

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



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

**Case No.: 573/021**

**In the matter between:**

**BHUNGANE APHINDILE**

**Applicant**

**and**

**MINISTER OF POLICE**

**Respondent**

The judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 25 January 2024 at 10h00.

**ORDER**

- (a) The application for condonation for the late filing of notice in terms of section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act No. 40 of 2002 is dismissed.

(b) The Applicant is ordered to pay the costs of this application.

## JUDGMENT

**MOAGI AJ**

### **Introduction**

- [1] This is an application in terms of which the Applicant sought condonation for the late filing of notice of intended legal proceedings as contemplated in section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act No. 40 of 2002 (***“Act No. 40 of 2002”***), and for the Respondent to be ordered to pay the costs of this application on attorney and client scale, in the event of opposition of this application.
- [2] The Applicant launched this application in response to the special plea raised by the Respondent (the Defendant in the main action), of non-compliance with section 3 of Act 40 of 2002. In the main, the Respondent contended that the Applicant failed to serve the required notice within the prescribed period and that the Applicant's claim has prescribed.
- [3] This court is required to determine whether the Applicant has made out a case for condonation as contemplated in section 3(4) (a) and (b) of Act 40 of 2002?

## **Brief material background**

- [4] On or about 28 March 2017, the Applicant was arrested, detained and charged with murder.
- [5] On 17 August 2017, the Applicant was released on bail.
- [6] His criminal case was set down for trial on 21 to 22 May 2018. On 22 May 2018, the Applicant was discharged in terms of section 174 of the Criminal Procedure Act, Act No. 51 of 1977 ("**CPA**").
- [7] On 28 February 2019, the Applicant, through his attorney of record, served a notice in terms of section 3 of Act 40 of 2002 on the Respondent, demanding payment for unlawful arrest, detention (*contumelia*) and loss of income.
- [8] On 14 April 2021, the Applicant instituted an action against the Respondent for **unlawful arrest, detention and loss of income** (*emphasis underlined*).

## **Applicable Law**

- [9] Section 3 of Act No. 40 of 2002 deals with the prescribed notice of intended legal proceedings to be given to organs of state, and provides that:

*"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 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.*

- (4) (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.” (emphasis underlined).*

[10] Section 3(4)(b) of Act 40 of 2002 empowers this court to grant condonation sought by the Applicant, provided the court 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.<sup>1</sup>*

[11] In order to determine whether the Applicant's claim has not prescribed, one has to consider the provisions of subsection 3(3) (a) of the Act 40 of 2002 read with section 11(d) and section 12 of the Prescription Act No. 68 of 1969 (**“Prescription Act”**).

[12] Section 11 (d) provides that the period for prescription shall:

*“Save where an Act of Parliament provides otherwise, three years in respect of any other debt.”*

---

<sup>1</sup> Minister of Police and Others v Samuel Molokwane (730/2021) [2022] ZASCA 111 (15 July 2022) at par 23. In the Minister of Public Works v Roux Property Fund (Pty) Ltd (779/2019)[2020] Z119 ZASCA (1 October 2020 at par 13.

[13] Section 12 clarifies when prescription begins to run and provides that:

*“Subject to the provisions of subsections (2), (3), and (4), prescription (4), prescription shall commence to run as soon as the debt is due.*

(1) *If the debtor willfully 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.*

(2) *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.* (emphasis underlined).”

[14] In **Truter and Another v Deysel** 2006 (4) SA 168 (SCA) at 175 B Van Heerden JA stated that:

*“...Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running-it does not require knowledge of the relevant legal conclusions (i.e. that the known facts constitute negligence) ...”*

[15] In **Mtokonya v Minister of Police 2018 (5) SA 22(CC)** (“**Mtokonya**”) Zondo J (as he then was) stated that:

*“[36] Section12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from” the facts from which the debt arises”.*

## **Contentions of the parties**

### **Applicant's case**

- [16] The Applicant in the founding affidavit filed in support of the relief sought in this application, averred that on or about 28 March 2017, he was unlawfully arrested and detained by members of the South African Police Services stationed in Rustenburg, who were at all material times, acting within the course and scope of their employment.
- [17] He was arrested and detained on allegations of murder which were unfounded and not true.
- [18] Further, that he was not aware that he had a civil claim against the organ of the state. He only became aware of the requirements of section 3 of Act No. 40 of 2022, on 23 January 2019, when he consulted with his attorney of record.
- [19] It was contended on behalf of the Applicant that the Respondent's special plea on non-compliance with Act No. 40 of 2002 *"does not take into account that, the Applicant was detained for 5 months. This unlawful detention should be regarded as a continuous causa. Common sense dictates that the first day of arrest and detention is inextricably linked to the very last day of detention."*

[20] Further that, it can only be said the Applicant was unlawfully arrested if not found guilty at trial, and this was pronounced on 21 May 2018. According to the Applicant, the debt became due on 21 May 2018, when he was discharged in terms of section 174 of the CPA.

### Respondent's case

[21] It was contended on behalf of the Respondent that the Applicant has failed to meet the requirements of section 3(4)(b) of Act 40 of 2022, in particular, the Applicant's claim has prescribed. The Applicant was arrested on 28 March 2017 and his claim prescribed on 27 March 2020. The summons were only issued on 9 April 2021 and served on the state attorney on 14 April 2021.

[22] The prescription period commenced on the date of the alleged arrest and detention, that is, on 28 March 2017. The Applicant's attorneys of record are the same attorneys who served the notice in terms of section 3(4)(b) of Act 40 of 2022 to the organ of state within three years from the date of arrest and they ought to have known that this matter would prescribe if they do not serve the summons within three years from the date of the arrest.

### Discussion

[23] As stated above, this court is empowered to grant condonation sought by the Applicant, provided the court is satisfied that:

*(iii) 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.*

[24] Below, I deal first with the requirements of section 3(4)(b)(i) of Act 40 of 2002; whether the debt has not been extinguished by prescription?

[25] In terms of section 12(3) of the Prescription Act, the following two-pronged questions have to be traversed to determine whether the debt has not been extinguished by prescription?

25.1 *Whether the creditor had knowledge or is deemed to have knowledge of the identity of the debtor?*

25.2 *Whether the creditor had knowledge or is deemed to have knowledge of the facts from which the debt arises?*

*Whether the creditor had knowledge or is deemed to have knowledge of the identity of the debtor?*

[26] Having perused the documents filed in respect of this matter, the issue of knowledge of the creditor was not put at issue by the parties.

[27] It appears from the founding affidavit and documents filed in respect of this matter that the Applicant was aware that he was arrested by members of the South African Police Services who he alleges, were based at Rustenburg Police station and were at all material times acting within the course and scope of their employment with the Defendant.

[28] The Applicant's attorney of record, in the notice served on the Respondent in terms of section 3 of Act 40 of 2002, confirmed that the Applicant informed them that he was arrested by members of the Respondent and was charged at Rustenburg Police station. Further that, the police officers brutally assaulted him.

[29] Even if it can be argued that the Applicant did not have knowledge of the debtor, which is not the contention raised on behalf of the Applicant, I am convinced that he could have acquired such knowledge, by exercising reasonable care to establish the people who arrested him upon his release on bail, on 17 August 2017, and not after his charges were withdrawn.

[30] In **Leketi v Tladi NO & Others** (2010) 3 ALL SA 519 (SCA) para 18 held that:

*"In order to determine whether the appellant exercised "reasonable care", his conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge."*

*Knowledge of the facts from which the debt arises:*

[31] The upshot of the Applicant's contention in respect of knowledge of the facts from which the debt arises is that:

31.1 he was not aware that he had a civil claim against the organ of state;

31.2 The unlawful detention should be regarded as a *continuous causa*. Common sense dictates that the first day of arrest and detention is inextricably linked to the very last day of detention.

31.3 Further, that it can only be said that the Applicant was unlawfully arrested if not found guilty at trial, and this was pronounced on 21 May 2018. *“It was only on 21 May 2018 that the second Defendant’s malicious prosecution ended.”*

[32] Having regard to the majority decision in *Mtokonya*<sup>2</sup>, in my view, the Applicant’s contention, that he only became aware of the unlawfulness of the arrest when he was discharged in terms of section 174 of the CPA on 21 May 2018, is a conclusion of law and not what section 12(3) of the prescription Act contemplated.

[33] *Zondo J (as he then was) in Mtokonya* at para 44 stated that:

*“Whether the police’s conduct against the applicant was wrongful and actionable is not a matter capable of proof. In my view, therefore, what the applicant said he did not know about the conduct of the police, namely, whether their conduct against him was wrongful and actionable was not a fact and, therefore, falls outside of section 12(3). It is rather a conclusion of law.”*  
*That’s not necessary for the purpose of section 12(3).*

[34] The contention that the Applicant had no facts to rely on at the time of his arrest, detention and subsequent malicious prosecution, and that such facts could only be established if not found guilty, is a misdirection of the law of prescription.

[35] The fulcrum to the Applicant’s notion of a *continuous causa* seems to be anchored on the quote borrowed from **Thompson and**

---

<sup>2</sup> *Supra*.

**another v Minister of Police and another 1971 (1) SA at A-C**  
that:

*“In a claim for damages for wrongful arrest, the delict is committed by the illegal arrest of the plaintiff without the due process of law, i.e. the injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made, and, in order to comply with the requirements of section 23 of the Police Act, 7 of 1958, the action must be commenced with[in] six months of the cause of action arising. In an action for damages for malicious arrest and detention where a prosecution ensues on such arrest, however, as in the case of an action for damages for malicious prosecution, the proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury to the accused will arise until the prosecution has been determined by his discharge, whether by an initial acquittal or by his discharge after a successful appeal from a conviction.”*

[36] The facts in the present matter are distinguishable from those in Thompson and another v Minister of Police (*supra*) and case law relied on by Counsel for the Applicant in the heads of argument<sup>3</sup>.

[37] I am not persuaded from the merits of this case that the unlawful arrest, detention and the subsequent malicious prosecution should be treated as one continuous transaction which is not completed until the outcome of the criminal prosecution. It should be noted that the Applicant limited his claim to unlawful arrest, detention and loss of income. There is no claim instituted by the Applicant for malicious arrest and/or malicious prosecution against the National Director of Public Prosecutions.

---

<sup>3</sup> The cases relied on by Counsel for the Applicant are Nel and another v Minister of Security and another (18/2006) [2008] ZAFSHC 88 (28 August 2008); Makhwelo v Minister of Safety and Security 2017 (1) SA 274 (GJ), Nooe v Minister of Police and another (2021/742)[2022] ZAGPJHC (30 September 2022).

[38] I agree with the submission made on behalf of the Respondent that the current claim is against one Defendant/Respondent, being the Minister of Police, and this can be seen from the combined summons and particulars of claim under case number 573/2021

[39] Further that, in the particulars of claim before this Court, the Applicant has not pleaded anything regarding a claim for malicious prosecution and in any event, that claim would have to be against the National Director of Police Prosecutions, who has not been joined in the current proceedings.

[40] In the **Minister of Police v Zamani (CA 10/2021) [2021] ZAECBHC 41; 2023 (5) SA 263 (ECB) (12 October 2021)** VAN ZYL DJP stated that:

*“[27] The decision in Makhwelo is also in conflict with the judgement of the Constitutional Court Mtokonya. In Mtokonya the Court dealt with a case of unlawful arrest and detention. The case was “about whether section 12(3) of the Prescription Act requires a creditor to have knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable before prescription may start running against the creditor”. The Court concluded that section 12(3) does not require knowledge of legal conclusions or the availability in law of a remedy. “Whether the police’s conduct against the applicant was wrongful and actionable is not a matter capable of proof. In my view, therefore, what the applicant said he did not know about the conduct of the police, namely whether their conduct against him was wrongful and actionable, was not a fact and, therefore, falls outside of s 12(3). It is rather a conclusion of law,” and “[k]nowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion*

*and is not knowledge of a fact. Therefore, such knowledge falls outside the phrase 'knowledge ... of the facts from which the debt arises' in s 12(3). The facts from which a debt arises are facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor." The finding in Gore that the running of prescription is not delayed until a creditor is aware of the full extent of his legal rights, is consistent with the "well known principle in our law that ignorance of the law is no excuse. A person cannot be heard to say that he did not know his rights." Footnotes excluded".*

[41] In the context of the claim in the present matter, the Applicant was not required to conclusively know that the arrest and detention was unlawful but rather, to know, sufficient facts which would reasonably have placed him in a position to form the belief that the arrest and detention was without justification.

## **Conclusion**

[42] In considering the available evidence in totality, it can be said that the Applicant could have acquired knowledge of the debtor and required facts immediately after his arrest and detention, alternatively immediately after he was released from detention.

[43] In applying the objective standard, of a reasonable person in his position, the Applicant failed to institute action timeously, caused by inaction and not an inability to obtain knowledge of the identity of the debtor and the facts timeously. I find that the Applicant's claim has prescribed.

[44] There is no evidence which was presented before this court to demonstrate that the Applicant was prevented from giving instructions to an attorney to institute proceedings on his behalf. The fact that the Applicant may not have known what his legal rights were, did not delay the running of prescription. Section 12(3) of the Prescription Act does not require the creditor to have knowledge of any right to sue the debtor.

[45] The need for a cut-off point beyond which a person who has a civil claim to pursue against an organ of state, has been stated clearly by the Constitutional Court in *Road Accident Fund and Another v Mdeyide* (CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) (30 September 2010).

[46] I find that the Applicant's claim has prescribed, in the circumstance, it will serve no purpose to deal with the other requirements of section 3(4)(b) of Act 40 of 2022 listed above.

[47] The general rule is that costs follow the cause. I find no reason to deviate from the general rule.

## **ORDER**

In the result, I make the following order:

- (a) The Applicant for condonation for the late filing of notice in terms of section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act No. 40 of 2002 is dismissed.

(b) The Applicant is ordered to pay the costs of this application.

---

**M S MOAGI  
ACTING JUDGE OF THE HIGH COURT  
NORTH WEST HIGH COURT**

**APPEARANCES:**

**JUDGMENT RESERVED ON: 13 OCTOBER 2023**

**JUDGEMENT DELIVERED ON: 25 JANUARY 2024**

**ON BEHALF OF THE APPLICANT: ADV B. RILEY**  
**Instructed by: Shuping Attorneys**  
**45 Von Wielligh Street**  
**Rustenburg**

**ON BEHALF OF THE RESPONDENT: MR S MAELANE**  
**Instructed by: The State Attorney**  
**Cnr Sekame Road**  
**Dr James Moroka Drive**  
**1<sup>st</sup> Floor, East Gallery**  
**Megacity Complex**  
**Mmabatho**