REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 05859/2015

[1] REPORTABLE: YES / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED.

15/3/19
Date:

WHG VAN DER LINDE

In the matter between:

Dawid Fourie — 1st Plaintiff

Malcolm Oranje — 2nd Plaintiff

and

The Minister of Police — 1st Defendant

National Director of Public Prosecutions — 2nd Defendant

J U D G M E N T

Van der Linde, J:

[1] In this action the two plaintiffs institute a claim for damages against the two defendants arising from their alleged unlawful arrest, detention, and malicious prosecution. The 2nd

defendant was not represented and played no role in the proceedings. No relief was asked against the 2nd defendant. A special plea of prescription was raised and when the matter was called before me I was informed that the parties had agreed the terms of a separation of issues. It seemed to me that it would be convenient in terms of Rule 33(4) first to dispose of the special plea of prescription.

[2] The order of separation I made was to separate from the other issues that arise before me, those issues that arise from the following pleaded paragraphs, and postponing the other issues, ruling that only the issues now identified below are to be determined at present:

(a) Particulars of claim: paragraphs 6, 6.1, 6.1.1, 6.1.2 and 6.2.

(b) 1st defendant's amended plea: paragraphs 1, 2, 3 and 4.

(c) Plaintiff's replication to special plea: paragraphs 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 4.2 and 4.2.

[3] The parties closed their cases without leading evidence and addressed me on the basis of that the facts asserted in pleadings were not in contention. The essential facts upon which I therefore determine this issue are that the plaintiffs were arrested on 24 March 2003 and detained. On 24 August 2008 they were convicted and sentences were imposed by the Protea Regional Court on 12 March 2009. During April 2013 the convictions and sentences were set aside by the Supreme Court of Appeal.

[4] The summons for the relief currently claimed was served by the plaintiffs on the 1st defendant on 20 February 2015. The plaintiffs replicate in the following terms (emphasis supplied):

"2.1 *The cause of action for unlawful and wrongful arrest, unlawful and wrongful detention arose on the 24th March 2003.*

2.2 *At the time the cause of action arose, the plaintiff could not institute legal action against the defendants, because there was a criminal action pending against them.*

2.3 *The criminal trial did not give rise to the delictual claim against the defendants.*

2.4 *The plaintiffs only became aware of the creditor and the facts that gave rise to the debt upon a legal advice by their attorney of record in these proceedings.*

2.5 *It has been held that where civil proceedings and criminal proceedings arising out of the same circumstances are pending against the person it is usual practice to stay civil proceedings until the criminal proceedings have been finalised.*

2.6 *It is further been held* [sic] *that in accordance with the so-called 'once and for all' rule, both already sustained and prospective flowing from one cause of action.* [sic] *The plaintiffs' cause of action is complete as soon as some damages suffered, but also respect of all loss sustained later* [sic].

2.7 *The plaintiffs therefore admit that the cause of action of unlawful and wrongful arrest and unlawful and wrongful detention arose on the 24th March 2003."*

[5] The first question that arises is when prescription began to run. In terms of section 12 of the Act prescription begins to run when the debt is due, not when the debt arises (emphasis supplied):

"12 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.
[Sub-s. (1) substituted by s. 68 of Act 32 of 2007.]
(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
(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 care.
[Sub-s. (3) substituted by s. 1 of Act 11 of 1984.]
(4) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18 (2), 20 (1), 23, 24 (2) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and an alleged offence as provided for in sections 4, 5, and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013,

during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition."

[6] The onus to establish the defence of prescription in terms of section 11(d) of the Prescription Act 68 of 1969 rests upon the 1st defendant; see Gericke v Sack 1978 (1) SA 821 (A) at 824 per Diemont, JA:

"However the Act specifically provides that prescription begins to run only when the debt becomes due and that it is not deemed to become due until the creditor has knowledge both of the identity of the debtor and of the facts from which the debt arises. If follows that if the debtor is to succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date. The fact that the appellant has alleged in her replication that she learned the respondent's identity only on 17 February 1971 does not relieve the respondent of the task of proving that she acquired that knowledge on 13 February 1971 - the date on which he relies."

[7] In the replication the plaintiffs admit that the cause of action arose on 24 March 2003 but they do not admit that the debt was then due. As pointed out, a debt is not deemed to be due until the creditor actually has or ought to have had knowledge of the identity of the debtor and of the facts from which the debt arises.

[8] See generally The Law of South Africa 2nd Edition, Volume 21, "*Prescription*", para 125 footnote 33. The author says:

" A creditor will be deemed to have knowledge of the identity of the debtor, and the facts from which the debt arose, if he or she could have acquired it by exercising reasonable care. So it will be essential for a debtor to allege and prove that the creditor had or ought to have had, the requisite knowledge on a particular date. Such a debtor must also succeed in proving, in a particular case, the date on which he or she contends prescription begins to run."

[9] The point here is that the *onus* is on the 1st defendant, the debtor, to allege and prove that the creditor had or ought to have had the requisite knowledge on a particular date.

[10] In this matter the plaintiffs have alleged that they only became aware of the creditor and the facts that gave rise to the debt, *"upon a legal advice by their attorney of record in these*

proceedings". Therefore there was a direct challenge as to the date upon which they acquired knowledge or ought to have acquired knowledge.

[11] The 1st defendant chose not to lead any evidence on this score, nor did it assert or argue the date on which the plaintiffs ought to have acquired the requisite knowledge. In my view it has therefore failed to discharge the *onus* resting on it to prove when the debt became due. It follows that the plea of prescription cannot be upheld and I make the following order:

(a) The 1st defendant's special plea of prescription is dismissed with costs.

WHG van der Linde
Judge, High Court
Johannesburg

Date argued: 14 March 2019
Date judgment: 18 March 2019

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