

## REPUBLIC OF SOUTH AFRICA

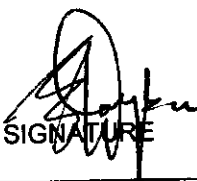


IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(Functioning as LIMPOPO DIVISION, POLOKWANE)

CASE NO: 288/2013 *LimPoPO*

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES:</u>
	<u>YES/NO</u>
(3)	<u>REVISED.</u>
<div style="display: flex; justify-content: space-between;"> <div> <u>08.12.2014</u> DATE         </div> <div>  SIGNATURE         </div> </div>	

In the matter between:

PHILLEMON SELEKA

FIRST PLAINTIFF

DIAMOND NGINENDA

SECOND PLAINTIFF

TSHEPO KLAAS BALOYI

THIRD PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

NGWAKO KGOMO

SECOND DEFENDANT

PAULOS SHIKA

THIRD DEFENDANT

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JUDGMENT

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MAKGOBA J.

- [1] The Plaintiffs instituted actions for damages against the Defendants arising out of the alleged unlawful arrest, detention and assault by members of the South African Police Service, namely the Second and Third Defendants who at all material time were acting within the cause and scope of their employment with the First Respondent.
- [2] The Defendants raised a special plea of prescription on the basis that the Plaintiff's actions were instituted and summons was served three years after their respective causes of action had already arisen.
- [3] The parties agreed to submit a stated case to the Court in terms of Rule 33(1) and (2) of the Uniform Rules of Court for the Court to adjudicate on the issue of prescription.

[4] The following facts are agreed upon between the parties for the purpose of the adjudication of the special case:

- 4.1 The cause action for the claim of wrongful arrest and detention instituted by Phillemon Seleka, (herein referred to as the First Plaintiff) against the Defendants arose on 03 February 2010. The cause action for the claim of assault instituted by the First Plaintiff against the Defendants arose however, on 08 February 2010.
- 4.2 The cause action for the claim of wrongful arrest and detention instituted by Diamond Nginenda (herein referred to as the Second Plaintiff) against the Defendants arose on 03 February 2010. The cause action for the claim of assault instituted by the Second Plaintiff against the Defendants arose, however, on 08 February 2010.
- 4.3 The cause action for the claim of wrongful arrest and detention instituted by Tshepo Klaas Baloyi (herein referred to as the Third Plaintiff) against the Defendants arose on 04 February 2010. The cause action for the claim of assault instituted by the Third Plaintiff against the Defendants arose, however, on 08 February 2010.
- 4.4 The First and Second Plaintiffs served Summons on the Defendants on 21 May 2013. The Third Plaintiff, however, served its Summons on 08 April 2013 on the Defendants.

- 4.5 The First, Second and Third Plaintiffs served their respective Summons against the Defendants three years after their respective causes of action had already arisen.
- 4.6 On 9 March 2012 the First, Second and Third Plaintiffs respectively served Letters of Demand as well as Notices in terms of Section 3 of the Institution of Legal Proceedings against Certain Organs of the State Act 40 of 2002 on the Defendants. The aforesaid letters of demand and notices were served after the expiry of the prescribed period of six months (i.e. two years after the cause of action had arisen).
- 4.7 The question of law in dispute between the parties is whether a letter of demand and/or a Notice in terms of Section 3 of the Institution of Legal Proceedings against Certain Organs of the State Act 40 of 2002 is a process as contemplated in Section 15(1) of the Prescription Act 68 of 1969 alternatively, whether the service of the respective notices and letters of demand by the First, Second and Third Plaintiffs on the Defendants interrupted prescription as is contemplated in Section 15(1) and (2) of the Prescription Act 68 of 1969.

[5] The Plaintiffs contend that the running of prescriptions was interrupted as contemplated in s 15(1) of the Prescription Act 68 of 1969 when the plaintiffs served letters of demand as well as the notices in terms of s 3 of Act 40 of 2002 on the defendant in March 2012. The defendants contend otherwise.

[6] Section 15(1) of the Prescription Act 68 f 1969 provides that:

*" (1) The running of prescription shall, subject to the provisions of Subsection (2) be interrupted by the service on the debtor of any process whereby the Creditor claims payment of the debt"*

The Prescription Act does not define "a process" but s 15 (6) of the Act provides that:

*"(6) For the purposes of this Section, "process" includes a petition, a notice of motion, a rule nisi, a Pleading in reconvention, a third party notice referred to in any rule of Court, and any document whereby legal proceedings are commenced"*

[7] In the letter of demand the plaintiffs demand from the defendants payment failing which Summons will be issued against the defendants. On the other hand in the notice in terms of s 3 of Act 40 of 2002 the plaintiffs give the defendants particulars and nature of the claim against the defendants and the plaintiff's intention to institute actions against the defendants. The question arises whether such letter of demand and/or notice constitute "a process".

[8] An analysis of s 15(1) of the Prescription Act reveals that for prescription to be interrupted in terms of that section three requirements must be present:

- (a) there must be a process;
- (b) the process must be served on the debtor;
- (c) by that process, the creditor must claim payment of the debt.

Section 15(6) of the Act does not contain a definition of the word "process," it merely catalogues or lists certain documents which will be regarded as "process" for the purpose of the section. These listed documents are all documents "whereby legal proceedings are commenced."

[9] In my view documents like a letter of demand or a statutory notice in terms of s 3 of Act 40 of 2002 do not fall within the category of the above listed documents whereby legal proceedings are commenced.

[10] It is important to note that s 15 (6) of the Act states that "process" includes "any document whereby legal proceedings are commenced."

It follows that the section envisages that there may also be documents which fall to be classified as a "process" but which do not commence legal proceedings.

In my view the letter of demand and/or a section 3 notice in terms of Act 40 of 2002 are such documents which do not commence legal proceedings.

[11] In the case of *Mias De Klerk Boerdery (Edms) Bpk v Cole*<sup>1</sup> it was held that a notice of intention to amend in terms of Rule 28 was a "process" in terms of s 15(1) of the Prescription Act which interrupted the running of prescription. This is correctly so since a notice to amend can only emanate from a legal process which had already begun.

[12] The decision in *Santam Insurance Co Ltd v Vilakazi*<sup>2</sup> is apposite although dealing with s 6(1) (b) of the former Prescription Act of 1943. The Court held that:

*"... it is clear that the service referred to in Sec 6(1) (b) must be service whereby action is instituted as a step in the enforcement of the claim or right. The underlying reason why such a service interrupts prescription is that the creditor has thereby formally involved his debtor in Court proceedings for the enforcement of his claim".*

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<sup>1</sup> 1986(2) SA 284 (NPD)

<sup>2</sup> 1967(1) SA 246(A) at 253 H

In the earlier decision in *Park Finance Corporation (Pty) Ltd v Van Niekerk*<sup>3</sup> it was held that the process in terms of s 6(1) (b) of the Prescription Act of 1943 should be a process by which action is instituted to enforce the right that could otherwise be rendered unenforceable by lapse of time.

- [13] In *First Consolidated Leasing v Service SA and Another*<sup>4</sup> a plea of prescription was raised in an action for payment of an amount owing in terms of a lease. Plaintiff alleged that prescription was interrupted as a notice of motion had been issued for the interim attachment of goods which were the subject-matter of the lease.

The Court held that the motion proceedings were instituted for an attachment order pending an action and nothing more. It followed that those proceedings did not interrupt prescription under s 15(1) of the Prescription Act 68 of 1969.

- [14] By parity of reasoning, it is my view that the Section 3 Notice and Letter of Demand served by the plaintiffs on the defendants were served as such pending the institution of legal proceedings against the defendants and cannot be regarded as processes to commence legal action. These documents (section 3 notice and letter of demand) are processes which do not commence legal proceedings and thus fall outside the ambit of processes envisaged by s 15 (1) of the Prescription Act.

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<sup>3</sup> 1956(1) SA 699 (T) at 674 A-C

<sup>4</sup> 1984(4)SA 380 (WLD)

- [15] In the light of interpretation of s 15 (1) of the Prescription Act by our Courts, a process which is merely informative, and which is not one by which the creditor purports at all to enforce the right co-relative to the relevant obligations, is not a process for purposes of such section.

In *Naidoo and Another v Lane and Another*<sup>5</sup> Meskin J said:

*"By its reference to a process whereby the creditor "claims payment of the debt" in s 15(1) of the Act, the Legislature intends to refer to a process by which the creditor claims obligation owed to him, i.e. a process by which a creditor purports to enforce the right co-relative to such obligation."*

- [16] Having regard to the aforesaid decisions, I come to the following conclusion:

16.1 A notice in terms of s 3 of Act 40 of 2002 does not commence legal proceedings but is rather a notice of intended legal proceedings to be given to an organ of State. An action to enforce a right of payment of a debt is not instituted by service of such a notice.

16.2 Equally, an action to enforce a right for payment of a debt is not instituted by way of a letter of demand.

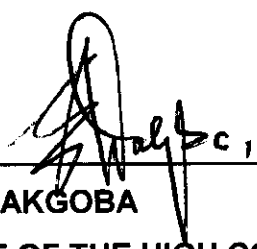
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<sup>5</sup> 1997(2) SA 913 D & CLD at 919 A-B

16.3 Both the Notice in terms of Act 40 of 2002 and a letter of demand are not processes whereby the plaintiffs are claiming payment of a debt from the defendants but are notices of intention to institute legal proceedings and a demand for payment of a sum of money failing which summons will be issued.

[17] In the premises the letter of demand and notice in terms of s 3 of Act 40 of 2002 issued by the plaintiffs did not interrupt the running of prescription and the First, Second and Third plaintiff's claims instituted against the defendants have accordingly prescribed.

[18] In the result, the defendants' special plea of prescription is upheld and the plaintiff's actions are dismissed with costs.



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**E.M. MAKGOBA**  
**JUDGE OF THE HIGH COURT**

**HEARD ON : 3 NOVEMBER 2014**

**For the Plaintiffs : Adv. V.H Mugwambane**

**Instructed by : Malumbete & Makhubele Attorneys  
c/o Director Makhafola Inc.  
Polokwane**

**For Defendants : Adv. R P A Ramawela**

**Instructed by : State Attorney**