IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 37154/08

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. **YES**

20 October 2020
DATE

SIGNATURE

In the matter between:

ANDRIES HUMAN Plaintiff

and

MINISTER OF SAFETY AND SECURITY Defendant

NEUKIRCHER J:

1] This judgment deals with two issues that were argued when the trial, set down for 8 - 9 days, was called on 12 October 2020:

1.1 the first was whether the plaintiff's claim, as embodied in the amended particulars dated 1 February 2018 had prescribed[1]; and

1.2 whether the plaintiff should be granted a postponement to allow him to file a Rule 28 amendment and an application for condonation in terms of s3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act no 40 of 2002 (Act 40 of 2002)[2].

2] In order to give context to the above it, it is necessary to set out the facts and the arguments presented in this matter.

BACKGROUND

3] The plaintiff issued out summons on 7 August 2008[3] against the defendant for an amount of R102 867 500,00 for damages arising out of the plaintiff's arrest and detention. The plaintiff's claim sets out 5 heads of damages:

3.1 R36 315 000,00 for *contumelia*, deprivation of freedom and discomfort;

3.2 R1 000 000,00 in respect of legal costs;

3.3 R 10 552 500,00 in respect of the fair and reasonable market value of the 64 vehicles that were seized and never returned to him;

3.4 R45 000 000,00 in respect of loss of income due to his extended incarceration; and

3.5 R10 000 000,00 in respect of the fair and reasonable market value of his immovable properties, most of which were repossessed and sold

---

1 As embodied in the First Special Plea set out in the defendant's consequential amendment filed on 30 September 2020

2 In response to the Second Special Plea

3 And service took place on that date as well

because of his inability to pay the monthly bond instalments due to his incarceration.

4] In response and over and above the plea on the merits, the defendant raised various Special Pleas relating to prescription and to non-compliance with Act 40 of 2002.

5] The matter was set down for 3 weeks commencing 3 May 2011 but was postponed by agreement to enable the defendant to attempt to trace missing police dockets and, once traced, to consult the relevant witnesses. It was again set down for hearing for 25 days commencing 30 September 2013. On that date, the parties agreed to a separation of issues and argued the Special Pleas of prescription and Act 40 of 2002 before Tolmay J. It was agreed between them that the outcome of the issue of prescription would be determinative of the issue relating to Act 40 of 2002.

6] On 9 October 2013, the defendant's Special Pleas were dismissed with costs.

7] On 21 February 2018, plaintiff then substantially amended his particulars of claim and each of the claims set out in par 3 *supra*, have now been categorized under separate headings:

7.1 Claim 1 is headed *"Claim 1 (MALICIOUS PROSECUTION)"* and has a subheading *"First bail application"* and another *"Knowledge";*

7.2 Claim 2 is headed *"CLAIM 2: LEGAL COSTS"*;

7.3 Claim 3 is headed *"CLAIM 3: Iniuria and Contumelia*";

7.4 Claim 4 is headed *"CLAIM 4: Loss of income and loss of properties"* and has a subheading of *"PROPERTY"* and a second of *"MOTOR VEHICLES"*.

8] The matter was again enrolled for 4 November 2019 when it was removed, once again, by agreement.

9] In a letter to Ledwaba DJP dated 30 November 2019, the plaintiff's attorney[4] states as follows:

"5. The reasons for the matter not being required to be allocated as a special trial is that the Plaintiff no longer persists in the claims referred to in:

5.1 paragraph 36.1 of the particulars of claim (legal costs, in the amount of R1, 000, 000.00);

5.2 paragraph 36.3 of the particulars of claim (value of motor vehicles seized by SAPS, in the amount of R10,552,500.00);

5.3 paragraph 36.4 of the particulars of claim(value of immovable property lost to the Plaintiff by virtue of his detention prior to his having been granted bail, in the amount of R10,000,00.00);

5.4 paragraph 36.5 of the particulars of claim (loss of income during his detention in the amount of R45,000,00.00)."

10] This was confirmed in the Pre-Trial conference held on 11 September 2020. The parties also agreed as follows:

---

[4] Mr Coetzee

10.1 *"6.2 The parties agree that there shall be no separation of issues of liability (merits) and quantum in respect of the Plaintiff's claim for the damages referred to in paragraph 36.2 of the particulars of claim (read together with paragraphs 6 – 15, paragraphs 19 - 24 and paragraph 29)."*

10.2 *"7.2 The Defendant shall file his plea, as amended consequentially upon the amendment of the particulars of claim, on or before 25 September 2020.*

7.3 The Plaintiff will thereafter give consideration to the filing of a replication or an amendment of the amount claimed as referred to in paragraph 6.2 of the particulars of claim as amended, on or before 2 October 2020."

11] The defendant duly filed his plea, albeit late[5], on 30 September 2020 in which he not only pleads over, but also raises two Special Pleas. On 5 October 2020 the plaintiff filed a "*Plea to Defendant's Special Plea"* (i.e. a replication).

The Special Pleas

12] These are based on the points of a) prescription and b) that plaintiff has failed to comply with the provisions of s3(2)(b) of Act 40 of 2002.[6]

---

5 To which there was no objection noted

6 "*3. (1) No legal proceedings for the recovery of a debt may be instituted against an 40 organ of state unless-*

(a) the creditor has given the organ of state in question notice in writing of his or

(b) the organ of state in question has consented in writing to the institution of that her or its intention to institute the legal proceedings in question; or 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).

12.1 **The First Special Plea**

12.1.1 In this the defendant pleads that par 36.2 of the amended particulars of claim the plaintiff claims damages for *"Deprivation of Freedom, discomfort, contumelia"* and does not persist with his original claims, which were all based on malicious prosecution;

12.1.2 that, in support of this claim, the plaintiff has pleaded that:

12.1.2.1 he was arrested on 28 August 1994 by members of the SAPS without a warrant;

12.1.2.2 three bail applications[7] were refused;

12.1.2.3 at the first bail application *"false information was given by members of the SAPS in opposing the Plaintiff's bail application, which caused the magistrate(s) and judges on appeal and the highest court of appeal to refuse the Plaintiff's bail application";*

12.1.2.4 he was granted bail on 23 December 2000 without the necessity of a formal bail application;

12.1.2.5 as a consequence of false information having been given by members of the SAPS, plaintiff was *"denied bail from 29 August 1994 until 23*

---

(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."

[7] The content of the first bail application forming an integral part of the second and third bail applications

December 2000 and was incarcerated during such period being 6 years, 3 months, 25 days";

12.1.2.6 in terms of 12(1)[8] of the Prescription Act 68 of 1969 (the Prescription Act), prescription in respect of the *"deprivation of freedom debt*" began to run on 23 December 2000 and was extinguished by 23 December 2003;

12.1.2.7 summons commencing action was only served on defendant on 7 August 2008 by which time the debt had become prescribed.

12.2 **The Second Special Plea**

12.2.1 In terms of s3(2)(b) of Act 40 of 2002, the notice in terms of s3(1)(a) must *"briefly (to) set out the facts giving rise to the debt*";

12.2.2 the Notice in terms of s3(1)(a) dated 4 June 2008, failed to *"set out all facts giving rise to the deprivation of freedom debt as pleaded in the particulars of claim (namely, that the Plaintiff was incarcerated due to bail having been refused as a consequence of false information having been given by members of the SAPS)."*

---

8 "***When prescription begins to run***

(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due…"

13] To this the plaintiff replicated as follows:

13.1 as to the Act 40 of 2002 special plea[9]

13.1.1 that his claim is based on the *action iniuriarum*;

13.1.2 that the bail application forms an *"integral part of criminal proceedings*";

13.1.3 the action for "*malicious prosecution"*[10] falls under the *action iniuriarum* and prescription only commenced when the proceedings were terminated in the plaintiff's favour on 7 April 2008; and

13.1.4 plaintiff had given proper notice on 6 June 2008 and summons was served on 7 August 2008.

13.2 as to the prescription special plea

13.2.1 The judgment of Tolmay J dealt decisively with the issue of prescription.

13.2.2 Therefore:

"1.16 The Plaintiff therefore pleads that the special pleas raised in the Defendant (sic) plea has been adjudicated, alternatively that the judgment on prescription special pleas has been adjudicated and that the Defendant is estopped from raising the 2nd special plea, as it was agreed between the parties that the other special (plea) will follow the result of the prescription pleas; alternatively it

9 For unlawful arrest, detention and malicious prosecution
10 Words specifically pleaded by plaintiff

follows logically that after the court gave judgment on prescription, that the date of giving notice must read with the judgment on prescprtion…"

14] Thus, well-knowing the content of the Special Pleas, plaintiff chose not to bring a formal application for condonation in terms of s3(4) of Act 40 of 2002, but instead to rely on the argument presented in paragraph 1.16 of its replication.

15] When the matter was called before me, the argument on the two Special Pleas was raised first. The reason for this is logical: in the event that the defendant is successful on either one of the two that would be the end of the plaintiff's claim. At the end of his argument, Mr Coetzee, when pressed on certain issues arising from Mr Bester's argument, suddenly sought a postponement in respect of the issue of the Act 40 of 2002 Notice so that the plaintiff could launch the necessary condonation application in terms of s3(4). During the course of the submissions that followed, he also sought a postponement to enable his client to amend the amended particulars of claim[11].

16] Both applications for postponement were opposed by the defendant and they were both argued. The argument presented by Mr Bester was that I was already seized with the matter and that both Special Pleas had been fully argued, thus the issues set out in the amended pleadings had been fully

---

11 Clearly in an attempt to avoid any possible adverse finding on the prescription issue

ventilated in argument, the plaintiff had chosen to pin his colours to the mast and that this was a last gasp to try and circumvent the points which, at this late stage, was prejudicial to the defendant and should not be countenanced. It was also argued that, were any amendment to be allowed, the defendant would be severely prejudiced as there were certain witnesses which (given the amendment of 2018) had become unnecessary and were now untraceable. Thus the defendant's prejudice was manifest.

17] Mr Bester's submission was that judgment in respect of the two Special Pleas should be handed down. Obviously, if the prescription argument was upheld, the remainder of the issues would become moot. However, if unsuccessful he moved for judgment in respect of the issue pertaining to Act 40 of 2002 Notice. He argued that in the alternative to the latter, the matter could be postponed for the plaintiff to bring his condonation application and, as I am already seized with the matter, that could be heard at the same time as the trial on the merits.

18] It was immensely unfortunate, but given the turn of events, both counsel were in agreement that any trial on the merits would not be concluded in the allocated time. Mr Bester's one witness, was also only available in the first week of trial. Both parties were agreed that a part-heard matter would not be in anyone's interests and, in any event, the costs of obtaining a record after 2 weeks, would be costly and may take time. I am also of the view that these costs, together with the costs of reading the record, preparing once more and securing witnesses would escalate the costs that must, at this stage, already

be considerable. The parties were thus in agreement that the trial on the merits would have to be set down again in the event that the postponement on the issue of the amendment is granted.

The postponement

19] At issue thus before venturing into whether judgment in respect of any one or both of the Special Pleas should be finalised at this stage is whether a postponement should be granted to enable the plaintiff to amend his particulars of claim. The rationale is: if the postponement is granted, and the amendment is ultimately effected, it may very well be the end of the prescription issue.

20] What must be borne in mind in this matter is that the terms of the Rule 28 and the impact thereof cannot be assessed as it has yet to be formulated.

21] Mr Bester has submitted that he foresees that any attempt to amend will be opposed. This may well be so, but the grounds and cogency of the possible opposition will depend on the terms of the proposed amendment and this similarly cannot be foreshadowed.

Can/should a postponement be granted?

22] It is trite that a party may amend his pleadings at any stage before judgment. In fact, this is specifically provided for in Rule 28(10) which reads:

"(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment, grant leave to amend any pleading or

document on such other terms as to costs or other matters as it deems fit."

23] It is trite that once it hands down judgment, a court becomes *functus officio* and has no authority to grant any amendment.[12]

24] In **Myers v Abramson**[13] the following events transpired: at the close of the plaintiff's case the defendant applied for absolution on the ground that the pleaded claim was founded in contract whereas, accepting the truth of his evidence, the plaintiff was only entitled to claim damages. During the course of argument in the absolution application the plaintiff applied for leave to amend his declaration, by the addition of an alternative claim for damages should the court find that he was not entitled to the payment claimed, but only to recover damages. This was opposed and it was argued by defendant that as the plaintiff's counsel had already commenced his argument in reply, the court was precluded from dealing with it. It was also contended that the present cause of action was not cognizable by the court as it sought a remedy i.e. specific performance, which the court could not grant; accordingly it should not appear in the declaration alternatively, if plaintiff was entitled to the relief claimed, then plaintiff had made his election to hold the defendant to the contract and accordingly had no right to claim damages and the insertion of

---

12 Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 306F-G: *"The general principle, now well-established in our law, is that, once a court has duly pronounced a final judgment or order it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon become functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased…"*
Govender v Hassim 1994 (1) SA 304 (D) at 305G-H
This would exclude any factors that find application under Rule 42(1)

13 1951 (3) SA 438 (C)

such a claim in the declaration would be excipiable on the ground of inconsistencies contained and on the ground of it being embarrassing.

25] In granting the amendment, Van Winsen AJ stated the following:

"The question arises at the outset whether I am precluded from dealing with the application for the amendment in view of the fact that I was seized of an application for absolution which had, at the time the application was made, already been partly argued.

Rule of Court 28(7) provides that the Court may at any stage before judgement allow any party to amend his pleadings. The rule is in the widest possible terms and does not envisage any period before judgment during which the possible terms and does not envisage any period before judgement during which the possibility of making an application for amendment is precluded. On the contrary, the use of the word 'any' qualifying the word 'stage' seems to specifically exclude the possibility of there being some ' closed' period during which, before judgment, such application cannot be brought. The word 'any', as was held in Rex v Hugo, 1926 AD 268 at 271, is 'upon the face of it a word of wide and unqualified generality. It may be restricted by the subject matter or the context, but prima facie it is unlimited'. There is nothing in the context here to restrict the meaning of the word, and I think that the rule allows the Court to make an amendment if the circumstances warrant it even during the hearing of an application for absolution. Applications for amendment have been entertained and allowed even after the cases of both plaintiff and defendant have been closed and in certain circumstances even argued. See Vorster v Van der Walt, 1914 E.D.L.

305; Levy v Rose 20 S.C. 189; Clayton v Feitelberg, 1903 T.H.99. I cannot see any logical distinction between an application by defendant for judgment or for absolution at the end of the whole case, i.e. after the cases of both parties have been closed, and an application for absolution at the close of plaintiff's case. If an application for amendment can be entertained in the former circumstances, it can equally well be entertained in the latter. Cf Ferreira Deep Ltd v Olver, 1903 T.S. 145 at pp.148-9."

26] Some of the principles which guide a Court in deciding whether or not to grant an amendment are the following[14]:

26.1 an amendment will always be allowed unless it is *mala fide* or would cause an injustice to the other side which cannot be compensated by costs[15];

26.2 an unreasonable delay in filing an amendment may constitute a reason for refusing leave to amend;

26.3 whether the amendment seeks to make out a new case, especially after both parties have closed their respective cases[16];

26.4 is the amendment is bad in law or excipiable[17];

---

14 Erasmus Superior Court Practice; Juta at B1-178 – B1-184A

15 Moolman v Estate Moolman and Another 1927 CPD 27 at 29 *"…in other words, unless the parties cannot be put back for the purposes of justice in the same postion as they were when the pleading which it is sought to amend was filed."*

16 Kali v Incorporated General Insurances Ltd 1976 (2) SA 179 (O)

17 Cross v Ferreira 1950 (3) SA 443 (C) at 450 : *"Save in exceptional cases where the balance of convenience or some such reason may render another course desirable, an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable."*

26.5 not all amendments in which a new cause of action is pleaded will be refused;

26.6 a court will not necessarily refuse an amendment which will cure a pleading that is defective;

26.7 where the result of the refusal of the amendment would be the commencement of the action *de novo*[18].

27] What seems to be the common denominator in all these cases is the fact that the issue of prejudice is the one that will be decisive of these matters.

28] In the matter in hand, the origin of the incident was the plaintiff's arrest in 1994. He was incarcerated until 2000 when he was released on bail and the criminal proceedings were discontinued in 2008. Summons was issued and served on 7 August 2008. By the time the matter came before me on 12 October 2020, not only was the action itself over 12 years old, but some 26 years has passed since the plaintiff was arrested.

29] The claim that was originally instituted was one of malicious prosecution – this is to be distilled from the original particulars of claim and from the judgement of Tolmay J in 2013[19] where she states *"…The plaintiff contends that his claim*

---

18 Meyers v Abramson (supra) at 454G-H

19 In respect of the special pleas that were raised to the original particulars of claim

is based on malicious prosecution…" [20] and *"…On a perusal of the particulars of claim it is clear that all the necessary allegations are made to constitute a cause of action based on malicious prosecution. The plaintiff alleges that the SAPS wrongfully and maliciously set the law in motion by paying false charges without probable cause and that as a result of that he suffered damages. It is also alleged that the prosecution was stopped on 7 April 2008."*[21]

30] Whilst the plaintiff makes similar allegations in the amended particulars of claim, he has added the following:

*"**First Bail Application***

22. At the first bail application between August 1994 and September 1994 the following false information was given by members of the SAPS in opposing the Plaintiff's bail application, which caused the magistrate(s) and judges on appeal and the highest court of appeal to refuse the Plaintiff's bail application."

31] In **Kali v Incorporated General Insurances** (supra), Milne J stated[22]:

"The mere fact that the application is made at such a late stage is not per se a ground for refusing the application. Where, however, the amendment may result in prejudice to the plaintiff which cannot be cured by any adjournment and an appropriate order as to costs, then that would be a good ground for exercising my discretion against the defendant. I use the word 'may' advisedly

---

20 In para [5] of the judgment
21 In para [14] of the judgment
22 At 182B

since I respectfully agree that, in considering whether or not to grant an amendment

> *'Where there is a real doubt whether or not prejudice or injustice will be cuaed to the defendant if the amendment is allowed, it should be refused.'*

per Schreiner J (as he then was), in Union Bank of South Africa Ltd. V Woolf, 1939 W.L.D. 222 at 225, referred to with approval in Meyers v Abramson, 1951 (3) SA 438 (C) at 451."

32] In **Euroshipping Corporation of Monrovia v Minister of Agriculture and Others**[23] Friedman J stated the following:

"The fact that defendants would be deprived of an opportunity of obtaining evidence with which to test the validity of the allegations which plaintiff seeks to make, to my mind constitutes prejudice of a kind which cannot be cured by a postponement or an order for the payment of wasted costs.

In the course of his argument Mr Williamson adverted to the fact that because of the passage of time the plaintiff would itself inevitably labour under the same disadvantages as the defendants, if the amendments were allowed. He also pointed to the additional problems that plaintiff would face because of the onus which rests upon it at trial. However, when the Court weighs up the prejudice which would flow from the granting of an amendment, it is concerned not with the inconvenience that the plaintiff would suffer, but what the other party's prejudice is likely to be. See Moolman's case at 29 and Trans-Drakensburg Bank case at 640H. There is in an application such as this an onus on the party seeking the amendment to establish that the other party will not suffer irreparable prejudice and, as SHREINER J said on the sixth rule enumerated in Union Bank of South Africa Ltd v Woolf (supra at 225):

---

23 1979 (2) SA 1072 (C)

'Where there is a real doubt whether or not prejudice or injustice will be cause to the defendant if the amendment is allowed, it should be refused.' "

33] Prinsloo J recently, in **Xaba and others v IG Tooling and Light Engineering (Pty) Ltd** [24], had the following to say on this issue:

"[8] In considering the application for postponement, I indicated to Mr Mashele that the Practice Manual of the Labour Court provides that application will generally not be postponed and that this could only be done with the permission of the presiding judge, more so where the other parties to the matter oppose the application for postponement. In order to assess the application for postponement, I enquire from Mr Mashele what the purpose of the postponement would be and what the applicants seek to achive by postponing the matter. Mr Mashele indicated that the purpose of the postponement was to amend the applicants' papers to bring it in line with the applicable law. I asked Mr Mashele what was it that the applicants intend to amend, as I was of the view that the applicants' case had no merit in law and no amount of amendment could cure the fatal defects of the case. Surprisingly Mr Mashele, in seeking a postponement to amend the papers, was unable to tell me what the amendments would be and what the applicants intend to place before this court should a postponement be granted. I was not satisfied that any purpose would be served by postponing the matter and the application for postponement was refused."

---

[24] (2019) 40 ILJ 638 (C)

34] In this matter, Mr Coetzee moved the postponement for leave to amend at the last stage of argument on the two Special Pleas. As pointed out *supra*, this in itself is not necessarily a bar to a postponement to amend. However, what is absent is the actual Rule 28 itself. All I know is that it will, in all likelihood, be an effort to cure the Special Plea on prescription.

35] The facts giving rise to this action stem from 1994, some 26 years ago. The reason that the prosecution was halted was not that plaintiff was acquitted, but that the docket was missing and some of the evidence presentedat trial in respect of certain charges had also disappeared. Mr Bester also informed me that an important witness for defendant[25] cannot be traced. It behoves no further explanation, that after 26 years many of the defendant's witnesses may no longer be employed by SAPS may depending on their age, have retired or be difficult to trace. The expense of tracing them, transport to Gauteng and accommodation for the duration of the trial [26] is also a factor to be taken into consideration. The extreme delay in finalisation of this matter is also dismaying not only because of the lack of finality, but also because the more time that passes, the more people's memory fades, the latter of which has major implications on the issue of a witness's credibility – none of this can be compensation by a costs order.

36] Given this and the fact that the terms of the amendment have not been provided[27], I am not satisfied that a postponement of the matter to allow an

---

25 The confidential informant mentioned for the first time in the amended particulars of claim

26 If they are from other parts of the country

27 There was also no request to stand the matter down to later in the week to draft a Rule 28 amendment

amendment would serve the interests of justice and the application for postponement is therefore refused.

The special plea of prescription

37] Mr Bester argues that the "debt" in this matter, as pleaded in the amended particulars of claim, became due (at the latest) when the plaintiff was released from prison on 23 December 2000 and that this is the date on which prescription begins to run in terms of s12(1) of the Prescription Act. Given that summons was only served on defendant on 7 August 2008, this would mean that by that time the debt had become extinguished.

38] Thus, the question is: what is the "debt"?

39] "Debt" is not defined in the Prescription Act. At best, the Prescription Act provides as follows:

"12(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.

(2) …

(3) 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 case…"

40] The Supreme Court of Appeal has, in several cases[28], set out the principles to be considered when interpreting the word "debt":

40.1 a "debt" does not mean a "cause of action";

40.2 In **Evins v Shield Insurance Co Ltd** [29] it was stated thus: "*the 'debt' is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt"*[30];

40.3 the term "cause of action" is *"ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action, and correlatively, the defendant's 'debt' "*[31], and thus it is more appropriate to speak of a "right of action" which is then the basis of the claim;

40.4 the "right of action" accrues when all the *facta probanda* are in place.

41] S12(3) also provides that a debt is not due until the creditor has knowledge of the *"facts from which the debt arises"*.

42] In **Mtankanya v Minister of Police**[32] the court stated:

"[36] …Case law is to the effect that the facts from which the debt arises are

---

28 Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838D-H; Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A); Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA); Provinsie van die Vrystaat v Williams NO 2000 (3) SA 65 (SCA); FirstRand Bank v Nedbank (Swaziland Ltd 2004 (6) SA 317 (SCA)

29 Supra at 842 E-F

30 Sentrachem Ltd v Prinsloo at 15B-E; FirstRand Bank v Nedbank (Swaziland) Ltd at par 4

31 Evins supra at 825F-G

32 2018 (5) SA 22 (CC)

the facts which a creditor would need to prove in order to establish the liability of the debtor."

And at paragraph [45]

"The facts from which a debt arises are the facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor."

43] Thus, in a claim for malicious prosecution, the SCA stated the requirements in **Minister for Justice and Constitutional Development v Moleko**[33] thus:

"In order to succeed (on the merits) with a claim for malicious prosecution a claimant must allege and prove –

(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with 'malice' (or animo injuriandi); and

(d) that the prosecution has failed."

44] In the amended particulars of claim, the plaintiff claims R36 315 000-00 for *"Deprivation of Freedom, discomfort, contumelia"* (the contumelia claim) and alleges that:

44.1 he was arrested by members of the SAPS without a warrant on 28 August 1994;

44.2 his first bail application on 38 August 1994 was refused;

---

33 2009 SACR 585 (A) at para 8

44.3 his second bail application in October 1994 was refused, as was his third bail application;

44.4 that, at the first bail application *"false information was given by members of the SAPS in opposing the Plaintiff's bail application, which cause the magistrate(s) and judges on appeal and the highest court of appeal to refuse the Plaintiff's bail application."*;

44.5 the second and third bail applications were not *de novo* applications as the content of the opposing affidavit in the first bail application formed an integral part of each;

44.6 on 23 December 2000 plaintiff was granted bail without a formal application being brought;

44.7 plaintiff was, accordingly, as a consequence of the false information given by members of the SAPS *"denied bail from 29 August 1994 until 23 December 2000 and was incarcerated during such period being 6 years, 3 months, 25 days."*;

45] Thus the '"right of action" as pleaded in the amended particulars of claim is based on

45.1 *"false information was given by members of the SAPS in opposing the Plaintiff's bail application, which cause the magistrate(s) and judges on*

appeal and the highest court of appeal to refuse the Plaintiff's bail application."; and

45.2 as a consequence of the false information being given by members of the SAPS *"denied bail from 29 August 1994 until 23 December 2000 and was incarcerated during such period being 6 years, 3 months, 25 days."*.

46] Thus, the plaintiff needs to prove:

46.1 that members of the SAPS gave false information;

46.2 the causal nexis which caused plaintiff to be detained;

46.3 a duty of care on SAPS to give proper information; and

46.4 that the members of the SAPS acted in breach of their duty.

47] Given the manner in which the particulars of claim is now pleaded, the fact that the criminal trial was terminated in plaintiff's favour appears not to be an essential element of the claim.

48] Mr Bester argues that the facts relating to the first bail application, the denial of this and the two subsequent bail applications, must be treated as a separate cause of action from that of the malicious prosecution.

49] If one looks at the amended particulars of claim, plaintiff has pleaded:

"8. On or about 30 August 1994 the Plaintiff brought his first bail application, which was denied for the reasons as set out below...";

"13. "The plaintiff was denied bail from 29 August 1994 until 23 December 2000 and was incarcerated during such period being 6 years, 3 months, 25 days."; and

"22. At the first bail application between August 1994 and September 1994 the following false information was given by members of the SAPS in opposing the Plaintiff's bail application, which cause the magistrate(s) and judges on appeal and the highest court of appeal to refuse the Plaintiff's bail application...".

50] In my view what needs to be analysed is the following: are the facts pertaining to the bail application capable of adjudication as a separate and distinct issue from that of malicious prosecution? If so, then the question arises: when did the debt become due?

51] I have already set out *supra* what the law requires of the plaintiff to be successful in a claim for malicious prosecution[34]:

51.1 as to the requirement in (a): both the original and the amended particulars of claim state that the law was set in motion with the plaintiff's arrest on 28 August 1994, without a warrant;

51.2 as to the requirement in (b): both particulars of claim state that the defendant acted with malice;

---

[34] See par 40 supra and Minister for Justice and Constitutional Development v Moleko

51.3 as to the requirement in (c): both particulars of claim state that the prosecution terminated in plaintiff's favour when the "*state stopped prosecution on 7 April 2008"*.[35]

52] But that is where the similarities end. In the original particulars of claim the elements of the malicious prosecution are pleaded as follows:

"3. During 1994 Inspector Melt Van Niekerk, who was a member of the South African Police Service at all relevant times, as well as other members of the South African Police Service unknown to Plaintiff, wrongfully and maliciously set the law in motion by laying false charges of theft, fraud and corruption against plaintiff with the police at Hercules Police Station by giving them the following false information, namely that Plaintiff is the leader of a criminal syndicate involved in the crimes of corruption, theft of motor vehicles, fraud and the receiving of stolen property.

4. When laying these false charges and giving this disinformation, Inspector Melt Van Niekerk and the other members of the South African Police Service had no reasonable or probably cause for so ding. Nor did they have any reasonable belied in the truth of the information given.

5. As a result of the aforesaid conduct of Inspector Melt Van Niekerk and the other members of the South Africa Police Service:

---

35 This according to the amended particulars of claim. In the original particulars of claim it was pleaded as follows:

"5.7 On 7 April 2008 the prosecution against the Plaintiff was stopped on all charges in terms of Section 8 of the Criminal Procedure Act 51 of 1977. The Plaintiff was consequentially found not guilty on all charges."

5.1 Plaintiff was on 28 August 1994 and at Pretoria arrested without a warrant by members of the South African Police Service, inter alia Inspector Melt Van Niekerk;

5.2 Plaintiff was thereafter detained at the insistence of the aforesaid members of the South African Police Service as well as various other members of the South African Police Service.

5.3 Plaintiff appeared in the Pretoria Regional Court under case number SH119/94 for the first time on 28 August 1994 whereafter the case was postponed on numerous occasions.

5.4 Plaintiff was held in custody without bail for a period of 6 years, 7 months and 21 days until he was released on bail on 23 December 2000…

5.5 Inspector Melt Van Niekerk and various other members of the South African Police Service during or about 1994 unlawfully seized 64 motor vehicles…

5.6 …

5.7 On 7 April 2008 the prosecution against the Plaintiff was stopped on all charges in terms of Section 8 of the Criminal Procedure Act, 51 of 1977. The Plaintiff was consequently found not guilty on all charges…"

53] The facts set out in paragraphs 8, 13 and 22 of the amended particulars of claim[36] are not found in the original particulars of claim in any form.

---

[36] See par 46 supra

54] Whilst it may well be argued that there are overlapping factual allegations, this in itself is not enough to avoid the problem faced by the plaintiff i.e. that the right of action sought to be enforced subsequent to the amendment, is not recognisable as substantially the same right of action as disclosed in the original particulars of claim:

"[9] ... But the mere fact that there is some overlapping of factual allegations contained in the pre- and post amendment particulars of claim is not enough (cf Evins v Shield Insurance Co Ltd, supra, at 838H-839D). The right of action disclosed in the amended particulars of claim must at least be recognisable as the same or substantially the same as the right disclosed in the original claim. In the present case the right disclosed in the amended particulars of claim is recognisable as neither."[37]

55] This is because the very basis of the right of action has changed.[38]

56] The fact is that the allegations regarding the bail application if removed from the particulars of claim would not affect the plaintiff's original cause of action, being malicious prosecution.

57] However, were it pleaded that the plaintiff was arrested without a warrant but bail was denied because members of the SAPS provided false information in opposing the bail application that sets up its own right of action which is not reliant on the facts of the malicious prosecution or the discontinuation of the proceedings in the plaintiff's favour.

---

37 FirstRand Bank v Nedbank (Swaziland) Ltd supra at par [9]
38 FirstRand Bank v Nedbank (Swaziland) Ltd supra at par [6]

58] Mr Coetzee argues that the judgment of Tolmay J is dispositive of the issue of prescription as she dismissed this special plea in 2013 where it was brought in respect of the original particulars of claim. However, in my view, it is not. She held:

"…The incarceration was a result of the alleged malicious prosecution and does not constitute a cause of action on its own. The cause of action on which the plaintiff chose to base its claim in the particulars of claim is malicious prosecution."

59] At the risk of being repetitive, the plaintiff now bases his incarceration on the false information and fraudulent acts of the SAPS which, as set up in the amended particulars of claim, now constitutes a separate and distinct right of action, the particulars of which were known to the plaintiff when he was released on bail on 23 December 2000.

60] This being so, the plaintiff cannot rely on the date of 7 August 2008 to found the date on which the debt became due. As stated, that date is 23 December 2000.

61] Summons was issued and served on 7 August 2008 which is 1 year and 4 months after the debt became prescribed.

62] Therefore, the defendant's First Special Plea must succeed.

Costs

63] Mr Bester has asked that the action be dismissed with costs on the attorney and client scale as a mark of the court's displeasure. This is so as the plaintiff should have decided on a course of action long ago. This order is opposed by Mr Coetzee who submits that there is no basis laid for this punitive order, and in any event the defendant only filed its consequential amendment on 30 September 2020 i.e. 10 days before trial and thus plaintiff had to do whatever was in his power to prepare for trial on this basis.

64] I agree that, whilst plaintiff has vacillated in this hearing, there are no grounds for a punitive costs order given the lateness of the amended plea[39]. However, I am of the view that costs should follow the result.

Order

65] The order I make is therefore the following:

65.1 the defendant's first Special Plea of prescription is upheld;

65.2 the plaintiff's claim is dismissed with costs.

NEUKIRCHER J
Date of hearing: 12 October 2020
Date of judgment: 20 October 2020
Judgment and order granted electronically in accordance with the directives regarding special arrangements during the National State of Disaster

[39] Albeit that this was by agreement between the parties and plaintiff came to court ready to proceed

Counsel for plaintiff: Mr Coetzee
Instructed by: P C Coetzee Attorneys
Counsel for defendant: Adv TWG Bester SC
Instructed by: State Attorney, Pretoria