



**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 3771/2007

In the matter between:

JULIAN CLAUDE AUGUSTINE

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

Delivered in court: 29 May 2018

MBATHA J

[1] The plaintiff issued summons on 28 October 2016 in this court against the Minister of Safety and Security ('the defendant'). The summons was served on 28 October 2016.

[2] In his summons the plaintiff avers that on or about 5 February 2002 at Kloof, Pinetown, he was arrested for fraud and corruption by police officers at the South African Police Services (SAPS) based in Pinetown, whose names and ranks were

unknown to him. In consequence of being arrested the plaintiff was detained in police custody for one day.

[3] On 22 January 2003, the charges were provisionally withdrawn against the plaintiff but were subsequently reinstated and as a result thereof he appeared in court on nine different occasions. On 26 September 2006, all charges were withdrawn against the plaintiff. As a direct consequence of the arrest, detention and being charged he claims damages against the defendant. The plaintiff contends that at the time of his arrest the defendant became aware or ought to have been aware that charges preferred against the plaintiff were false and without substance.

[4] The defendant has raised a special plea to the plaintiff's claim in that the plaintiff was obliged to lodge an action for damages with the defendant within a period of three years from the date which the cause of action arose in terms of the Prescription Act,¹ (the Act). Counsel for the defendant contends that the cause of action arose on 5 February 2002 when the plaintiff was arrested and detained by the police officers of the South African Police Services (SAPS). Therefore the plaintiff's claim prescribed after three years from the date of his arrest.

[5] The plaintiff denies that the claim has prescribed as alleged by the defendant. The plaintiff avers that the cause of action arose when the Director of Public Prosecutions withdrew all the charges against the plaintiff on 26 September 2006. The summons was issued within a three year period from the date of the withdrawal of the charges, therefore the claim has not prescribed.

[6] It is common cause that the arrest occurred on 5 February 2002, that on 22 January 2003 charges were provisionally withdrawn against the plaintiff, reinstated and that on 26 September 2006; all charges were withdrawn against the plaintiff.

¹ 68 of 1969.

[7] At the commencement of the trial I was required to proceed in terms of Uniform rule 33(4) that the Plea of Prescription be determined first and that the issue of liability and quantum to stand over for later determination. I am to consider the special plea on the pleadings as they stand.

[8] It is common cause that a party who raises a special plea bears the onus to prove the facts underlying the special plea. The defendant in support of its contention that prescription arose from the date of arrest, being 5 February 2002, relies on various authorities set out in the heads of argument. The defendant relies on the case of *Mtokonya v Minister of Police*² where the court stated as follows:

‘The question that arises is whether knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a fact. This is important because the knowledge that section 12(3) requires a creditor to have is “knowledge of facts from which the debt arises”. It refers to the “facts from which the debt arises”. It does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy.’

[9] In *Mtokonya*, the dispute was whether the prescription period should be calculated from the date of the applicant’s release from detention or when he realised that he had a cause of action. The court held that prescription started running after the applicant’s release from detention. *Mtokonya* is distinguishable from the facts of this case in that the applicant was detained for a period longer than 48 hours before being taken to court and was thereafter released. In this case, it did not end with the arrest and detention of the plaintiff, but he was charged, he appeared in court, charges were provisionally withdrawn, reinstated and permanently withdrawn.

[10] I was also referred by counsel for the defendant to the SCA judgments of *Eskom v Bojanala Platinum District Municipality & another*³ and *Truter & another v Deyse*⁴ as well as various other judgments as authorities for the contention by the

² [2017] ZACC 33; 2017 (11) BCLR 1443 (CC) para 37.

³ [2005] 3 All SA 108 (SCA).

⁴ 2006 (4) SA 168 (SCA).

defendant that the question of prescription arises when the creditor claimant has knowledge of facts from which the 'debt' arises. It was strongly argued on behalf of the defendant that prescription started to run from the date of arrest and that this was in line with s 12(3) of the Act.

[11] On the other hand, the plaintiff's replication is that prescription started to run only upon the final withdrawal of the charges against the plaintiff on 26 September 2006, as the plaintiff was only able to acquire knowledge of the complete cause of action after the charges were withdrawn, and his claim/debt became due and payable thereafter.

[12] Section 12 of the Act provides when prescription begins to run. It states as follows:

'(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.

(4)

[13] The Act does not define the word 'debt', but the term is often given a general meaning and includes a 'debt' resulting from a delict. In terms of s 12(1) prescription commenced when the 'debt' is 'due'. The terms 'due' has been interpreted, to mean that for prescription to run, there must be a 'debt', whereby a debtor is under an obligation to perform immediately. However the creditor must have knowledge of the debtor and of the facts from which the 'debt' arises. Prescription extinguishes a 'debt'

being anything that is owed or 'due'. The word 'debt' refers to the claim and not the cause of action. In general, prescription begins to run as soon as the 'debt' is 'due', unless the 'debt' is the result of a continuing wrong.⁵ It must be immediately claimable by the creditor in legal proceedings.

[14] In *Truter & another v Deyssel*,⁶ the SCA dealt with the running of prescription in respect of a claim for damages for medical negligence. It held as follows:

'[16] ...A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

...

[17] ... "the combination of *facts* that are material for the plaintiff to prove in order to succeed with his action.'

[15] In my view, each case needs to be decided on its own facts. The question is therefore whether at the time of the plaintiff's arrest and release from detention the 'debt' was 'due', for the plaintiff to institute legal action. In this case the plaintiff was admitted to bail on the day of arrest, was caused to appear in court several times until the provisional withdrawal of charges. Charges were reinstated up to the time of its final withdrawal. I accept the submission of plaintiff's legal representative that when charges were still pending, the plaintiff did not have full facts of the 'debt', as the plaintiff did not have access to the contents of the dockets, as the matter was still being investigated.

[16] In this case the plaintiff was charged with twenty counts of fraud and corruption. The charges did not materialise to a trial, until they were finally

⁵ My emphasis.

⁶ 2006 (4) SA 168 (SCA)..

withdrawn. It is my view that the 'debt' was a continuing wrong, unlike in the *Mtokonya* case. It culminated into a single 'debt'. Therefore prescription could not have been running in a piecemeal fashion, as the wrong was continuing.

[17] In *Links v MEC for Health, Northern Cape*,⁷ the Constitutional Court extensively analysed s 12(3) of the Act, finding that prescription did not begin to run on the approximate date when Mr Link's thumb was amputated, but the date on which he had knowledge of all the facts that caused his thumb to be amputated. He could only have acquired these facts when he consulted and gained access to medical records.⁸ This judgment emphasises that a 'debt' will only be 'due' when the creditor has knowledge of the debtor and the facts from which the 'debt' arose. This judgment supports the contention raised on behalf of the plaintiff, that he could not have access to the docket whilst the matter was still under investigation.

[18] In *Links*, the Constitutional Court had considered the *Truter* judgment in arriving at its conclusion. I am of the view that a knowledge of the full facts was required by the plaintiff to proceed with the action. The plaintiff's claim is also based on a continuing wrong, which includes the arrest, detention and malicious prosecution. These could not be separated from each other.

[19] Accordingly, I make the following order:

The special plea is dismissed with costs.

MBATHA J

⁷ [2016] ZACC 10.

⁸ My emphasis.

Date of hearing: 28 May 2018

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Appearances

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