

SOUTH AFRICA / JUDGMENT

Masina v Minister of Police (22851/2015) [2017] ZAGPPHC 445 (4 August 2017)

[2017] ZAGPPHC 445

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

22851/2015

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 22851/2015

2017/07/31

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

MJ MASINA PLAINTIFF

and

THE MINISTER OF POLICE DEFENDANT

REASONS

FOR JUDGMENT

RAULINGA J,

- [1] The applicant applies for an order that condonation be granted to the (Plaintiff) under case number 22851/2015 in terms of section 3(4)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act, No 40 of 2002, ("the Act") for his late compliance with section 3(1) and (2) of the Act, with costs in the event of opposition to the application.

- [2] The respondent opposes the application and seeks dismissal of the application with costs.
- [3] The applicant claims damages from the respondent in the amount of R660.000.00 resulting from an incident on the 16 May 2012 and in which incident the applicant alleges he was wrongfully and unlawfully shot by members and/or employees of the respondent.
- [4] Summons was served on the respondent on 19 May 2016. After entering an appearance to defend, the respondent filed a plea in which two special pleas are raised.
- [5] The first special plea relates to the failure of the applicant to timeously comply with section 3(1) and (2) of the Act, and the second special plea is of prescription in terms of section 11(d) of the Prescription Act No 68 of 1969.
- [6] The applicant alleges that he was shot by a member of the South African Police Service with live ammunition just above the right

ankle on 16 May 2012.

- [7] The respondent denies that the members of the South African Police Service fired gunshots on the day and time in question, and therefore that the applicant was shot with live ammunition by a member of the South African Police Service. However, the respondent admits that members of the South African Police Service were present at the scene of the incident, but avers that their presence was meant to maintain law and order in that members of the community in question were violent and were damaging government property.
- [8] The applicant states that months after being shot he was approached by his acquaintance, Mr Mngadi, during February 2013 who requested him to consult with an attorney regarding the events of 16 May 2012. Mr Mngadi was also allegedly shot by the members of the South African Police Service on the same day and had instructed his attorney to institute a claim against the Minister of Police.
- [9] The applicant states that at no stage prior to being approached by Mr Mngadi did he have knowledge that any claim would be instituted

against the Minister of Police as a joint debtor. This allegation is not placed in dispute by the respondent.

- [10] During or about June 2014 the applicant instructed Pieter Nel Attorneys to institute a claim against the respondent for the

unlawful conduct of its employee, alternatively the employees of the Minister of Police. On 29 September 2014, notice was sent to the respondent in terms of the Act.

- [11] Mrs Willene van Zyl and Mr J Terblanche deposed to confirmatory affidavits that the delay in transmitting the notice from June 2014 to September 2014 was due to an administrative oversight on their part.

[12] The sole basis for opposing the application for condonation is set out in the answering affidavit, namely that according to the respondent, the applicant has failed to prove that the debt has not been extinguished by prescription. Further, that notwithstanding the fact that the applicant's cause of action arose on 16 May 2015, the period between 16 May 2012 and 19 May 2015 is in excess of three years

[13] In terms of section 3 of the Act, a creditor of an organ of state is required to give notice of intended legal proceedings within 6 (six) months from the date on which the debt became due, and which notice must comply with section 4(1) of the Act.

[14] The applicant correctly submits that in terms of section 3(3) of the Act, 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 could have acquired such knowledge or soon as he could have acquired it by exercising

reasonable care, unless the organ of state wilfully prevented him from acquiring such knowledge.

[15] In terms of section 3(4)(b) of the Act, the court may grant an application for the condonation if it is satisfied that:

15.1 The debt has not been extinguished by prescription;

15.2 Good cause exists for the failure by the creditor; and

15.3 The organ of state was not unreasonably prejudiced by the failure.

[16] In *MEC for Education, KwaZulu Natal v Shange* 2012(5) SA 313(SCA), where a similar question was adjudicated, namely whether prescription starts to run from the date of the incident in circumstances where the applicant only at a later stage became aware of the identity of the debtor as joint -wrongdoer.

[17] It is not disputed by the respondent that the applicant only became aware of the identity of the respondent in this matter as joint-wrongdoer during or about February 2013, at the earliest, when he was approached by Mr Mngadi and was informed that Mngadi had instituted a claim against the Minister of Police.

[18] The applicant states that he has never been a party to civil litigation and that he does not have any knowledge of the legal

system. This assertion by the applicant is understandable and acceptable given the fact that he appears to be a lay person with no knowledge of how the legal system operates. This must be considered against the backdrop that the provisions of section 12(3) of the Prescription Act 68 of 1969, seeks to prevent negligence, and not innocent inaction. In my view, the applicant was not negligent but admittedly ignorant of the operation of the law.

- [19] It must also be noted that the respondent bears the full evidentiary burden to prove a plea of prescription including the date on which a plaintiff obtained actual or constructive knowledge of the debt, as well as the identity of the creditor was at the earliest only obtained in February 2013, therefore less than 3 years after which summons was instituted. In my view therefore, the applicant's claim against the respondent has not been extinguished by prescription.
- [20] The applicant only instructed attorneys during or about June 2014 to institute his claim against the Minister of Police. The notice was sent approximately 2(two) months thereafter. The delay was only 3 days late, i.e. between the 16 May 2012 and 19 May 2015.
- [21] Ordinarily, prescription begins to run from the day on which the cause of action arose. In this case, the applicant's cause of action would have arisen on 16 May 2012, meaning that the running of the prescription against the claim began on 16 May 2012, and the period of three years would have lapsed on or about 15 May 2015.
- [22] One must be alive to the fact that the delay in transmitting the notice from June 2014 to September 2014 was due to an administrative oversight on the part of the applicant's attorneys, it was not due to negligence on his part.
- [23] In the interest of justice the applicant must be allowed to properly ventilate the dispute between the parties and that condonation be granted.
- [24] In the premise I make the following order:

24.1 Condonation is granted.

TJ RAULINGA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

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