

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

CASE NO. 3665/18

Date heard: 10 August 2021

Date delivered: 5 October 2021

In the matter between

AYANDA MAYONGO

First Plaintiff

VUYISA GOVA

Second Plaintiff

LUVUYO THISLA

Third Plaintiff

and

MINISTER OF POLICE

First defendant

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Second defendant

JUDGMENT

KRÜGER AJ

Introduction

[1] The first and third plaintiffs were arrested without a warrant by members of the South African Police Services¹ on 31 October 2015 and detained until 10 November 2015. The second plaintiff was arrested 9 November 2015. They were subsequently charged with murder, kidnapping and assault with the intention to do grievous bodily harm in the Regional Court in Ngcobo. They were acquitted on all charges on 31 May 2018.

¹ Referred to as 'SAPS' hereafter.

[2] Some months after their acquittal, the plaintiffs caused summons to be issued on 7 December 2018 against Minister of Police and the National Director of Public Prosecutions, as first and second defendants respectively. The plaintiff based their claims against the first defendant on his vicariously liability for the actions of members of SAPS for the alleged unlawful arrest of the first and third plaintiff on 31 October 2015, and that of the second plaintiff on 9 November 2015. This claim included the alleged unlawful detention of the plaintiffs until 10 November 2015. They further instituted a claim for damages on the basis of malicious prosecution against both the first defendant and second defendant for setting the law in motion against them. The National Director was cited as being responsible for the actions of members of the prosecuting authority.

[3] In response, the defendants raised a number of special pleas, but the only special plea of concern is that of extinctive prescription raised by the first defendant.

The stated case

[4] The dispute came before the court as a stated case in terms of Rule 33(1) and (2) of the Uniform Court Rules. The legal question this court before this court is whether the plaintiffs' claims for damages arising out of their alleged wrongful arrest and detention by members of SAPS have been extinguished by prescription in terms of section 11(d) of the Prescription Act.²

[5] The parties appended the *Notices of Rights in terms of the Constitution* of all three plaintiffs, the *Warning Statements* of the first and third plaintiffs to the supplementary agreed statement, the original having no documents attached. In court, Ms *Ntsepe*, for the first defendant, handed up the *Warning Statement* of the second plaintiff and a sworn statement of the investigating officer, which she indicated to be included in the documents to be considered with the statement, by agreement between the parties.

[6] The common cause facts agreed upon by the parties are:

² Act 68 of 1969.

- a. The first and third plaintiffs were arrested on 31 October 2015 by members of SAPS and they were detained until 10 November 2015;
- b. The third plaintiff was arrested on 9 November 2015 by members of SAPS;
- c. The first and third plaintiffs' debt in respect of the alleged unlawful arrest and detention became due on 31 October 2015;
- d. The second plaintiff's debt became due on 9 November 2015;
- e. On 7 December 2018 the plaintiffs issued summons against the first and second defendants for damages arising out of their alleged unlawful arrest and malicious prosecution.

[7] The *Notices of Rights in terms of the Constitution* of the plaintiffs attached to the statement of facts confirm the dates of arrest as indicated above. The *Warning Statements* of the first and third plaintiffs is dated 1 November 2015, while that of the second plaintiff is inexplicably dated 10 October 2015³ which is a date before his arrest. It would seem to be a mistake on the part of the investigating officer, and that the second plaintiff was warned on 10 November 2015.

[8] In *Mtonkonya v Minister of Police*,⁴ Zondo J said the following about proceedings in terms of Rule 33:

'From rule 33(1) and (2)(a) it is clear that what is contemplated in a special case is that there must be a question of law that the parties require the court to decide on the agreed facts and in the light of their contentions which must be set forth in the agreed statement.'⁵

[9] The rules require parties not only to set out the agreed facts and the legal question they want the court to answer, but it also requires the parties to set out their contentions thereon. Neither the initial nor supplementary statements of fact contain any contentions of either the plaintiffs or the first defendant regarding the question before the court.⁶ While is this not helpful, the agreed facts indicate the dates of arrest of each the plaintiffs as the date on which the

³ This is reflected in the notice as 2015/10/10.

⁴ 2018 (5) SA 22 (CC).

⁵ Para 15.

⁶ See *Mtonkonya* paras 18-20 for a discussion regarding the contentions of parties in a stated case.

debt of each plaintiff became due. This enables the court to make a finding, absent further contentions by the parties. Other in than *Mtokonya*, it would seem that there is no contention on the part of the plaintiffs they lacked the knowledge about the identity or the wrongdoer or whether they could institute proceedings against the first defendant once the facts which would give rise to the causes of action had happened. I restrict my judgment to the ‘four corners of the agreed statement’.⁷

Applicable principles: prescription

[10] Section 12(1) of the Prescription Act determines that prescription starts to run the moment the debt is due. This has been elaborated upon in case law, in the absence of a legislative definition.

[11] In *Truter v Deysel*,⁸ Van Heerden JA

‘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.’⁹

[12] Eksteen J in *Thompson v Minister of Police*,¹⁰ explained insofar as the delict of wrongful arrest is concerned:

‘There the delict is committed by the illegal arrest of the plaintiff without the due process of the law. Improper motive or want of reasonable and probable cause required for malicious arrest have no legal relevance to this cause of action. It is also irrelevant whether any prosecution ensues subsequent to the arrest; and, even if it does, what the outcome of that prosecution is. The injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made.’¹¹

[13] In *Mtokonya*, the date of release from detention was held to be the date on which the complete cause of action arose in respect of the plaintiff’s claim for unlawful detention.

⁷ *Mtonkonya* para 15.

⁸ 2006 (4) SA 168 (SCA).

⁹ Para 15.

¹⁰ 1971 (1) SA 371 (E).

¹¹ At 375E-G.

[14] In accordance with section 11(d) of the Prescription Act a debt of the nature such as a claim for delictual damages prescribes within three years of the date of the debt becoming due.

Analysis

[15] The causes of action of the first and third plaintiffs arose in respect of their unlawful arrest on 31 October 2015. The complete set of facts which they would need to prove to be successful in their claim for damages had happened by that date. In respect of second plaintiff, this date was 9 November 2015.

[16] The complete set of facts necessary for the first and third plaintiffs to institute their claims for damages for alleged unlawful detention was in existence on 10 November 2015.

[17] Summons in respect of the claims for unlawful arrest by all three plaintiffs and for unlawful detention by the first and third plaintiffs was issued on 7 December 2018. This is more than three years since the facts given rise to the causes of action which the plaintiffs would have to prove had happened. The plaintiffs' claims for damages for their alleged unlawful arrest and detention have been extinguished by prescription.

[18] I make the following order:

- a. The first defendant's special plea of prescription is upheld with costs.

R Krüger AJ

Acting Judge of the High Court of South Africa

No appearance for the plaintiffs

Phumzile Songo Attorney, East London, c/o Wheeldon Rushmere & Cole Inc

For the first defendant: Adv Ntsepe

Instructed by Zilwa Attorneys, Makhanda, Mr Goremasandu