

SOUTH AFRICA / JUDGMENT

Khoza and Another v Minister of Police and Another (3507/18) [2024] ZAGPPHC 628 (12 June 2024)

[2024] ZAGPPHC 628

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

3507/18

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

1.

REPORTABLE: YES/NO

2.

OF INTEREST TO OTHER JUDGES : YES/NO

3.

REVISED

12

June 2024

Case

No: 3507/18

In

the matter between: JOHN
 KHOZA
 First Plaintiff
 AMOSCHAUKE
 Second Plaintiff
 And
 THE
 MINISTER OF POLICE
 First Defendant
 WARRANT
 OFFICER JA RAS
 Second Defendant

JUDGMENT

MABUSE J

- [1] By the summons issued by the registrar of this Court on 22 January 2018, the Plaintiffs claim payment of money from the Defendants. The Plaintiffs' claims are registered by the Defendants, in some instances by special pleas apart from pleading over.
- [2] The parties in this matter are:
- [2.1] the First Plaintiff, Mr John Khoza ("Khoza"), a police officer who resides at 4[.] C[.] Street, Unit 3[.], R[.] Flats, Sunnyside, Pretoria, Gauteng. He sues in this matter in his personal capacity;
- [2.2] the Second Plaintiff, Mr Amos Chauke ("Chauke"), a member of the South African Police Services. He resides at 3[.] D[.] Street, N[.], Pretoria. He too sues in his personal capacity;
- [2.3] the First Defendant is cited in this matter in his official capacity. His business address is 7th floor, W[.] Building, 231, Pretorius Street, Pretoria;
- [2.4] the Second Defendant, Warrant Officer JA Ras(" W/O Ras"), who is cited in this matter both in his personal and official capacities, a member of the South African Police Services of Boschkop Police Station and who resides at Plot 348, Mooiplaats, Pretoria.

THE PLAINTIFF'S CAUSE OF ACTION

- [3] On 23 November 2012, and at Boschkop, the First and Second Plaintiffs were arrested by W/O Ras for the offence of bribery or taking money from a member of the public under CAS 214/11/2012 and, following the said arrest, were detained without any warrant.

[4] Subsequently, the Plaintiffs were released without having appeared at court. Later the Plaintiffs were subjected to disciplinary proceedings led by Lieutenant Colonel Folk during which they were found guilty as charged and dismissed as members of the South African Police Services. The Plaintiffs felt aggrieved by their dismissals as members of the South African Police Services. They took their dismissals to the Bargaining Council which Council found that their dismissals by the Chairperson of the disciplinary

proceedings were substantially unfair.

[5] The Bargaining Council then ordered the First Defendant to reinstate the Plaintiffs with effect from 21 October 2013 on the same conditions and terms as those that they had before their dismissals. The Plaintiffs themselves were directed to report for duty on or before 3 October 2016 to commence their normal duties.

[6] Furthermore, the First Defendant was ordered by the Bargaining Council to pay the Plaintiffs their back pays calculated from 1 July 2014 to 30 September 2016. The orders imposed on the First Defendant had to be complied with within 14 days of the award being received by the First Defendant.

[7] On 1 December 2016, the Plaintiffs resumed their duties as members of the South African Police Services.

[8] The Plaintiffs now claim that, because of the malicious prosecutions instituted by the Defendants, they suffered damages.

[10] They claim that:

[10.1] the Second Defendant set the law in motion by instigating and/or alternatively, instituting criminal proceedings of bribery and corruption against them;

[10.2] the Defendants acted without reasonable and probable cause;

[10.3] the Defendants acted with malice;

[10.4] no proceedings were instituted against the Plaintiffs to the effect that the law was set in motion in a criminal court. The Defendants failed to successfully prosecute the criminal proceedings and failed to successfully prosecute the unfair labour dismissals which resulted in the Defendants having suffered loss.

[11] The Plaintiffs plead that because of their arrest, detention and further detention, as well as malicious prosecution, they suffered some damages.

THE DEFENDANT'S SPECIAL PLEAS

[12] Against all the abovementioned claims, the Defendants have, apart from their main plea, raised the following special pleas:

[12.1] the Defendants' first special plea is that the Plaintiffs' claims have become prescribed;

[12.2] the second special plea is that there is no cause of action, as the Plaintiffs were never prosecuted in a criminal court and never appeared before a Magistrate;

[12.3] on the claim of unfair dismissal, the Defendants plead that there is no cause of action.

[13] In order to highlight the circumstances giving rise to the plea of prescription, I shall tabulate, in their chronological order, the essential facts. These facts were not in dispute:

[13.1] the Plaintiffs were arrested and detained on 23 November 2012 at Boschkop Police Station;

[13.2] they were arrested by Warrant Officer Ras, the Second Defendant, who was at all material times acting within his course and scope of employment with the Minister of Police ("the First Defendant");

[13.3] subsequent to their arrest and detention and further detention, the Plaintiffs were released without having appeared before a court of law or alternatively because a Magistrate with competent jurisdiction (it is of paramount importance to point out that the Plaintiffs have not pleaded the date on which, after their detention and further detention, they were released without having appeared before a court of law and/or alternatively before a magistrate with competent jurisdiction);

[13.4] in respect of their claims of unlawful arrest, the Plaintiffs only issued or commenced action against the Defendants on 22 January

2018. According to the return of service of the Sheriff dated 5 February 2018, a copy of the combined summons in this matter was served on the First Defendant on 30 January 2018 at 14h00 at the State Attorney, Pretoria, Ground Floor, SALU Building, corner Francis Baard and Thabo Sehume Streets, Pretoria. There is no indication that a copy of the summons was served upon the Second Defendant;

[13.5] that, in paragraphs 8.2 of the pre-trial minutes, the Plaintiffs' attorneys confirmed that the Plaintiffs were arrested on 23 November 2012;

[13.6] that in their letter of demand to the National Commissioner of the SAPS, dated 22 June 2017, they set out that the Plaintiffs were arrested, detained and further detained on 23 November 2012.

[14] It is therefore common cause that the alleged unlawful arrest of the Plaintiffs by the Second Defendant took place on 23 November 2013. It is undisputed.

[15] Before considering the various arguments raised in support of and against the second plea of prescription, it is necessary, in my view, to make some reference to the statutory provisions of the Prescription Act 68 of 1969 ("Prescription Act").

THE PROCESS OF EXTINCTIVE PRESCRIPTION OR LIMITATIONS OF ACTIONS

[16] According to the Prescription Act, a debt is extinguished by prescription after a lapse of a prescribed period. The various periods of prescriptions are prescribed in s 11 of the Prescription Act.> The Prescription Act had the effect of extinguishing a debt after the lapse of a specified period. For every type of debt, the law fixes a period, after which the debtor may, if he so wishes, claim that the creditor's rights against him have ended. This is precisely what the Defendant in the instant matter have done. The Prescription Act, which commenced to operate on 1 December 1970, applies to debts arising after its commencement. The termination of obligations because of prescription is regulated by the Prescription Act.

"11.The periods of prescription of debts shall be the following:

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

It is three years in respect of the Plaintiffs' debt because it is not a debt which is covered by any other section of section 11 of the Prescription Act.

- (2) If the debtor willfully 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 which does not arise from a contract shall not be deemed to be due until the creditor becomes 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."

[19] Now referring to the salient facts of this instant matter, it is not the Plaintiffs' case that they, as creditors, were prevented by the Defendants, as debtors, from becoming aware of the existence of the debt.

THE SPECIAL PLEA OF PRESCRIPTION

[20] In paragraph [4] of their claims of unlawful arrest and detention, the Plaintiffs pleaded as follows:

"On 23 November 2012 and at Boschkop Police Station, the First and Second Plaintiffs were arrested by warrant officer JA Ras for alleged bribery/taking money from a member of the public under GAS 214/11/2012 and were detained without a warrant."

[21] The Defendants have not contested the date on which the Plaintiffs alleged that they were arrested. This means that they have admitted that the Plaintiffs were arrested and detained on 23 November 2012. That date has now become crystalized. It is now a fact and there is no dispute about it. The Plaintiffs have not sought to amend it to any other date.

[22] In their first special plea, the Defendants state that, on the Plaintiffs own version, their cause of action is predicated on unlawful arrest and detention which took place on the date of their arrest, namely 23 November 2012.

[23] Furthermore, the Defendants plead that the debt relied upon by the Plaintiff, because of the purported unlawful arrest and detention, is a debt defined in s 11(d) of the Prescription Act.

"(a) That the Applicants' non-compliance with the provision of Section 3 of Act 40 of 2002 is condoned.

(b) That the First and Second Applicants are granted leave to pursue their claim against the First and Second Respondents on the pleadings already issued, served and filed in the above stated case; and,

(c) That the First and Second Respondents are ordered to pay the costs of this application on a scale as between attorney and client."

[25] In conclusion, they pleaded further that the court cannot revisit the issue of prescription as the court has already dealt with it and that it has become res judicata.

[26] The Defendants do not agree with the Plaintiffs. They argue that the Plaintiffs' claims based on unlawful arrest and detention, allegedly occurred, according to the particulars of claim, on 23 November 2012, and that the Plaintiffs only issued their summons on 22 January 2018, more than three years after 23 November 2012 and a copy thereof was only served on the First Defendant on 30 January 2018. It must be remembered that it is the date of service of a copy of a document claiming damages that must be looked at and not the date of issue thereof. As the Plaintiffs' debt is a debt as defined in s 11(d) of the Prescription Act, the Plaintiffs' claims have been extinguished by prescription because it is common cause that the summons was served more than three years after the debt arose.

[27] According to counsel for the Defendants, an unlawful arrest is a single completed wrongful act that gives rise to a single debt separate from the detention because of the unlawful arrest. Counsel for the Respondents found support in the case of *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at paragraph [20]. In this judgment, the Court had the following to say:

"In accordance with this concept, a distinction is drawn between a single, completed wrongful act- with or without continuing injurious effects, such as a blow against the head - on the one hand and a continuous wrong in the course of being committed, on the other.

The principle laid down in the *Barnett* case was followed in *Minister of Police and Another vs Yekiso* 2019 (2) SA 281 (WCC) at paragraph [19], where the Full Bench stated that:

"[19] The court a quo unfortunately erred in finding that the claim for unlawful arrest and subsequent detention and prosecution was to be treated as one continuous transaction which could not be regarded as complete until the outcome of the criminal prosecution.

[28] Based on the aforementioned judgment, the Defendant's counsel submitted that the legal position thus is that an unlawful arrest and any damages claim on such arrest will prescribe within three years after the date of the arrest and, in this current matter, the Plaintiffs' claims prescribed on 23 November 2015, which is three years after 23 November 2012, the uncontested date on which the Plaintiffs were, according to the particulars of claim, arrested.

[29] The argument by counsel for the Defendant is based on the provisions of section 11(d) of the Prescription Act which provides that:

"The periods of prescription of debts shall be the following -

(d) where an Act of Parliament provides otherwise, three years in respect of any debt." The debt that the Plaintiffs are trying to enforce falls, according to the particulars of claim, within the period set forth in s 11(d) of the Prescription Act.> In terms of Section 12(1) of the Act:

"12

(1) Subject to the provisions of subsection (2) and (3) prescription shall commence to run as soon as the debt is due."

[30] Now, on the authority of *Evins vs Shield Insurance Co Ltd* 1979 (3) SA 1136 (WLD) at page 1141 G, the Plaintiffs' cause of action arose on 23 November 2012, as alleged in the particulars of claim. According to the said authority of Evans:

"A cause of action accrues when all the facts have happened which are material to be proved to entitle the Plaintiff to succeed."

Therefore, the Plaintiff's debt arose on the day of their arrest.

[31] In the Appellate Division judgment of *Evins vs Shield Insurance Co Ltd* (1961)9 [1980] ZASCA 3 (4 March 1980) the Appellate Division upheld the decision or the judgment of the court a quo.

THE PRINCIPLE OF RES JUD/CATA

[32] In their replication, the Plaintiffs contend that the issue of prescription has been dealt with in the interlocutory application. Based on that, they plead that according to res judicata the Defendants are precluded from raising the issue of prescription in their special plea. They pleaded that this Court may not revisit the issue of prescription as it has already been dealt with.

[33] According to the Appellate Division case of *Evins vs Shield Co Ltd* at page 26, the principle of res judicata establishes that where a final judgment has been given in a matter by a competent Court, then the subsequent litigation between the same parties or their privies, in regard to the same subject matter, and based upon the same cause of action, is not possible and, if attempted by one of them, can be met by the exceptio rei judicatae vel litis finitae. The object of this principle is to prevent the repetition of lawsuits, the harassment of

a defendant by a multiplicity of actions and the possibility of conflicting decisions.

[34] I do not see how the order of Rabie J set out in the replication and paragraph (24) above, supports the Plaintiffs' case. This Court has not been favoured with a copy of the proceedings which Rabie J dealt with when he made the order referred to in the Plaintiffs replication. What is clear, though, is that the said order makes no reference whatsoever to the issue of prescription.

[35] I will favourably conclude for the Plaintiffs that when Rabie J made the said order, he was dealing with an application for condonation in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Legal Proceedings Act"). Section 3(4) of the Legal Proceedings Act provides that:

"(4)(a) If an organ of state relies on the 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 unreasonably prejudiced by the failure."

[36] When Rabie J granted the order applied for on 8 February 2021, "he was satisfied that the debt has not been extinguished by prescription." (s 3(4)(d)(i))

It is seemingly because of the said section, in particular, section 3(4)(b)(i) of the Legal Proceedings Act, that the Plaintiffs argue that the issue of prescription has been dealt with and that it now constitutes *res judicata*. Relying on those proceedings, the Plaintiffs' counsel has reached a conclusion that the order of Rabie J has conclusively determined the issue of extinctive prescription. According to the Plaintiffs, the Defendants may not raise the special plea of extinctive prescription as the Court, as per Rabie J, found at the time of the order, on 8 February 2021, that the Plaintiffs' claims have not been extinguished by prescription.

[37] But the Defendants disagree with the argument that the issue of prescription has been dealt with by Rabie J; that the Defendants may not raise it again as it has become *res judicata*. According to the counsel for the Defendants, it is settled law that the granting of condonation in terms of s 3(4)(b) of the Institution of Legal Proceedings Act, where a court needs to be satisfied that the debt has not been extinguished by prescription, is not a finding that renders a prescription point *res judicata*.

[38] In arguing that the *exceptio rei judicatae vel litis finitae* does not apply in this kind of scenario, as sketched out in paragraph [37] *supra*, the Court relied on the judgment of the Minister of Safety and Security and Another v Patterson (A371/2013) [2016] ZAWCHC 169 (22 November 2016), a judgment of the Full Court of the Western Cape High Court. In the court *a quo* the appellants, the defendants in the court *a quo*, had raised a special plea of

extinctive jurisdiction against the respondents', the plaintiffs in the court a quo's claim. The Plaintiffs replicated to the special defence and alleged that by virtue of the order made by Traverso DJP, the issue of prescription was resjudicata. Traverso DJP had granted the following order:

"1. Non-compliance with sections 3(2)(a), 3(c), 2(b)(i) and 3(2)(b)(ii) of Act 40 of 2002 is condoned in terms of section 3(4)(a) and (b) of Act 40 of 2002.

2. Leave be granted to the applicants to withdraw the summons issued in the aforementioned matter.

3. Leave be granted in terms of section 3(4)(c) to institute fresh legal proceedings against the first and second respondents in the abovementioned matter."

[39] The court a quo upheld the *exceptio rei judicatae vel litis finitae*. The applicants, the defendants in the court a quo, then appealed against the court a quo's finding and the appeal was heard by the Full Court of the Western Cape High Court.

[40] The Full Court observed, in my view, quite correctly so, that the judgment of the court a quo was based only on its conclusion that the order made by Traverso DJP, had conclusively determined that issue of extinctive prescription. The Full Court observed furthermore that the conclusion was incorrect. In its view (paragraph [12]):

"The court a quo was misdirected in two material respects. First, it failed to take account of the conceptual distinction between a court being "satisfied" for the purposes of Section 3(4)(b)(i) of the Institution of Legal Proceedings Act that "a debt has not been extinguished by prescription and a court determining conclusively for the purposes of dismissing a special defence that the defendant has not "proved" that the debt has been extinguished by prescription. Second, it failed in the context of the aforementioned institution of fresh proceedings by a respondent to take into account the incidents of Section 15 of the Prescription Act (to which it should in fairness be recorded the court's attention was not drawn)."

[41] The Full Court stated that:

"[15] A defendant who raises the defence of extinctive prescription attracts the onus to prove, on a balance of probabilities, that the debt has been extinguished. Extinctive prescription is a defence, not a cause of action. Furthermore, it is a matter that a court is not entitled to raise *suo motu* against a claimant. The party who invokes prescription, which invariably will be the party resisting enforcement of the debt, must do so in the relevant documents filed of record in the proceedings."

This paragraph makes it clear that a plea of extinctive prescription is a defence in that irrespective of the order of the court granted on application in terms of Rule 3(4) of the Institution of Legal Proceedings Act, the Defendant may raise it at any stage. The special plea of extinctive prescription may only be raised by the Defendant at a final stage, which may be a plea stage. The plea is a stage during which the defence of extinctive prescription must be raised. The

fact that the court had already ruled in favour of the Plaintiffs' application in terms of section 3(4) of the Institution of Legal Proceedings Act, does not and will, not stop a party who wants to raise extinctive prescription as a defence, from raising it, not even by alleging *res judicata*. The Full Court also stated that:

"(16) There is no basis for a defence of prescription to be raised before a court

seized with an application for condonation in terms of Section 3(4) of the Institution of Legal Proceedings Act. There must at most be an indication that such a defence has been or will be raised by the alleged debtor in the main proceedings that the application for condonation seeks leave to institute or continue. There is therefore no onus on the defendant or prospective defendant in the context of a condonation application in terms of Rule 3(4) to establish its defence in the pending main proceedings. Accordingly, it serves no purpose for the defendants to raise any defence of prescription at the stage of the Section 3(4) application."

The defendant who intends raising a plea of extinctive prescription against the plaintiffs claim may even consent to the granting of such order or even if that order contains the statement that:

"The court may grant an application referred to in paragraph (a) if it is satisfied that the defendant has not been extinguished by prescription" because a defendant is not obliged to raise a defence of extinctive prescription at the stage of the application for condonation in terms of section 3(4)(a)(i) of the Institution of Legal Proceedings Act. Even if the defendant raises it, it will be a warning to the plaintiff that in the main proceedings there is a likelihood of the defendant raising it as a defence.

[42] In paragraph [18] of the said judgment, the Full Court had the following to say about *res judicata*:

"18. The respondent's apparent invocation of *exceptio res judicatae* in response to the Minister's plea of prescription was accordingly misconceived and the court *a quo* should not have dismissed the plea on the basis that it was *res judicata*."

[43] Equally, in the instant matter, the Plaintiffs are ill advised in raising the exception of *res judicata*. When Rabie J made an order in terms of Section 3(4) of the Institution of Legal Proceedings Act, he was not seized with the determination of the Defendants' special plea of prescription. Before Rabie J was an application for condonation of the Plaintiffs' failure to comply with the statutory requirement pertaining to the institution of an action against the Defendants.

[44] The principle set out in the Patterson case above was followed by the Full Bench in Member of the Executive Council for the Department of Health, Eastern Cape vs Gamede (CA05/2022) [ZAECMHCJ 45 (29 November 2022), in which the Court had the following to say:

"[30] The test for res judicata includes that the same issue of fact or law which was an essential element of the judgment on which reliance has been placed must have arisen and must be regarded as having been determined in the earlier judgment. It was not necessary for a defence of prescription to be raised before a court seized with a condonation application in terms of the Act. There is therefore no onus on a defendant to establish its defence in the pending main proceedings when applying for condonation in terms of the Act."

[45] The principles set out in the Patterson judgment above was also followed in S J Makena vs Director of Public Prosecution Case Number 23003/18 delivered on 19 December 2023 by WJ Scholtz AJ. In paragraph [13] of his judgment, WJ Scholtz AJ had the following to say:

"... I studied the judgments and I agree with the ratio decidendi as held therein. I accordingly find on the question, that this court can entertain a special plea of prescription despite the fact that condonation in terms of Section 3 of the Institution of Legal Proceedings Act has been granted."

Acting Judge Scholtz made the above statement after counsel for the plaintiff in that matter had, without advancing any substantial

reasons, persuaded him not to follow the Gumede judgment. The Judge felt [in paragraph 12] bound by Brand AJ's judgment in Camps Bay Rate Payers' and Residents' Association and Another vs Harrison and Another 2011 (4) SA 42 (CC), where the said court stated, regarding the maxim stare decisis, that:

"Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe, rightly so. The doctrine of precedent not only binds the lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when one satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."

[46] I have not been told that the Patterson or the principles set out in it have been set aside.

Consequently, I feel bound by the principles it has set out. Applying the principles set out in the Patterson case to the facts of this current matter, I find that:

1. the Plaintiffs exceptio res judicata, in the circumstances of this case, cannot be sustained and therefore lacks merit.
2. the Plaintiffs cause of action that arose on 23 November 2012 has been extinguished by prescription.

[47] Mr Kwinda argued that the case of the Western Cape, in other words, the judgments of the Full Court is distinguishable. Mr Kwinda did not provide any substantial reasons why he did not agree with that judgment. He kept on repeating that the pleas are res judicata and that the order in terms of Section 3(4) of the Institution of Legal Proceedings Act was granted in 2021 by Rabie J. He then argued that it was not in the interest of justice that the issue of

extinctive prescription should be revisited. I am of the view that Mr Kwindi did not have the opportunity to fully peruse and understand the judgment on which the Defendants' legal team relied.

THE SECOND SPECIAL PLEA

[48] The Plaintiffs pleaded that:

"4.9 The Second Defendant set the law in motion, by instituting and/or alternatively instituting criminal proceedings and bribery and counterclaim:

4.9.1 the Defendants acted without reasonable and probable cause.

4.9.2 the Defendants acted with malice and/or alternatively animus iniuriandi.

4.9.3 the Defendants failed to successfully prosecute the criminal proceedings and further failed to successfully prosecute and justify the unfair labour dismissal which resulted in the Defendants having suffered loss."

[49] Against these allegations, the Defendants raised a second special plea, apart from making certain denials. Firstly, the Defendants deny that the arrest and detention of the Plaintiffs was unlawful. The arrest and detention have been dealt with under the first special plea.

[50] The special plea raised by the Plaintiffs was that it is common cause that the Plaintiffs were never prosecuted in a criminal court. Accordingly, no criminal proceedings were instituted against them to effect that the law was set in motion in a criminal court.

[51] Importantly, the Defendants' plea of extinctive prescription in respect of this claim of unlawful arrest and detention, and furthermore of the allegation that the Defendants instituted malicious proceedings, and furthermore that the Second Defendant set the law in motion by instigating and/or alternatively instituting criminal proceedings of bribery and corruption, is applicable also to this claim by the Plaintiffs.

[52] According to paragraph [4.1] of the particulars of claim, the Plaintiffs were arrested on 23 November 2012 by W/O Ras, for the alleged offence of bribery or taking money from a member of the public under CAS 214/11/2012. It can therefore be assumed that the said malicious proceedings were instituted on or before 23 November 2012 and consequently led to the opening of CAS 214/11/2012. Accordingly, any cause of action arising from the said malicious institution or setting the law in motion by the Defendants has been extinguished by extinctive prescription inasmuch as the combined summons or a copy thereof was served on the First Defendant on 30 January 2012, more than three years after the Plaintiffs cause of action had arisen.

[53] Therefore, any claim by the Plaintiffs that the First and Second Defendants instituted malicious proceedings against them, and furthermore that the Second Defendant set the law in motion against them, became extinguished by extinctive prescription three years after such causes of action had arisen or on 23 November 2012, according to paragraph [4.1] of the particulars of claim.

[54] Accordingly, these claims stand to be dismissed by reason of the fact that they have been extinguished by prescription.

THE THIRD SPECIAL PLEA

[55] The Plaintiffs have, in respect of their claims of unfair labour dismissals, pleaded, inter alia:

"That the Defendants failed to successfully prosecute the criminal proceedings and furthermore failed to successfully prosecute and to justify the unfair labour practice dismissal, which resulted in the Defendants (sic) having suffered lossesn.

[56] Apart from pleading over, the Defendants have raised, as follows, what they regard as a third special plea:

"3.1 The Plaintiffs plead in paragraph 4.3 of the particulars of claim that subsequent to the arrest, detention and further detention they were subjected to disciplinary hearings led by a member in the employ of the First Defendant.

3.2 The Plaintiffs further plead in paragraph 4.6 of the particulars of claim that as a result of them having been discharged they instituted or referred a dismissal dispute to the Bargaining Council which found that their dismissals were substantially unfair.

3.3 As a result of the aforesaid, the First Defendant was ordered to reinstate the applicants from the 21st of October 2013 (the date of their dismissal) and that the

First Defendant was further ordered to pay the Plaintiffs from the date on which their salary was stopped.

3.4 The Defendants specifically plead that the Plaintiffs chose to claim compensation pursuant to the provisions of the Labour Relations Act 66 of 1995, as a result of the outcome of the internal disciplinary hearings.

3.5 The Defendants specifically plead that if the Plaintiffs wished to claim damages based on their unfair dismissal, they ought to have instituted a common law claim against the First Defendant based on breach of contract but failed to do so. On perusal of the Plaintiffs' particulars of claim, no case is made out for damages based on the breach of contract by the First Defendant.

3.6 The Plaintiffs therefore does (sic) not disclose a cause of action to claim any damages based on the unfair dismissal.

3.7 In the light of the aforesaid, the Plaintiffs' action, based on unfair dismissal, should be dismissed with costs."

The Defendants pleaded as follows in the alternative:

"3.8 If the Honourable court finds that the Plaintiffs did predicate their claim for damages on a breach of contract, which is denied by the Defendants, then and in that event the Defendants specifically plead that the claim

prescribed as the claim for contractual damages would have arisen on the date of dismissal, being the 21st of October 2013.

3.9 The debt is also a debt that prescribes within 3 (three) years as per Section 11(d) of the Prescription Act 68 of 1969. Therefore, the Defendants will then pray that the Plaintiffs' claim on unfair dismissal be dismissed."

[57] The Plaintiff so-called Third Special Plea.

"3.1 The Plaintiffs plead that claims 1 and 2 against the Defendant, as pleaded, is as follows:

3.1.1 malicious prosecution.

3.1.2 legal costs.

3.1.3 emotional and psychological stress (which still persists); and

3.1.4 loss of promotional prospects.

3.1.5 future loss of income and future promotional income.

3.1.6 past loss of income.

3.2 The Plaintiffs' plead that the claim against the Defendants is not unfair dismissal as alleged by the Defendants.

3.3 The Plaintiffs' plead that they had never instituted action proceedings against the defendants based on unfair dismissal before the Honourable court.

3.4 The Plaintiffs plead that had never pleaded any contractual damages against the Defendants.

3.5 The Plaintiffs' plead that the award of Bargaining Council by Mthukwane J N, dated the 16th day of September 2016, in which it was ordered, inter alia, that the First Defendant was ordered to pay the plaintiffs back pay calculated from the 1st day of July 2014 (date on which salary was stopped) to the 30th day of September 2016)."

THE PLAINTIFF'S REPLICATION

[58] It is clear as crystal that in dealing with the Defendant's third special plea, the Plaintiffs:

(1). never complained about its character.

(2). never objected to it.

(3). never pointed out that in its current form the third special plea that:

"3.6 the Plaintiffs therefore does not disclose the cause of action to which they had any damages based on unfair dismissal." is not a special plea and that therefore any objection to the formulation of a special claim of unlawful dismissal should have been brought by way of an exception and not a special plea. This is so because of Rule 23 of the Uniform Rules of Court provides that:

"1. Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an

exception thereto and may set it down for hearing within 15 days after delivery of such exception»

[59] Except to observe that indeed the third special plea is not in fact a special plea, any objection to the formulation of the Plaintiffs' claim should have been brought by way of an exception and not as a special plea. This Court is reluctant to make any ruling on the Defendants' so-called Third Special Plea, since this court already has found that the Plaintiffs' claims have been extinguished by extinctive prescription.

Accordingly, I make the following order;

[1] The Defendants' First and Second Special Pleas are upheld.

[2] Plaintiffs' actions are hereby dismissed with costs, which costs shall include the costs consequent upon the employment of senior and junior counsel.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiffs: Adv Kwindi T.C

Instructed by:

Makhafo/a and Verster Incorporated

Counsel for the Defendants: Adv M M W Van Zyl SC

Assisted by:

Adv. CG VO Sevenster

Instructed by:

Office of the State Attorney

Date heard:

26 February 2024

Date of Judgment:

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