REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **19477/2008**

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

…….……..... …….
SIGNATURE **DATE**

In the matter between:

LAWRENCE NYIKO NKWINIKA Plaintiff

And

DECTECTIVE MALAPANE First Defendant

MINISTER OF SAFETY AND SECURITY Second Defendant

J U D G M E N T

MALI AJ

[1] In this matter the plaintiff has sought to sue defendants for unlawful arrest, detention and assault. The first defendant has since passed on. The second defendant has raised a special plea.

[2] The alleged unlawful arrest, detention and assault which occurred on 19 February 2007 at Midrand Police Station. The criminal prosecution against the plaintiff was withdrawn by the Magistrate Court on 15 October 2007. The plaintiff instituted the proceedings on 20 February 2008.

[3] Defendant contends that the plaintiff has not complied with the provisions of Section 3(1)(a) and Section 3(2)(a) of Act 40 of 2002 ("the Act"). Section 3 of the Act provides that within six months from the date on which the debt became due a service on an organ of state must take place in a prescribed manner.

[4] The crisp issue to be decided is whether 19 February 2007 or 15 October 2007 is the applicable date to calculate the commencement of the six months period as provided by the Act.

[5] In **Thompson & Another v Minster of Police & Another** [1] it was held:

> "*in the case of wrongful arrest, however, the intention may be said to be direct dolus directus as it is done with the definite object of hurting the defendant in his person , dignity or reputation…. The arrest itself is a prima facie odious interference with the liberty of the citizen that animus injuriandi is thereby presumed in our law, and no allegation of actual subjective animus injuriandi is necessary".*

[1] 1971 (1) page 374 G

[6] In **R v Moloi**[2] the court held that the eventual conviction or acquittal of a person is not itself proof that the arrest was lawful or unlawful.

[7] In **Minister of Safety and Security v Sekotho and Another** [3] the court held:

> *"that while it is clearly established that the power to arrest may be exercised only for the purposes of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, a peace officer must bring that arrestee before a court as soon as reasonable possible and at least within 48 hours, depending on court hours. Once that has been done, the authority to detain, that is inherent in the power to arrest is exhausted. The authority to detain the suspect further is then within the discretion of the court."*

[8] In **Marcel Labuschagne v Minister of Safety and Security**[4], the court found that the "trigger" date was the date of the arrest and not the date of the withdrawal of the matter against the plaintiff. This matter has similarity of certain facts in the present case.

[9] It was argued on behalf of the plaintiff that he had to rely on the entire set of facts inclusive of the docket and the outcomes of the proceedings of the criminal matter against the plaintiff, thereby submitting that the cause of action arose on 15 October 2007. I was referred to **Truter v Deysel** [5]**,** a case which dealt with the issue of prescription, in particular to the following:

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[2] 1952(3) SA p 659 at page 662
[3] 2011 (1) SACR 315 (A) at 42
[4] 18769/2009 SGHC unreported
[5] [2006] ZASCA 16,

> "*the creditor acquires a complete cause of action for the recovery of the debt when the entire set of facts which the creditor must prove in order to succeed with …[the] … claim against the debtor is in place".*

[10] Even though in **Truter** above the principle of access to entire facts was emphasised the court also enunciated the principle of separation of facts from evidence. At page 168 it was held that for purposes of prescription cause of action meant every fact which it was necessary for the plaintiff to prove in order to succeed in his claim. It did not comprise every piece of evidence which is necessary to prove those facts.

[11] In **Truter** the Supreme Court of Appeal over ruling the decision of the court *a quo* held that in a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts. As a result the special plea raised by the defendants was upheld on the basis that all the facts and information in respect of the operation performed on the plaintiff by the defendants in 1993 were known or readily accessible to him and his legal representative as early as 1994 or 1995 and not in 2000.

[12] The plaintiff's counsel struggled to explain which facts were missing and or were not accessible to the plaintiff that would have hindered him to issue the notice as at 19 February 2007. The counsel could not advance any substantive argument supporting the submission that the cause of action arose on 15 October 2007. The law as pronounced above is precise in cases of arrest and detention; that sufficient facts in support of the cause of action are established upon the occurrence of the same.

[13] It was argued on behalf of the defendant that the cause of action arose on 19 February 2007 and that the cause of action means every material fact which is necessary to be proved to entitle the plaintiff to succeed in his claim. Cause of action for purposes of unlawful arrest and detention consists of wrongful deprivation of a person's liberty[6]. In *casu* the plaintiff's cause of action is his alleged unlawful arrest, detention and assault by the defendants which occurred on 19 February 2007.

[14] I therefore find that on 19 February 2007 the plaintiff had sufficient facts which were readily available before him to institute legal proceedings. Therefore the cause of action arose on 19 February 2007 and as a result the notice as contemplated in section 3 of the Act would have been issued within six months from then.

[15] With regard to costs the plaintiff's counsel submitted that in the event that the finding is in favour of the defendants that each party pay its own costs. His argument is on the basis that the defendant is the state organ and that the plaintiff is exercising his constitutional right against the state.

[16] It is important to note that the defendant's counsel repeatedly invited the plaintiff's counsel to file application for condonation in respect of late filing of the notice. He even committed that the application will not be opposed. The defendant's counsel rejected the offer forthright. I find no reason to deviate from the general rule that costs follow the event.

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[6] Sikhunana v Minister of Safety and Security (669/04) [2013] ZAECPEHC

[17] Having regard to the above the Special plea is upheld and the plaintiff's claim is dismissed.

16.1. The plaintiff is ordered to pay costs at Attorney and Client scale.

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MALI AJ

ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Counsel for the Plaintiff: Adv S. Mathabathe

Instructed by: Denga Incorporated

Counsel for the Defendant: Adv K. Lengane

Instructed by: State Attorneys

Date of Hearing: 24 February 2015

Date of Judgment: 27 February 2015