IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,

PRETORIA

16/3/18

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

In the matter between: - **CASE NO.: 2015/80133**

JEREMIAH PHEHELLO MAKHUBEDU **APPLICANT**

And

MINISTER OF POLICE **FIRST RESPONDENT**

INSTECTOR SITHOLE **SECOND RESPONDENT**

JUDGMENT

TSATSAWANE AJ

Introduction

1 This is an application for condonation in terms of section 3(4)(a) of the institution of legal proceedings against certain organs of the State Act 40 of 2002 ("**the Act**").

2 The application was brought as a result of the respondents having taken the law point that the applicant did not comply with the provisions of section 3(1)(a) of the Act before instituting the main action proceedings against the respondents.

3 The application is opposed by the respondent.

The applicant's case

4 The applicant instituted action proceedings against the respondents on 5 October 2015. This date appears from the Registrar's date stamp on the face of the summons.

5 In his particulars of claim, the applicant says that ~

5.1 he was unlawfully arrested and detained on 13 August 2008;

5.2 he was maliciously prosecuted pursuant to the aforesaid arrest for alleged unlawful possession of a firearm and ammunition whilst under the influence of liquor;

5.3 he was detained for 2 weeks and released from detention on 22 August 2008;

5.4 despite his release from detention, he was prosecuted until the State declined to continue with the prosecution after which the prosecution was terminated in his favour;

5.5 as a result of the aforesaid, he suffered damages in the amount of R1 466 000,00. This is the amount which the applicant claims from the respondents.

6 In paragraph 8 of his particulars of claim, the applicant says that he delivered to the defendants the notice contemplated in section 3(1) of the Act. The notice upon which the applicant relies in this regard is attached to the particulars of claim and it is dated 24 June 2015 and has an acknowledgement of receipt date stamp of 14 August 2015.

7 Section 3(1) of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of the State unless the creditor has given the organ of the State concerned a written notice of intention to institute legal proceedings or the organ of the State has agreed in writing to the institution of the legal proceedings without such a notice.

8 In terms of section 3(2) of the Act, the notice contemplated in section 3(1) must be served upon the organ of the State concerned within 6 months from the date on which the debt became due.

The respondent's case

9 In their plea, the defendants alleged, amongst others, that ~

9.1 the applicant's claim has been extinguished by prescription in terms of the Prescription Act 68 of 1969;

9.2 the applicant has failed to comply with the provisions of section 3(1)(a) of the Act in that the applicant did not deliver the notice contemplated therein within the prescribed 6 months' period from the date on which the debt allegedly arose.

10 In his reply to the defendant's plea, the applicant denied that his claim has been extinguished by prescription and that he did not comply with the provisions of section 3(1)(a) of the Act. Despite this denial, the applicant has decided to bring this application.

The application for condonation

11 In this application, the applicant seeks an order condoning the non-compliance with the provisions of section 3(1)(a) and 3(2) of the Act.

12 Section 3(4)(b) of the Act provides that the Court may grant condonation if it is satisfied that ~

12.1 the debt has not been extinguished by prescription;

12.2 good course exists for the failure by the creditor; and

12.3 the organ of State was not unreasonably prejudiced by the failure to comply with the provisions of section 3.

13 What emerges from case law dealing with condonation in terms of section 3(4) of the Act is that the Court has a discretion to grant or refuse condonation. In Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA) the Court said ~

"*[13] The discretion may only be exercised, however, if the three criteria in s 3(4)(b) are met: that the debt has not been extinguished by prescription ...; that good cause exists for the creditor's failure; and that the organ of state has not been unduly prejudiced. The Minister does not rely on either of the latter two criteria in this appeal.*"

14 In the light of the above, it follows that the three criteria must be satisfied before condonation is granted. The Court does not have a discretion to grant condonation if the three criteria are not met. For example, the Court does not have a discretion to grant condonation if the creditor's claim has been extinguished by prescription.

15 The first requirement with which the Court must be satisfied is that the creditor relies on an extant cause of action, i.e. that the creditor relies on a debt which has not yet been extinguished by prescription. Accordingly, if the debt has been extinguished by prescription, the Court ought not to grant condonation due to the fact that, in that event, there is no claim to pursue.

16 In Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) the Court held that ~

> "*[16] The structure of s 3(4) is now such that the court must be satisfied that all three requirements have been met...*" (my emphasis).

17 Accordingly, if one of the requirements has not been satisfied, condonation is not competent.

18 The applicant's claim, being one of malicious prosecution, could only have arisen when the prosecution was terminated in his favour. In Thompson and Another v Minister of Police and Another 1971 (1) SA 371 (E) at 375 it was held that ~

> "*In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be prejudged by*

the civil action... The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or where the Attorney-General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge..."

19 In his particulars of claim, the applicant does not say as to when the alleged malicious prosecution was terminated in his favour. In a letter dated 6 August 2014 attached to his founding affidavit, it is stated that the case against the applicant "*was withdrawn at Court on the 15th October 2008...*"

20 A handwritten note on the front cover of the police docket which is attached to the plaintiff's founding affidavit states that the State, per P W Coetzer, public prosecutor, declined to prosecute the applicant on 21 November 2009 due to insufficient evidence. For purposes of this application, I will assume in favour of the applicant that the claim for malicious prosecution arose on the later date, i.e. 21 November 2009.

21 Assuming that the applicant's claim for malicious prosecution arose on 21 November 2009, it follows that it was extinguished by prescription by no later than December 2012, being a period of more than 3 years contemplated in the Prescription Act 68 of 1969.

22 It is common cause that the applicant only instituted his action proceedings against the respondents on 5 October 2015 and served the summons shortly thereafter. By that time, the debt had already been extinguished by prescription in terms of the Prescription Act 68 of 1969 due to the fact that ~

22.1 the applicant knew that he was arrested by members of the South African Police Service for whom the Minister of Police is responsible;

22.2 the applicant knew that the criminal prosecution against him was terminated in his favour in November 2009; or on his own version, he knew that charges against him were "*withdrawn at Court on the 15th October 2008 ...*";

22.3 the applicant knew the identity of the Minister of Police who is cited herein as the first respondent;

22.4 the applicant knew all the facts on the basis of which his present claim is based or could have acquired such facts; and

22.5 the defendant did not prevent the applicant from knowing any of the above facts.

23 In the premises, the applicant's claim against the respondents has been extinguished by prescription in terms of the Prescription Act 68 of 1969 and I do not have a discretion to grant the relief which the applicant seeks in this application.

24 In the premises, the following order is made ~

24.1 The application is dismissed.

24.2 The costs of this application shall be paid by the applicant.

Kennedy Tsatsawane

Acting Judge of the Gauteng Division of the High Court of South Africa, Pretoria.