REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 13823/19

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

23/07/21
DATE

SIGNATURE

In the matter between:

SELLO JONAS MAKENA	Applicant
And	
MINISTER OF POLICE	1st Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	2nd Respondent
LT COL SHIMI JOHANNES MOJELA	3rd Respondent
LT COL THABO JACOB PONI SEREKEHO	4th Respondent

JUDGMENT

The judgment and order are accordingly published and distributed electronically. The date and time of hand is deemed to be 10:00 on 23 July 2021.

TEFFO J

Introduction.

[1] The applicant, Mr Sello Jonas Makena, is seeking condonation for the late filing of a notice of the intended legal proceedings to be given to an organ of state in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act[1] (the "Act").

[2] The respondents oppose the application.

[3] The respondent's answering affidavit and the applicant's replying affidavit were not filed timeously. The late filing thereof was not opposed. I accordingly granted condonation for their late filing.

[4] The applicant was arrested by members of the South African Police Services ("SAPS") on 12 July 2014. He was detained at the Pretoria West Police Cells. He first appeared in court on 14 July 2014 and was further detained until on 21 July 2014 when he was released on bail. He stood trial until on 14 May 2018 when he was acquitted on all charges. Notices in terms of the Act were served on the first and second respondents on 23 October 2018. The applicant thereafter issued summons on 28 February 2019 in terms of which he claimed damages in a total amount of R 7 046 000.00 for unlawful arrest and detention, malicious prosecution, past loss of income, loss of future employability, legal costs and general damages.

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[1] Act 40 of 2002

[5] The respondents filed a special plea and pleaded that the applicant did not timeously give notice of his intention to institute legal proceedings against them as required in terms of the Act.

[6] Various letters were exchanged between the parties in which the applicant's attorneys requested the respondents to withdraw their special plea on the basis that according to the applicant the notices were timeously served on the first and second respondents.

[7] The respondents did not respond to their correspondence. Eventually, the applicant launched this application.

The parties' contentions.

[8] The respondents only oppose the application in relation to the claim for unlawful arrest and detention. They contend in their answering affidavit that the alleged claim originated on 12 July 2014 when the applicant was arrested, at best on 21 July 2014 when the applicant was released on bail, and prescribed on 11 July 2017 or on 20 July 2017. It is further contended that the applicant has not given an explanation for the delay in giving the notice of the intended proceedings against them and has not dealt with the prospects of success in the application.

[9] The applicant contends that the debt only became due when he was acquitted on 14 May 2018 and that he could not have instituted the claims while the criminal proceedings against him were still pending. Furthermore, that the notices were served timeously on the respondents and that the claim for unlawful arrest and detention did not prescribe. He asserts that there are

prospects of success in his claim and that he has given a reasonable explanation for the delay in the event the court finds that the notices were late.

The issues for determination

[10] This court has to determine whether condonation for the late filing of the notice in terms of the Act, should be granted or not.

Applicable Legal Principles.

[11] Section 3 of the Act provides 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 intention 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 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);

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.*

Discussion.

[12] The notices in terms of the Act were served on the first and second respondents on 23 October 2018. The Act requires the notices to be served on the organ of state within 6 (six) months of the debt becoming due. The alleged unlawful arrest and detention, and further detention took place between 12 July 2014 and 14 July 2014 respectively. The notices were therefore served on the first and second respondents more than 3 (three) years after the arrest of the applicant. According to the applicant, the notices were served timeously in that they were served five months from the date of his acquittal.

[13] The applicant contends that in the event the court finds that the notices were served late, they are late by a period of 45 months. He claims that the period is not inordinate having regard to the fact that between July 2014 and May 2018 he had to defend the criminal action against him and could not have instituted any civil proceedings against the respondents until the criminal proceedings were finalized.

[14] Summons was issued on 28 February 2019. This was more than four years after the applicant was arrested.

When did the debt become due?

[15] Section 3(3) of the Act provides that-

(3) For purposes of subsection 2 (a) –

a) a debt may not 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 subsection 2 (2)(a), must be regarded as having become due on the fixed date.

[16] In terms of the Prescription Act[2], the prescription period for debt claims is 3 (three) years. Section 12(1) of the Prescription Act provides that prescription shall commence to run as soon as the debt is due. 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 through exercising reasonable care.[3]

[17] The respondents contended that the debt became due at the time the applicant was arrested, from 12 July 2014 or at best on 21 July 2014 when

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[2] Section 11(d) of Act 68 of 1969.
[3] Section 12(3) of Act 68 of 1969, see also s 3(3) of Act 40 of 2002.

the applicant was released on bail. The applicant claims that the debt became due only after he was acquitted on 14 May 2018. The reason being that his cause of action is not only the unlawful arrest and detention but also malicious prosecution. His claim is for damages consequent upon the unlawful actions which could only be claimed after his acquittal.

[18] In **Truter and Another v Deysel**[4], the court held as follows:

*"...Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescription period to begin running – it does not require knowledge of the relevant legal conclusions (i.e that the known facts constitute negligence) .... "***(my emphasis)**.

[19] In **Mtokonya v Minister of Police**,[5] Zondo J held as follows:

"Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of the legal conclusions that may be drawn from the facts from which the debt arises."

At paragraph 45 of the judgment he went on to say:

"Therefore such knowledge falls outside the phrase "knowledge of facts from which the debt arises" in section 12(3). The facts from which a debt arises are the facts of the incident or transaction which, if proved, would mean that in law the debtor is liable to the creditor."

[20] In the unreported judgment of **Eskom V Bojanala Platinum District Municipality** ,[6] Moseneke J as he then was , held as follows:

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[4] 2006 (4) SA 168 (SCA) at 175 B
[5] 2018 (5) SA 22 (CC)
[6] 2003 JDR 0498 (T) at para 16. Also referred to by Saner in his book: "Prescription in SA Law" (Issue 23 3-98).

"In my view, there is no merit in the contention drawn on behalf of the plaintiff that prescription began to run only on the date the judgment of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of section 12(3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered elastic, open ended and contingent upon the claimant and its subjective sense of legal certainty. On that contention, every claimant would be entitled to have less certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under section 12(3). A claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises."

[21] It is therefore evident from the applicant's version that at the time of his arrest or shortly thereafter, he already knew who the debtor was and the facts from which the debt arose. He was aware of the facts of the incident and who arrested him. He was legally represented throughout his criminal trial. He was therefore not required to have knowledge of the legal conclusions that may be drawn from the facts from which the debt arose. It was therefore not necessary for him to wait for the outcome of the criminal proceedings before he could pursue his claim for unlawful arrest and detention. It follows that the debt became due when the applicant was arrested on 12 July 2014 or shortly thereafter when he was released on bail on 21 July 2014. No evidence has been presented in the papers that the respondents wilfully prevented the applicant from acquiring the knowledge of their identity and of the facts giving rise to the debt.

Organ of State

[23] The applicant contended that it was not required to serve the third and fourth respondents with a notice of the intended legal proceedings as they are not organs of state. The respondents disagree.

[24] "Organ of state" is defined as follows in the Act:

'Organ of state' means –

a) *Any national or provincial department;*

b) *A municipality contemplated in section 151 of the Constitution;*

c) *any functionary or institutions exercising a power or performing a function in terms of the Constitution or a provincial Constitution referred to in section 142 of the Constitution;*

d) *the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act, 1998 (Act 5 of 1998);*

e) *the South African National Roads Agency Limited contemplated in section 3 of the South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998);*

f) *National Ports Authority Limited, contemplated in section 4 of the National Ports Act, 2005, and any entity deemed to be the National Ports Authority in terms of section 3 of that Act;*

g) *Any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable.*

[25] In terms of paragraph (g) above, the third and fourth respondents fall under the definition of 'organ of state'. The notice in terms of the Act should have been served on them prior to the proceedings being instituted against them.

[26] Section 3(4) of the Act reads as follows:

> *"(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;*
>
> *iii) the organ of state was not unreasonably prejudiced by the failure."*

Debt not extinguished by prescription.

[27] Mr Kufa on behalf of the applicant submitted that the respondents never raised the issue of prescription in their plea. The issue was only raised for the first time in the respondent's answering affidavit. This submission loses sight of the provisions of section 3(4)(b)(i) of the Act. The section provides that the court may grant condonation if it is satisfied that the debt has not been extinguished by prescription. The issue of prescription is very

crucial as a determining factor when the court exercises its discretion under section 3(4)(b)(i) of the Act.

[28] Having regard to the authorities referred to above, I conclude that when the applicant issued summons, and served same on the respondents in 2019, the claim for unlawful arrest and detention had already prescribed. The applicant failed to deliver in the prescribed manner, the required notice in terms of the Act. The notice was supposed to have been served within 6 (six) months from the date on which the debt arose. At best for the applicant, the notice should have been delivered to the respondents by no later than 20 January 2015. The notice was therefore more than 3 (three) years out of time.

[29] It will therefore serve no purpose to grant condonation where the claim has already been extinguished by prescription. Under the circumstances I do not find it necessary to deal with further requirements envisaged in section 3(4)(b).

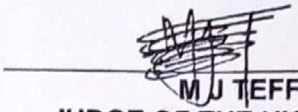
Costs.

[30] The respondents asked for costs on a punitive scale against the applicant. I am not persuaded that the respondents are entitled to such a costs order.

[31] I accordingly make the following order:

1. The application for condonation for the late giving of a notice in terms of section 3(1) of the Institution of Legal Proceedings against Organs of State Act, 40 of 2002 is dismissed;

2. The applicant is ordered to pay costs of the application.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances.

For the Applicant	M Kufa & N Maropene
Instructed by	Makhafola &Vester Inc
For the Respondents	M Barnard
Instructed by	State Attorney Pretoria
Date Heard	25 January 2021
Date handed down	23 July 2021