IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO. 414/2020

In the matter between:

PHAKAMANI MEHLWANA	Applicant
and	
MINISTER OF POLICE	1ST Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	2ND Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	3RD Respondent

JUDGMENT

GQAMANA J:

[1] "*The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established*."[1] In the instant matter the applicant seeks to avoid the consequences of the time-bar period set out in section 3 (2) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act"), by asking for a condonation from this court under the dispensation provisions of sub-section 4 (a).

[1] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) (*Zondi I*) at para 82.

[2] The facts giving rise to this application are as follows. The applicant alleges that he was wrongfully arrested on 29 July 2014 at or near Kruisman Street, Zwide, Gqeberha without a warrant by members of the South African Police Service (SAPS), who were acting within the course and scope of their employment and service of the Minister of Police, the first respondent. He further alleges that in the course of such arrest, the police assaulted him. Thereafter, he was transported to Kwa-Zakhele police station for detention until his first appearance at court on 31 July 2014. On this date, the prosecutor and the investigating officer opposed bail. Accordingly, he was detained and remanded in custody at St Albans Prison until 7 August 2014, for a formal bail hearing. On 7 August 2014, he appeared in court for bail hearing; however, the presiding Magistrate refused him bail. Due to the nature of the charges against him and the fact that he had previous convictions for offences listed in Schedule 1, the onus was upon him to satisfy the bail court that it was in the interest of justice that he be released on bail as envisaged in section 60(11) (b) of the Criminal Procedure Act 51 of 1977 ("the CPA"). He alleges further that, on 18 January 2015, during his detention and incarceration at St Albans Prison, he was stabbed by a gang member twice on his neck and left rib, during a prison gang fight. As a result thereof he sustained stab wounds on the neck and left rib and was hospitalised for one month two weeks. His criminal trial commenced on 8 June 2017. On 5 December 2018, he was released from detention after having secured bail. His criminal trial was finalised in his favour on 10 April 2019, wherein he was acquitted. Throughout his criminal case he was legally represented by an attorney.

[3] Based on the aforesaid facts, he issued summons on 14 February 2020, for wrongful arrest and detention, assault, malicious prosecution and breach of duty of care against the respondents. In response to his summons and particulars of claim, the respondents raised two special pleas, namely, prescription and non-compliance with the provisions of section 3 (2) (a) of the Act. For purposes herein, the special plea for non-compliance with section 3 is directed only to his claims for the alleged assault, wrongful arrest and detention and breach of duty of care. The claim for malicious prosecution is excluded from the special plea raised by the first and second respondents. It is generally accepted that for malicious prosecution claim, the cause of action arises only after a successful termination of the criminal proceedings in the plaintiff's favour, which *in casu* was on 10 April 2019.

[4] The applicant conceded up-front during hearing of this application that, his claim against the first respondent for the assault, which occurred on 29 July 2014, at the time of his arrest, has prescribed and accordingly would not pursue it. Therefore, only his claims for wrongful arrest and initial detention, further detention for the period 31 July 2014 until 5 December 2018 and the breach of duty of care are relevant in this application.

[5] The notices envisaged in section 3(1)(a) of the Act were given on the respondents in September 2019. Thereafter summons was issued on 14 February 2020. As foreshadowed in paragraph 3 above, the summons was met with the special plea of non-compliance with the provisions of section 3(2)(a) of the Act. Faced with such hurdle the applicant on or about January 2021, launched the present application, which is opposed by all the respondents.

[6] Section 3 of the Act reads as follows:

> "(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.
> (4) (a) If an organ of state relies on creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for such failure."

[7] Where an applicant, as here, failed to give such notice timeously, such failure may be condoned by a court in terms of subsection (4)(b), 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 would not unreasonably prejudiced by such failure.

[8] The requirements set out in subsection 4(b) are conjunctive and must be established by an applicant in the condonation application.[2] In the instant matter, the respondents in opposition of the relief the applicant seeks, contend that none of the aforesaid requirements have been met.

[9] The approach to condonation application of this nature is well articulated in *Madinda v Minister of Safety and Security*.[3] For the court to be satisfied that all the aforesaid requirements have been established involves not proof on a balance of probabilities but '*the overall impression made on a court which brings fair mind to the facts set up by the parties*.'[4]

[10] *Mr Mnyani,* applicant's counsel argued with great enthusiasm that, the applicant's claims for unlawful arrest and detention have not been extinguished by prescription because, the applicant only acquired knowledge of the facts which gave rise to such claims in June 2017, when he had access to police docket. The argument was advanced that, he had no knowledge until he had access to the docket, whether the police had reasonable suspicion that he had committed an offence and the lack of justification of his arrest and detention. In support of his submissions, Mr *Mnyani* placed reliance in two reported judgments, namely, *Makhwebo v Minister of Safety and Security*[5] and *Minister of Police v Zamani.*[6] In the main judgment in *Zamani*, the court dismissed the defendant's special plea of prescription and found that the defendant could not place reliance on section 12(3) of the Prescription Act, because that was not the case pleaded

[2] *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* [2010] 3 All SA 537 (SCA) para [11].
[3] 2008 (4) SA 312 (SCA).
[4] Para [8] and also in *Maguga v Minister of Police* [2018] ZAECHC 78 (4 September 2018) para [22].
[5] 2017 (1) SA 274 (G).
[6] 2021 JDR 0214 (ECB). This was a judgment on the application for leave to appeal. The main judgment is reported as *Zamani v Minister of Police* (12/2019) [2020] ZAECBHC 23 (10 November 2020).

by the defendant nor was it one which the plaintiff could be called upon to answer at the trial stage.

[11] In its judgment for leave to appeal the court said the following:

> "[12] The conclusion reached by the court in the impugned judgment was influenced principally by *Makhwelo*, which make access to a police docket pivotal to the identification of the debtor, the appropriate cause of action, and the opportune moment for launching the action before it is hit by prescription.
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> [13] It has, however, greatly exercised my mind whether, upon a reading thereof, the subsequent pronouncement in *Mtokonya* may not be said to have watered down the principle enunciated in *Makhwelo*. In the first place, *Mtokonya* was decided on the basis that the court had to determine a legal (as against a factual) issue which did not prevent prescription from running and that the applicant therein " … *did have the knowledge of the identity of the debtor and the material facts giving rise to the debt at the time he was released from detention … but … did not know that he had a legal remedy against the defendant*." In the instant matter the respondent's uncontroverted testimony was that he had no knowledge of the identity of the debtor, certainly not without having had sight of the police docket. It is a matter of concern that the line between what is purely factual, as against legal, within the meaning of section (12)(3), is too narrow and may at times result in a conflation of these terms.
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> [14] The problem that confronts us is exacerbated if one has regard to the following remarks by Froneman J (writing for the majority) in *Kruger*:
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> "*It is not clear to me whether the first judgment purports to lay down a legal rule that in all debts arising from delictual claim based on malicious prosecution, prescription starts to run only when a claimant has knowledge of the contents of the police docket. That would be a disquieting departure from the clear conceptual logic of the precedents in this area. For the reason stated above–that the evidence to prove lack of reasonable and probable cause and intent to injure will vary from case to case- a legal rule to that effect cannot and should not be posited*."

[12] The *Zamani* main judgment has since been set aside on appeal.[7] The full bench stated the following:

> "[26] I agree with the defendant's submission that *Makhwelo* was wrongly decided. As stated earlier the burden of proving that an arrest and detention are justified, rests on the person who effected the arrest. The judgment in *Makhwelo* further conflates the strength, or the prospects of success of a claim, with the knowledge required for the institution of a claim in order to interrupt the running of prescription. As stated in *Gore*, prescription is not postponed until such time as the creditor is in a position to comfortably prove his or her case. It is also not necessary for the creditor to have certainty "*in regard to the law and the defendant's rights and obligations that might be applicable to such debt*."

[7] *Minister of Police v Zamani* CA 102021 [2021] ZAECGHC (12 October 2021).

> [27] The decision in *Makhwelo* is also in conflict with the judgment of the Constitutional Court in *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 knowledge 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 arise' 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*."

[13] I agree fully with the Full Bench's criticism of *Makhwelo*'s judgment. It was not only wrongly decided, but was patently wrong. Over decades, it has been our law that the plaintiff bears no onus to prove wrongfulness of the arrest and detention. In *Thompson v Minister of Police*,[8] it was held that:

> "In the claim based on wrongful arrest however the position is different. There the delict is committed by the illegal arrest of the plaintiff without 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 the prosecutors 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*".

[14] Also in *Links v Department of Health*,[9] the Constitutional Court said that, in a delictual cliam fault and unlawfulness do not constitute factual ingredients of the cause of action, but they constitute legal conclusion which are drawn from the facts.

[15] It follows therefore that a plaintiff's right of liberty is infringed as soon as he or she is deprived of such freedom without justification and the harm continues until he or she

[8] 1971 (1) SA 371 (E) at 375 E–G.
[9] 2016 (4) SA 414 (CC), para [31].

is released from detention and his or her freedom is restored. Thus in a case of wrongful arrest and detention, the debt arises from the moment of his arrest and each day in detention constitutes a new debt as long as the wrongful conduct endures.[10] An arrest or detention is *prima facie* wrongful and accordingly it is not necessary for the plaintiff to either allege or prove wrongfulness. The defendant bears the onus to prove the lawfulness of the arrest and detention.[11]

[16] It is trite that in terms of s 12(1) of the Prescription Act, prescription begins to run the moment the debt is due. And a debt is due when a creditor acquires knowledge of the identity of the debt and the facts which gave rise to the debt or when everything has happened which would necessitate him or her to institute his or her action and to pursue the claim.[12] In the context of this case and in line with the authorities referred to above, the applicant's claims for arrest and detention for the period from 29 July 2014 until 17 June 2017 have prescribed. Therefore, the applicant's application for condonation fails on the first requirement set out in section 4(b)(i) of the Act.

[17] In so far as the applicant's claim for further detention, for the period, which has not been extinguished by prescription, he still faces other hurdles because, he has to show "*good cause*" for his failure. On his own version, he was legally represented throughout his criminal trial. He was released from detention on 5 December 2018. The relevant notices were only given in September 2019. There is no allegation that he was prevented by the first and second respondents from giving such notice. To the contrary, on his version he knew as early as in June 2017, when he was placed in possession of the police docket that his arrest and detention was unlawful. Despite his knowledge of such facts, he failed to give the required notice.

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[10] *Lombo v African National Congress* 2002 (5) SA 668 (SCA) at para [26] and *Minister of Police v Yekiso* 2019 (2) SA 281 (WCC) at para [19].
[11] *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at pp 587–589 and also *Lombo* (*supra*) at para [32].
[12] *Truter v Deysel* 2006 (4) SA 168 (SCA) at para [16].

[18] Throughout the criminal proceedings, the applicant was legally represented. The applicant contends that when he was acquitted on 10 April 2019, he approached his erstwhile attorney to institute a claim on his behalf against the first and second respondents.[13] However, his erstwhile attorney advised him that he had no mandate to deal with civil matters and promised to link him up with another attorney on the agreed date. This undertaking was not honoured. By pure luck, on an unspecified date, he met his present attorney of record and arrangements were made to call her for purposes of setting up an appointment. Due to his limited financial resources, he was unable to call his attorney as agreed. It was only later in August 2019, that his mother gave him money for taxi to visit his attorney for consultation. Having consulted with his attorney, he was advised of his claims against the respondents. On or about 20 September 2019, the respondents were served with the notices in terms of section 3 of the Act.

[19] The above explanation is for the period after his acquittal, but as I have indicated above, each day of his detention gave rise to a new debt. He was released from detention in December 2018. No explanation is given by him as to why he could not secure legal services or give the required notices as soon as he was released from detention. He knew that his liberty was infringed on each day he was kept in detention. After his release, nothing prevented him from giving instructions to an attorney to institute proceedings on his behalf.

[20] Furthermore in assessing whether "good cause", exist the court must consider also the prospects of success in the proposed action. On the facts pleaded, the applicant was charged for an offence listed in Schedule 1 of the CPA. He had previous convictions, namely, housebreaking with intent to steal and theft, robbery, malicious damage to property and three convictions for theft.[14] Accordingly in terms of the provisions of section 60 (11)(b) of the CPA, he had to be kept in detention and the onus was on him to adduce evidence to the satisfaction of the court that, it was in the interests of justice that he be released on bail. The applicant was legally represented at the criminal proceedings and he applied for bail, which was refused by the magistrate. The

[13] Index pp 10-11 [34] and [35].
[14] Index p 62 para 29.2.5.

applicant's prospects of success for the unlawful detention claim are very slender if they exist at all. Therefore, the applicant has failed to show that good cause exists for his failure.

[21] Insofar the third requirement, the first and second respondents have set out in detail the basis upon which they contend that they would be unreasonably prejudiced. The cause of action herein arose in July 2014. It has been a long time since the incident occurred and due to time lapse, the memory of witnesses would have faded. That would severely prejudice the first and second respondents' case.

[22] With regard to the claim against the third respondent, the applicant alleges that the assault occurred on 18 January 2015. His contention is that he was assaulted by gang members whilst he was incarcerated at St Albans Medium B prison. The applicant conceded that he had full knowledge of the facts that gave rise to the assault claim on 18 January 2015. However, his main contention was that in this regard is that, he had no knowledge of the identity of the organ of state until his attorney of record advised him. As indicated above, the applicant had access to legal representative to advise him shortly after his arrest and throughout his criminal case. There are no records of the alleged assault. He is silent in his affidavit whether he had informed his legal representative about this alleged assault. There is no allegation that he has ever reported the alleged assault to the authorities at correctional services. In my view, for the similar reasons as indicated above, the applicant's claim, for assault against the third respondent has been extinguished by prescription. Had the applicant exercised reasonable care, he would have acquired knowledge of the identity of the third respondent as the relevant organ of state. The third respondent did not prevent him from acquiring such knowledge.

[23] In so far as costs are concerned, there is no reason why the costs should not follow the results.

[24] In the circumstances the following order will be issued:

1. The application for condonation is dismissed.

2. The applicant is ordered to pay the respondents' costs.

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N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the applicant	:	*M Mnyani*
Instructed by	:	Nongogo Attorneys Inc.
		Port Elizabeth
Counsel for the 1st and 2nd respondent	:	*G Appels*
Instructed by	:	State Attorney
		Port Elizabeth
Counsel for the 3rd Respondent	:	*I Dala*
Instructed by	:	State Attorney
		Port Elizabeth
Date heard	:	2 September 2021
Date judgment delivered	:	9 November 2021