

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Reportable: No
Of interest to other judges: No

4 December 2020

Vally J

Case No.: 42399/2019

In the matter between:

Zide Mothibeli

Plaintiff

and

Minister of Police

First Defendant

National Director of Public Prosecutions

Second Defendant

JUDGMENT

Vally J

Introduction

[1] The plaintiff sues the first respondent (Minister) for unlawful arrest and the second respondent (NDPP) for unlawful and malicious prosecution.

Common cause facts

[2] The following facts are common cause: the plaintiff was arrested on 30 September 2018 for allegedly raping a minor. He was incarcerated. He alleges that he was assaulted on the same day. On 1 October 2018 he appeared in

court where he applied to be released on bail. His application was unsuccessful. He remained in custody until 23 October 2018 when he was released on bail. The State, through the offices of the NDPP, pursued the prosecution of his case until 10 April 2019 when it withdrew the charges against him due to lack of evidence. He served a notice on the NDPP on 12 August 2019 and on 3 October 2019 on the Minister. The notice served on the NDPP was within the six months period.

The special pleas

[3] On these facts the Minister and the NDPP have raised two special pleas, only one of which really goes to the heart of the matter. This judgment addresses that one. It is that the plaintiff has failed to comply with the peremptory requirements of s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act), and as a result his claim has prescribed.

[4] In response to both special pleas the plaintiff - in replication - alleged that it was only on the 26 June 2019 that he acquired knowledge of the Minister and the NDPP as persons against whom the claim should be brought. He had, therefore, complied with the necessary requirements set out in the Act, especially s 3 thereof, and thus his claim was not prescribed.

Disputed fact

[5] The replication gave rise to a dispute of fact, which is captured in the following question: when did the applicant become aware of the identity of the

Minister and the NDPP as the parties he should be suing for the harm he alleges was done to him? The parties agreed that this court need only concern itself with this disputed fact at this time, as its determination may result in the claim being dismissed without the court having to deal with the merits of the plaintiff's claim.

Oral Evidence

[6] The plaintiff was the only person who testified. His evidence was that he is employed as a porter at the Charlotte Maxette Hospital, and he has no formal qualifications save that he completed Grade 10 in school. He was at work sometime in June 2019 when he met a lady who visited the hospital regularly to assist patients with making claims against the Road Accident Fund. He decided to solicit her assistance. He informed her that he was arrested for no apparent reason and was eventually released. She asked him, 'when did your case end?' He informed her that it was on 16 April 2019. She asked him if he intended to sue 'the police'. He replied by saying 'yes', but did not know 'how to go about it'. She then informed him that he should consult with an attorney and directed him to his present attorney. He met with the attorney on 26 June 2019, who informed him that he should sue the Minister and the NDPP. He asked the attorney to assist him in doing so. During cross-examination he admitted that the lady who directed him to his attorney was a frequent visitor at the hospital, and that he saw her on many occasions but only approached her in June 2019. He could not recall the exact date he approached her. He knew that he could sue the police because he 'knew they did wrong', but did not know how. He was only concerned to see that justice was done.

Finding based on this evidence

[7] The evidence is unequivocal. The plaintiff was at all times aware that he could pursue a civil claim for the alleged harm done to him by the police. What he did not know was how to launch the proceedings. That knowledge he only acquired from the attorney. As for the question of who to sue, he left that in the hands of the attorney.

Section 3 of the Act

[8] Section 3 of the Act provides:

- '(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 the legal proceedings in question; or
 - (b) the organ of state in question has consented in writing to the institution of that legal proceedings-
 - (i) without such notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in sub-section 2.
- (2) A notice must-
 - (a) within six (6) months from 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.
- (3) For purposes of subsection (2)(a)-
 - (a) a debt may not be regarded as 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 2(2)(a) must be regarded as having become due on a fixed date.'

Analysis

[9] The arrest and alleged assault of the plaintiff took place on 30 September 2018. His prosecution commenced on 1 October 2018. His incarceration ended on 23 October 2018. Six months from this date he should have served a notice on the Minister indicating his intention to institute legal proceedings. He served his notice on 3 October 2019. This is well outside the six (6) months period. In his replication, which no doubt was drafted by his attorney, he alleges that the only time he became aware of the identity of the Minister and the NDPP was when he consulted with this attorney on 26 June 2019.

[10] As for the NDPP he should have served a similar notice at least six months from 10 April 2019 when his case was withdrawn. He served a notice on 12 August 2019 which is within the six (6) months period. Hence, the special plea taken by the NDPP bears no merit.

[11] With regard to the Minister, it was vigorously contended on his behalf that he only became aware that the Minister was the correct defendant on 26 June 2019 when he consulted his attorney. The problem with this contention is that the plaintiff knew on 30 September 2018 that he was unlawfully detained and that he intended to pursue a case against the police. In other words, he had knowledge of the identity of the organ of state that should be sued¹ – although as a layperson he understood the identity of the organ of state to be the police and not the Minister – and he had knowledge of the facts giving rise to the debt

¹ Owed him a 'debt' in terms of s 3 of the Act

i.e. the unlawful arrest which . He knew he could sue, what he did not know 'how to go about it'. This problem would have been resolved had he consulted an attorney after 23 October 2018 but before the six months from 30 September 2018 had expired. He provides no explanation as to why this was not done until he met the lady in June 2019. Had he done so he would have been informed that prescription of his claim commenced running from 30 September 2018 and that it was necessary to cite the Minister as the defendant, since the Minister is the person who is liable for the actions of the police.

[12] That he did not know it was the Minister who should be cited as the defendant is of no assistance to his case. Knowledge of who the defendant should be is a legal issue not a factual one. Put differently, the citation of the Minister as the appropriate defendant is a legal consequence of the unlawful conduct of the police. Factually it was the police who arrested and assaulted him. Legally it is the Minister who bears responsibility for their unlawful conduct. He does not have to acquire this knowledge before the period for the prescription of his claim commences.²

[13] In our case, prescription began to run from 30 September 2018 for that is when his cause of action commenced. His claim prescribed on 29 March 2019, unless he could claim that he was unable to act until 23 October 2018 as he was detained until then, in which case his claim would have prescribed on 22 April 2019. He only served his notice on the Minister on 3 October 2019,

² *Claasen v Bester* 2012 (2) SA 404 (SCA) at [10] – [15]

which is well outside both dates. Failure to serve his notice timeously resulted in his claim prescribing.

[14] The Minister was correct to raise the special plea. The plaintiff, however, was not without a remedy once the plea was raised. He could have applied for condonation.³ It is his decision not to take advantage of it. It is a decision that was taken with legal advice. Accordingly, his claim against the Minister stands to be dismissed.

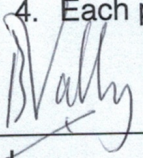
Costs

[15] The plaintiff has successfully resisted the special plea of the second defendant but not that of the first defendant. If costs were to follow the result, he would have to pay the costs of the first defendant, and the second defendant would have to pay his costs. But since the matter was dealt with compositely it would, in my view, only be fair and just that each party pay its own costs.

Order

[16] The following order is made:

1. The special plea of the first defendant is upheld.
2. The plaintiff's claim against the first defendant is dismissed.
3. The special plea of the second defendant is dismissed.
4. Each party is to pay its own costs.


Vally J

Gauteng High Court (Witwatersrand Local Division)

³ *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) at [10] – [12]

Date of hearing:	28, 29 October 2020
Date of judgment:	4 December 2020
For the plaintiff:	D Sondlani (Attorney)
For the First Respondent:	M Pompo
Instructed by:	State Attorney

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