are obliged when interpreting any legislation to promote the spirit, the purpose and the objects of the Bill of Rights. The Prescription Act is no exception. In ***Macleod v Kweyiya***[8] it was stated that:

> *"[13] It is the negligent, and not an innocent inaction that s 12(3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself. In MEC for Education, KwaZulu-Natal v Shange 2012 (5) SA 313 (SCA) para 11 this court had to consider whether a 15 year old learner who had been hit with a belt on the side of his eye by his teacher acted reasonably in waiting more than five years to institute action against the teacher's employer. As in the present matter, the plaintiff became aware of the possibility of a claim by chance. He had initially accepted the teacher's explanation that it was an accident. A family friend noticed that he was wearing an eye patch and suggested that he should approach the Public Protector. An advocate in that office advised him of the possibility of a claim against the teacher. Snyders JA held that the delay was innocent, not negligent. She stated:*
>
> > *'He was a rural learner of whom it could not be expected to reasonably have had the knowledge that not only the teacher was his debtor, but more importantly, that the appellant was a joint debtor. Only when he was informed of this fact did he know the identity of the appellant as his debtor for the purposes of the provisions of s 12(3) of the Prescription Act' ".*

[11] In ***Minister of Police v Zamani***[9] , the court did not depart from the established principles when it determined the issue of prescription. This court was not determining prescription but was dealing with it as a factor to be considered in dealing with condonation. There was accordingly no reason to distinguish it.

[12] I had referred in the main judgment to the decision in ***Gericke v Sack***[10] the Appellate Division stated:

> *"It follows that if the debtor is to succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date." (my emphasis).* As aforementioned no such allegations were made in the answering affidavit.

[8] 2013 (6) SA 1 (SCA) at paras 10 and 13.
[9] [2021] ZAECBHC 41 at para 8.
[10] [1978] (1) SA 821 (A) at 827 – 828.

[13] Ms Da Silva conceded that the claim against the second defendant (the National Director of Public Prosecutions) for malicious prosecution had not prescribed. She did not make any submissions in relation to the long delay caused by the applicant in furnishing information. Again, the applicant did not deal with the allegations of delay attributed to him in the answering affidavit as reflected in the judgment. As found in the judgment, the respondent's material allegations were met with a bare denial. The court accepted the respondent's uncontroverted factual version as correct for the purpose of determining whether or not the applicant was entitled to condonation sought. It found that she was. The ground based on conflicting judgments has no merit because the applicant elected not to advance facts in resisting the condonation application.

[14] For all the reasons advanced above, and the circumstances of this case, the applicant has failed to show that this court in granting condonation for the late delivery of the statutory notice, misdirected itself.

[15] In the result, I am accordingly of the opinion there are no reasonable prospects of success and there is no other compelling reason to grant leave to appeal. It follows that the applicant has failed to meet the threshold set out in section 17 of the Act. The application for leave to appeal must accordingly fail. The complaint about the cost order is unfounded because in as much as the respondent sought condonation, the unexplained conduct of the applicant of delaying to furnish information even though there was a court order, justified such an order.

[16] On the issue of costs in this application, there is no basis for a punitive cost order contended for by the respondent. The respondent has succeeded in resisting this application and costs should follow the result.

ORDER

[17] I accordingly make the following Order:

1. **Leave to appeal is refused with costs.**

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T.V NORMAN

JUDGE OF THE HIGH COURT

Matter heard on	**:**	**22 September 2023**
Judgment Delivered on	**:**	**09 October 2023**

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