IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 1555/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

26/02/2024 [redacted]

DATE SIGNATURE

In the matter between:

LULU ELLEN NDLOVU **PLAINTIFF**

AND

MINISTER OF POLICE **DEFENDANT**

JUDGMENT

LANGA J:

Introduction and Facts

[1] This action was instituted by the Plaintiff Lulu Ellen Ndlovu who is claiming damages against the Minister of Police for unlawful arrest and subsequent detention. In the summons, issued on or about 23 June 2020, the Plaintiff alleges that there was compliance with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 ('Institution of Legal Proceedings Act'). The averment is repeated

in the amended particulars of claim dated 30 October 2021. The action is defended and the Defendant raised a special plea in terms of the Institution of Legal Proceedings Act'.

[2] The arrest, which was for an alleged rape, was conducted on 11 February 2019 when the Plaintiff was allegedly unlawfully arrested by the members of the South African Police Service at the Dennilton Magistrates Court. During the arrest he was handcuffed, grabbed by his trousers and dragged to the standing police vehicle. This incident allegedly took place in full view of the members of the public. He further alleged that the members of the police who arrested him were acting within the course and scope of their employment as police officers and members of the South African Police Service.

[3] Further, the plaintiff alleged that after the arrest he was detained at Vosman Police station in Witbank and was denied bail by court and kept in custody until he was released 26 July 2019 after the withdrawal of the case apparently due to the complainant disavowing her allegations. He averred that as a result of the said arrest and detention he suffered harm, inconvenience, discomfort, humiliation and contumelia.

[4] The Plaintiff is claiming loss suffered as a result of the arrest and detention in the amount of R4 580 000.00 made up of R80 0000 for unlawful arrest and detention for the period 11 - 12 February 2019 and R4 5000.000.00 for the detention from 12 February 2019 – 26 July 2019. Subsequently in the amended particulars of claim the Plaintiff added a further claim of malicious prosecution for which he claimed an amount of R100 0000 00. I must pause at this stage to mention that this claim for malicious prosecution was subsequently withdrawn by the Plaintiff on or about 07 February 2023.

[5] After the Plaintiff delivered a notice of bar the Defendant eventually filed a plea together with a special plea in terms of the Institution of Legal Proceedings Act. The

Defendant contended in the special plea that the action was for a recovery of a debt as envisaged in the Institution of Legal Proceedings Act and that this Act therefore regulate such proceedings.

[6] At the hearing of the matter 29 January 2024 the Defendant persisted with the special plea in terms of the Legal Proceedings Act and the parties agreed that this point *in limine* be argued first. It was contended on behalf of the Defendant that the notice relied on by the Plaintiff was served out of time as it should have been served by midnight on 11 August 2019 as the cause of action occurred on 11 February 2019. The Defendant further contended that despite the special plea having been served on the Plaintiff on or about 24 January 2023, the Plaintiff has up to date not filed any replication or brought any application for condonation for the non-compliance with the provision.

[7] The Plaintiff on the other hand contended that the notice was not out of time as the period of six months as stated in Section 3(2) of the Legal Proceedings Act only started to run when the debt became due. It contended that the debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state in question as well as the facts giving rise to the debt. The Plaintiff contended therefore that in this case the debt became due when the Plaintiff was released from prison after spending 7 months on 26 July 2019 without being charged. The Plaintiff strongly argued that the debt could not have become due from the day of the arrest but only when he was released. The Plaintiff relies on many authorities some of which strangely do not support its contention as I will illustrate shortly. It is necessary at this stage to quote the provisions of the section for ease of reference.

<u>Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002</u>

[8] Section 3 of the Legal Proceedings Act deals with the notice of the intended legal proceedings which is to be given to the organ of state before the institution of the legal proceedings in question and provides thus:

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of subsection (2)(a)-

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.

(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate. (My underlining).

[9] With these provisions in mind I want to first deal with the notice and when it was served as averred by the Plaintiff. The Plaintiff's pleadings are important in this regard as they constitute evidence on which its case is premised. According to its Amended Particulars of claim delivered on or about 30 October 2021, the Plaintff averred that the Section 3 notice was served on the Defendant on 26 June 2020. There is, however, also a letter dated 14 August 2019 by the Plaintiff's attorney of record directed to the National Commissioner of Police purporting to be a notice in terms of Section 3. According to the proof of registered post, the letter was served on the date of posting which is 19 August 2019. (My underlining).

[10] The purported notice as in the letter to the National Commissioner of Police does

not in my view assist the Plaintiff's case as it was clearly sent to a wrong functionary. So, if it is accepted that this letter constitutes a notice to the Defendant as envisaged in the section, it should have been served on the Minister of Police as the claim is against the Minister of Police and the summons were issued against the Minister of Police. Further, even if it is accepted that this letter constitutes such notice, it was however served out of time. The six months period expired on 11 August 2019 and the 'notice' was posted on 19 August 2019. It is understandable that in its submissions the Plaintiff did not attempt to place any reliance on this letter. Nothing therefore turns of this document.

[11] I now turn to the alleged notice of 26 June 2020 relied on by the Plaintiff. Although it is alleged that there has been compliance with Section 3, the Plaintiff could not refer court to this notice in the papers. The only Section 3 notice in the bundle is the letter directed to the National Commissioner of Police referred to above. It is evident that despite the contention that such notice was served, the Plaintiff did not discover it. In the absence of such notice on record, the only conclusion is that the Plaintiff failed to serve the notice. Having failed to serve the notice, the Plaintiff's only remedy was a condonation application for the late serving and filing of the notice. It is common cause that the Plaintiff has not filed any condonation application in this regard. The Plaintiff having not filed the application for condonation, the action stands to be dismissed.

[12] However, even if I proceed with the matter on the assumption that the Plaintiff had filed the alleged notice of the 26 June 2020 as stated in the amended particulars of claim, the notice would still have been served out of time. That is the case even if the court accepts the Plaintiff's argument that the debt became due when the Plaintiff was released on 26 July 2019. In that event the Plaintiff should have served the notice by at least not later than 26 January 2020. Thus, even on the Plaintiff's own argument, the notice would

have still been served 11 months after the debt became due. Therefore, on the basis of their own facts, the Plaintiff would have served the notice out of time.

[13] During the submissions, the Plaintiff's counsel Mr Mbatha conceded in reply that based on the facts as stated above, condonation should have been sought. In fact, Mr Mbatha requested an opportunity to file a condonation application. This was, however, too late as the matter had already been argued and a ruling imminent.

[14] In the light of the above, I am of the view that it would not be necessary for the court to make a determination on the question of when the debt becomes due as envisaged by Section 3 of the Legal Proceedings Act. Despite this I am nevertheless of the view that based on the authorities referred to by both parties, it is clear that the Plaintiff would have acquired knowledge of the identity of the debtor and the facts giving rise to the debts when he was arrested. The Plaintiff's reliance on *Makhwelo v Minister of Safety and Security* (2013/27724) [2015] ZAGPJHC 10 does not assist its case as this decision was not followed in other cases and was in fact rejected by the full bench in *Minister of Police v Zamani* 2023 (5) SA (ECB) (12 October 2021) as having been wrongly decided. *Zamani, supra,* followed *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) in which in the court in the context of the Prescription Act held that *"…As, section 12(3) does not require the creditor to have knowledge of any right to sue the debtor not does it require him to have knowledge of the legal conclusions that may be drawn from the facts from which the debt arises".* The issue was recently put beyond any doubt by the Constitutional Court in *Mmabasotho Christinah Olesitse N.O v Minister of Police* 2024 (2) BCLR 238 (CC) where the following was stated at paragraph [64]:

> *"The other consideration is that two or more causes of action, although arising from the same set of facts, may not arise at the same time. <u>For example, in the present</u>*

case, the first cause of action for unlawful arrest and detention arose immediately after the deceased was arrested and detained. From the beginning of the arrest and detention were either lawful or unlawful. But the second action based on malicious prosecution had not arisen then, and could not be instituted at that stage, as the criminal charges against the deceased had not yet been withdrawn. This occurred almost two years later, on 17 May 2021. There would also have been the risk of prescription of the first claim, if the deceased was to wait for the determination of the criminal charges in order to combine the two claims in a single action". (My underlining).

[15] In my judgment therefore, based on these authorities, it is clear that in a matter such as the present case, the debt becomes due when the arrest and detention happens. The Plaintiff's assertion that the debt became due only when the charges were withdrawn stands to be rejected. However, as stated above, even if it was correct in this regard, the Plaintiff would have still been out of time in terms of the filing of the notice which in any event it failed to discover.

Conclusion

[16] In conclusion I am satisfied that Plaintiff's debt became due when the arrest and detention occurred and that therefore the notice as envisaged in Section 3 (2) was due on 11 August 2019. The Plaintiff therefore failed to comply with the section. In the circumstances the Defendant's special plea ought to succeed.

[17] As regards costs it is trite that the general rule applying to costs is that the successful party is entitled to their costs. There is accordingly no reason why the Defendant in this matter should not be awarded costs.

Order

[18] In the result I make the following order:

1. The Defendant's special plea in respect of Section 3 of the Institution of the Legal Proceedings Against Certain Organs of State Act 40 of 2002 is upheld;
2. The action by the Plaintiff is dismissed with costs.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Advocate MH Mbatha
For the Defendant:	Advocate MO Letsoko
Date of hearing:	29 January 2024
Date of delivery:	26 February 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 26 February 2024 at 17h40.