REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41346/2008

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

29/9/2015
DATE

SIGNATURE

In the matter between -

MBAKWE EKENE APPLICANT

and

MINISTER OF SAFETY AND SECURITY
REPUBLIC OF SOUTH AFRICA RESPONDENT

J U D G M E N T- DELIVERED ON 29 SEPTEMBER 2015

MAHALELO AJ

[1] The applicant instituted a claim for damages against the respondent. The claim arose as a result of the alleged unlawful assault on the applicant by a member or members of the South African Police Service .Pleadings in the

matter have closed. At a pre- trial conference held on 3 March 2014 the respondent raised a special plea of failure by the applicant to comply with the provisions of s 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 (the Act).

[2] In the present application, the applicant seeks the dismissal of the special plea and a declaration that condonation for failure to comply with section 3 of the Act is not necessary as it has complied , alternatively, condoning the filing of such notice with the Provisional Headquarters of the respondent as being sufficient or in compliance with the Act. Further in the alternative, extending the time period and permitting the applicant to proceed with the action against the respondent thereby condoning its failure to comply with the Act.

[3] The applicant further seeks an amendment of paragraph 5 of its particulars of claim.

[4] The respondent opposed the applications.

[5] The applicant alleged that he suffered damages by reason of the averred wrongful and unlawful assault on him by a member or members of the respondent, a police officer/s, as a result of which he lost the use of his left eye permanently.

[6] The following facts, which are common cause between the parties, are of importance for purposes of the present applications.

[7] The applicant caused summons to be issued against the respondent on 2 December 2008 and served shortly thereafter. Immediately prior to the hearing of the matter and at a pre-trial conference dated 3 March 2014 the respondent raised a special plea of non-compliance by applicant with the provisions of s 3(1)(a) of the Act.

[8] The respondent required that a formal application for condonation should be adjudicated upon before the trial. A postponement was granted to afford the applicant an opportunity to bring a condonation application. Applicant promised to bring such application by the end of March 2014 but failed to do so. The present application was served on 14 July 2014

[9] The relevant conduct on which the applicant's claim is founded occurred on 7 April 2008.

[10] The claim in the normal course would have been extinguished by prescription on 6 April 2011.

[11] The period of six months afforded to the applicant by s 3(2)(a) of the Act would probably have ended at midnight on 7 October 2008.

[12] The intended statutory notice dated 17 September 2008 was delivered by hand to the Provincial Commissioner's office. Receipt was acknowledged with a stamp bearing the date of 16 February 2009. This notice was preceded

by a memorandum by an Advocate presented to the office of the Police Provincial Commissioner's office of the police on 26 August 2008. The said memorandum bore the name of the applicant and was titled "Police brutality: Nigerians".

[13] For purposes of this application it will be accepted that the notice referred to above does not bear the name of the applicant, it cannot therefore be said that, that is a notice as contemplated by the Act. The critical issue raised by the respondent is whether a notice in terms of s 3(1)(a) was delivered at all, and whether such notice was within the prescribed time limits. Respondent argued that the purported notice referred to above is non-compliant with the provisions of the Act and the applicant's delay in delivering the notice in terms of the Act has not been accounted for.

[14] 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 legal proceedings in question; or
>
> (b) the organ of state in question has consented in writing to the institution of those 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 as are within the knowledge of the creditor.

(3) For purposes of subsection (2)(a), -

(a) a debt may 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 a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) 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 was not unnecessarily prejudiced by the failure.

(c)If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question on such conditions regarding notice to the organ of state as the court may deem appropriate."

[15] The Act is a statute intended to regulate prescription and harmonise the periods of prescription of debts for which certain organs of state are liable , to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of recovery of debt.

[16] It is clear from the wording of the section that the phrase "*if the court is satisfied*" in s 3(4)(b) cannot be construed as peremptory in the strict sense of the word. The phrase has long been recognised as setting a standard which

is not proof on a balance of probabilities, but it is the overall impression made on a court which brings a fair mind to the facts set up by the parties (see *Madinda v Minister of Safety & Security* [2008] 3 All SA 143 (SCA)).

[17] For an application for condonation to succeed the first requirement speaks for itself. As far as the second requirement is concerned, the court must be satisfied that the applicant relies on a cause of action which has not prescribed. This has never been in dispute in the present matter..

[18] The respondent argued that the purported notice was defective and out of time, that the applicant failed to show good cause for its failure as required by s 3(4)(b)(ii) of the Act. In my view, "*good cause*" looks at all the factors having a bearing on the fairness of granting the relief as between the parties and as affecting the administration of justice. These may include prospect of success in the application, the reason for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, any contribution by other persons or parties to the delay and the applicant's responsibility thereof. A reading of the explanations advanced by the applicant clearly demonstrates that the applicant always had *bona fide* intentions to pursue his claim against the respondent. In my view, no blame can be attributed to the applicant for the ineptitude of his lawyer.

[19] Since pleadings in this matter have closed, it can be accepted for purposes of this application that good cause has been shown to exist.

[20] Be that as it may, due weight must be given to both the individual's right to access to justice and the protection of state interest in receiving timeous and adequate notice.

[21] It was argued on behalf of the respondent that the respondent was prejudiced by the applicant's delay and the prejudice related to the fact that the officials who were part of the meeting during which the memorandum and the notice were presented have resigned and are no longer in the service of the respondent and that some have passed away. The applicant submitted that the officials referred to above are not vital witnesses in the main case as it has provided the respondent with a list of eye witnesses who are still traceable.

[22] In my view, the respondent was not unreasonably prejudiced by the failure of the applicant to comply with s 3 of the Act.

[23] With regard to the second application, paragraph 5 of the unamended particulars of claim reads as follows:

> "The assault took place in public and in sight of the members of the public inside the Hunger Jack Pub."

[24] In terms of the notice dated 1 April 2014, applicant sought an amendment of that paragraph and to substitute it with the following:

"The said wrongful and unlawful assault took place in public and in the sight of the members of the public inside the Hunger Jack Pub. In the circumstances, it is pleaded that the member or members of the South African Police Services was or were acting at all times within the course and scope of their employment with the defendant at the time when the plaintiff was wrongfully and unlawfully assaulted, as stated hereinabove."

[25] The respondent opposed the application on the following grounds.

25.1 In the unamended particulars of claim the plaintiff only alleges that he was assaulted by members of the SAPS; the only connection, therefore, between the defendant and the assault on the plaintiff is that the assailants were members of the SAPS.

25.2 The introduction of "course and scope" amounts to the introduction of a new cause of action which has prescribed.

[26] It is common cause that summons in the matter were issued well within time. According to the pleadings and affidavits filed of record by the respondent, it is also common cause that the applicant was shot at by members of the SAPS.

[27] Paragraph 3.2 of the respondent's amended plea dated 14 April 2014 reads as follows:

"3.2 Defendant avers that on the day in question, several members of the public were involved in public violence in which life and limb was threated. The police then used rubber bullets to disperse the mob. If plaintiff was shot, then he must have been part of the riotous mob and the police therefore acted lawfully in the circumstances."

[28] The affidavit of Mr Sekwati dated 10 December 2012 filed in support of the application by respondent to uplift the notice of bar states as follows:

"4.1 The respondent/ applicant alleged that on 7 April 2008 he was wrongfully and unlawfully shot by a police officer in the side of his left eye. He does not relate the circumstances under which the incident occurred, thus creating an impression that he was an innocent person who was shot for no reason.

4.2 The applicant/respondent's case will be that on the day of the incident, the police were patrolling the streets of Hillbrow, Johannesburg, targeting people drugs. While they were in the process, five black males, the plaintiff, together with a group of other males, obstructed the police by shouting and throwing stones at them. The police fired rubber bullets at them in order for them to disperse. Possibly the respondent was hit and injured by one of the rubber bullets. The applicant will therefore deny that the shooting was unlawful in the circumstances as the police officers were acting in a situation of necessity and or private defence."

[29] The applicant argued that in view of the abovementioned paragraphs it has always been common cause between the parties that applicant was shot

by members of the SAPS who were performing their duties. Applicant alleges the shooting was unlawful.

[30] In *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173, it was held that -

> "[T]he object of pleadings is to define the issues, and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits, the court has a wide discretion. For pleadings are made for the court, not the court for pleadings."

[31] In *Wavecrest Sea Enterprises (Pty) Ltd v* Elliot 1995 (4) SA 596 (EC), Melusky J held -

> "[I]t is quite apparent that when a court has to decide whether a summons interrupts prescription it is necessary to compare the allegations and the relief claimed therein with the averments and the relief claimed in an amendment. The fact that there differences the *facta probanda* necessary to prove the original cause of action and those necessary to prove the amended claim does not invariably lead to the conclusion that the original summons did not interrupt prescription. The question is whether the right that is sought to be enforced and the relief claim in the amended claim is the same or substantially the same as the right of action and the relief in the original claim."

[32] In *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506, it was held that -

"[W]here a party has consistently relied on particulars of claim but has set it out imperfectly, an attempt to clarify it properly will not be regarded as the introduction of a new cause of action."

[33] In my view, the amendment sought to be introduced by the applicant is substantially the same as the right of action and the relief in the original claim and does not introduce a new cause of action, furthermore, the amendment sought to be introduced is not fatal to the respondent's case in that both parties pleaded under the pretext that the applicant was injured by member or members of the SAPS during the performance of their duties. It is therefore my view that the respondent will not be unreasonably prejudiced by the amendment and there is no reason why the amendment sought should not be allowed.

[34] With regard to costs, counsel for the applicant submitted that the respondent's opposition to the applications was unreasonable and obstructive, and that I should order the respondent to pay costs on a punitive scale. I do not agree with the applicant that opposition was unreasonable. It is the conduct of the applicant's legal representative which necessitated the application for condonation and amendment of the particulars of claim. The respondent, in my view, was fully justified to oppose the applications on the grounds stated, as well as on the ground of prescription which was not a good defence. In my view, justice and fairness require that ordinary costs should follow the result.

[35] In the result, the following order is made:-

35.1 Condonation is granted for the applicant's failure to comply with the provisions of s 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002.

35.2 Leave is granted to the applicant to amend paragraph 5 of its particulars of claim.

35.3 The costs occasioned by the opposition are to be paid by the respondent.

MAHALELO AJ
ACTING JUDGE OF THE GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

APPEARENCES;

Counsel for Applicant : Advocate T. Tshabalala

Counsel for Respondent : Advocate K M Molemoeng

Date of judgment : 29 September 2015