IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

Case No: A938/2004

Dates heard: 14/02/2005

Date of judgment: 6/4/2005

In the matter between:

GEORGE FREDERICK THEODORE PISTORIUS Appellant

and

MINISTER OF SAFETY AND SECURITY Respondent

JUDGMENT

DU PLESSIS J:

The appellant alleges that on 18 January 2001 at the auction kraal in Northam, one Superintendent Monye of the South African Police Service accused him of stock theft, unlawfully arrested him and detained him for about 2 to 3 hours. Contending that Monye and those assisting him acted within the course and scope of their employment with the respondent, the appellant instituted action in the Pretoria magistrate's court claiming damages.

When the appellant instituted action, section 57 of the South African Police Service Act, 68 of 1995 ("the Act") was still in force[1]. Section 57(1) provided that legal proceedings such as those that the appellant instituted, had to be instituted within 12 months after the date upon which the plaintiff became aware of the facts giving rise to the claim. The parties agree, correctly in my view, that a plaintiff who did not institute action within the 12 month period was, subject to what I later say regarding section 57(5), non-suited.

The appellant instituted the present proceedings on 25 June 2002, about 17 months after 18 January 2001 when the incident giving rise to his claim occurred to his knowledge. The respondent filed a special plea seeking the dismissal of the appellant's claim by reason of his failure to institute the proceedings within 12 months. The magistrate upheld the special plea and dismissed the appellant's claim with costs. This is an appeal against that judgment and order.

The appeal essentially turns upon the correct interpretation and application of section 57(5) of the Act that read as follows:

> "Subsections (1) and (2)[2] shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions contained in those subsections where the interests of justice so require".

[1] It has been repealed. See section 1(2)(b) of Act 40 of2002.
[2] Subsection (2) provides for notice to be given of an intended action, and is not relevant now.

The question is whether the interests of justice require the court to dispense with the time limitation contained in section 57(1). Before considering that, I must summarise the facts.

The appellant was the only witness in respect of the special plea. He testified that he had bought cattle a few days before the auction at Northam on 18 January 2001. He took these cattle to the auction where Monye arrived and publicly accused him of having stolen the cattle. The appellant informed Monye that he (appellant) had the necessary documentation available to prove that he had bought the cattle. Monye showed no interest and told the appellant to accompany him to the police station. The appellant did so. When they arrived at the police station, Monye locked the appellant in a cell in the charge office. The appellant made some phone calls, but his telephone was soon confiscated. Later Monye took the appellant to his (appellant's) farm to look there for more allegedly stolen cattle. He found none, and they returned to the police station where the appellant was released after members of the police stock theft unit told him that no charges against him were being investigated.

The appellant consulted his attorneys who, on 22 March 2002, duly addressed a letter of demand to the national commissioner of the SAPS. The letter sets out in detail the events and the persons involved. The commissioner's office acknowledged receipt of the letter of demand and informed the appellant's attorneys that the matter had been referred to the provincial commissioner of Northwest and that that office in due course was to furnish the appellant's attorneys with a reference number and the name of the state attorney dealing with the matter. The provincial commissioner's office did not make contact with the appellant's attorneys and on 29 May 2002 the latter enquired by way of a letter to the provincial commissioner of Northwest.

On **11** June 2001 the provincial commissioner wrote to the appellant's attorneys and informed them that the matter had been transferred to the area commissioner of Marico. The name and telephone number of a police officer dealing with the matter was furnished and the attorneys were again informed that they would be supplied with a

reference number and the name of the relevant state attorney. On 11 October 2001 the provincial commissioner of the Northern Province (now Limpopo) wrote to the attorneys that the matter had been referred to that office. Again the name of an officer dealing with the matter was furnished and again the attorneys were informed that they would receive a reference number and the name of the relevant state attorney. Early in November the attorneys replied by way of a letter expressing, not surprisingly, concern over the fact that the matter seemed to be shunted sideways instead of it progressing. In addition, the attorneys threatened to issue summons within a month should the promised name and reference number not be furnished. On 30 November 2001 the provincial commissioner informed the attorneys of the reference number and the name of the relevant state attorney.

On 14 January 2002, about four days before the expiry of the prescription period, the relevant state attorney wrote to the appellant's attorneys that he was awaiting instructions from his client (the SAPS) and would convey his client's attitude as soon as he had received instructions. The appelIant's attorneys' reaction was to write to the state attorney that, in view thereof that the latter would convey his client's attitude after obtaining instructions, the appellant had requested them to hold the matter in abeyance until they have again heard from the state attorney. Further correspondence followed but the state attorney did not convey his client's attitude as promised. Summons was eventually issued on 25 June 2002.

On these facts the learned magistrate reasoned that the interests of justice did not require the court to dispense with the requirement of section 57(1) because the appellant's attorneys were dilatory, so it was held, in their handling of the matter.

With respect, I cannot agree that the attorneys were dilatory. The state attorney informed them four days before the expiry of the I2-month period that he (the state attorney) was awaiting instructions from his client. The state attorney's letter really brought the appelIant's attorneys under the impression that the former was obtaining instructions with a view to exploring the possibility of a settlement of the appellant's

claim. To hold the issue of summons in abeyance under such circumstances is normal practice between attorneys. I may add that it is a salutary practice aimed at saving unnecessary costs.

It could be argued that the appellant's attorneys should have asked the state attorney whether it was in order for them to hold the matter in abeyance. In the factual context of this case, however, there was no reason for the appellant's attorneys to suspect that the state attorney would not agree to hold the matter in abeyance. They were wrong but that does not make them dilatory.

For the respondent, Mr Joubert submitted that the appellant bore an onus to prove that it is in the interests of justice that the court dispenses with the requirements of section 57(1). For this submission counsel relied on what was said in Minister of Safety and Security v Standard Bank of SA Ltd 1999 (3) SA 471 (W) at 476J to.477A. In that case Labe J approached the question on the footing that the appellant was seeking an indulgence and therefore had to persuade the court that the defendant would suffer no prejudice if the court dispensed with the requirements of section 57(1). I cannot agree. Properly interpreted, section 57(5) does not require of a plaintiff to approach the court hat in hand for an indulgence. The section defines the ambit of the limitation contained in section 57(1): actions against the police must be instituted within 12 months unless the interests of justice require a longer period. What the section requires the court to do is to decide on a conspectus of all the evidence what the interests of justice require. I shall assume that the appellant bore an onus to prove the facts upon which the court was to exercise the discretion. As the facts were not really in dispute, the question of onus is academic in this case however.

As a general proposition, parties to a dispute are entitled to have the true issues between them resolved. The court should endeavour to resolve the true issues and should not lightly non-suit a party who has transgressed procedural rules without prejudicing the other party's ability to put his or her case before the court. (See Baeck & Co v Van Zummeren and Another 1982 (2) SA 113 (W) at 118G to I)

The court *a quo* correctly pointed out that the purpose of a limitation such as the one under consideration is to ensure that a large and diverse organisation such as the SAPS is given ample warning of intended action and that action is instituted soon enough for the organisation to be able to investigate the issues at hand (See the remarks of Didcott J in Mohlomi v Minister of Defence 1997 (1) SA **124** (CC) at p. 305D to E). This in essence means that the purpose of the provision is to enable the SAPS to put its case before a court properly. The limitation is a means to an end and not an end in itself. There is no doubt that the respondent in this case had timeous and ample warning of the intended action and could investigate the matter. He was given the name of the policeman involved and details of the relevant facts already in March 2001. The late issue of summons did not prejudice the respondent's ability to meet the appellant's case

on its true merits.

As the facts summarised above show, the allegations against Supt. Monye are serious and evince a reprehensible abuse of power. Provided that the SAPS has had sufficient opportunity to investigate the facts, it is in the interests of justice to deal with such a case on its merits and not to leave a citizen who has so suffered without remedy.

The appellant has a constitutional right to have the dispute decided by a court of law, and in view of the fact that the respondent had ample time to investigate the allegations, it is not in the interests of justice to non-suit the appellant for the late issue of the summons.

I should add that it is somewhat surprising that the special plea was raised in this matter. To an extent, the state attorney's letter lulled the appellant's attorneys into a false sense of security. In such a case, the state attorney should take great care before it raises a "technical" defence. The state attorney represents the government and as such serves as a window through which the public view the government. It goes without saying that the government should not be perceived as trying to avoid the true issues when it is involved in litigation. That applies particularly when the case concerns allegations of a serious abuse of power on the part of a government official.

The appeal succeeds with costs. The order of the magistrate's court is set aside and substituted by the following order: "The defendant's special plea is dismissed with costs"

B.R. du Plessis

Judge of the High Court

I agree.

J Poswa
Judge of the High Court