

SOUTH AFRICA / JUDGMENT

Maundu and Others v Minister of Police (63331/2020) [2021]

ZAGPPHC 772 (10 November 2021)

[2021] ZAGPPHC 772

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

63331/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

Case number: 63331/2020

Date:

In

the matter between:

LUCKY

MAUNDU

FIRST APPLICANT

ERASMUS

DAVID

SECOND APPLICANT

MANFRED

HAUSIKU

HAIYAMBA

THIRD APPLICANT

SAKARIA

I

KAIKAMAS

FOURTH APPLICANT
vs
THE
MINISTER OF POLICE
RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The applicants (the Koevoet Members) seek an order for certification of a class action in terms of section 38(c) of the Constitution of the Republic of South Africa (the Constitution) [1] with ancillary relief. Primarily they seek an order declaring that all persons who were employed by the respondent (the Minister)

of a special unit within the South African Police Service (the Koevoet Unit) on/or after 1993 be permitted to constitute a class for purposes of an action to be instituted against the Minister.

[2] The issue to be determined is whether it is appropriate to certify a class action under the circumstances of this case.

BACKGROUND

[3] The facts that underpins this application predates our democratic dispensation. During 1978/1979 the Koevoet Members were part of a so called anti-terrorist unit, which was established in Namibia by the then South African Government. They were initially part of the Defence Force. There were about 900 (nine hundred) Koevoet Members who returned to the Republic of South Africa (“the Republic”) in 1994, before the first democratic elections. During 1992 and 1993 the Koevoet Members became part of the South African Police. The Koevoet Members state that during 1994, before the first democratic election they were informed to take leave of three months. When they returned their offices were however closed. They say they were unfairly dismissed. The Minister says that the Commissioner for Administration issued a directive on how to deal with all the Koevoet Members. There is a dispute between the parties whether they were unlawfully dismissed, or whether they left the Police Service after certain benefits were paid out to them. Some of the certificates attached indicate “afdanke/dismissal”, others “termination of service” and others “oneervolle ontslag/dismissal.”

[4] In their affidavit the Koevoet Members deal with the class they identified, the cause of action, the commonality they allege exist between them and the appropriateness of the representatives.

[5] The applicants attached a particulars of claim setting out their claim. They state that they will have to prove the existence of a permanent employment contract, that a breach of contract was committed by the unlawful termination of their employment and that they suffered damages as a result thereof.

[6] The Minister explains in his affidavit that in terms of a directive, it was determined that severance package benefits be paid to all Koevoet Members.[2] In this regard on 26 April 1994, all Koevoet Members were, according to the Minister, personally handed vouchers as their severance

packages, which included leave credits, pro-rata service bonuses, three months advance salary, pension as well as tax benefits.

[7] The Minister states that despite the fact that the computer systems had not yet developed at that time, the respondent had kept a list of all 900 Koevoet Members who were paid their benefits in full, and a list was attached to the papers to confirm this. The applicants deny that they received their benefits in full. It is not for this Court to determine the factual disputes between the parties.

[8] The Koevoet Members offer no explanation whatsoever as to why it took them so long to institute action or bring this application. On their own version they became aware of their alleged dismissal during 1994. The Minister in the answering affidavit states that the claim has probably prescribed.

LEGAL PRINCIPLES IN RELATION TO CLASS ACTIONS

[9] In *Children's Resources Centre Trust and Others v Pioneer Food (Pty)*

Ltd & Others[3] the definition of the concept of a class actions was confirmed.[4]

The aim is ultimately to bring a number of separate claims together in one procedure, such an action is a representational device.[5]

[10] In *Children's Resources Centre* factors that should be considered in the event of a proposed class action were set out as follows:

"All of the parties accepted that it is desirable in class actions for the court to be asked at the outset, and before issue of summons, to certify the action as a class action. This involves the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of action; the court being satisfied that the representative is suitable to represent the members of the class; and the court being satisfied that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims. In my view they were correct to do so and we should lay it down as a requirement for a class action that the party seeking to represent the class should first apply to court for authority to do so."[6]

- [11] In *Mukaddam v Pioneer Foods (Pty) Ltd & others*[7] a more flexible approach was laid down and it was held that the factors mentioned in *Children's Resources Centre* should not be elevated to constitute rigid prerequisites, but that the guiding principle should be the interest of justice. It was also held that these factors were not conditions precedent, jurisdictional facts, or exhaustive.[8] As a result a Court when exercising its discretion to either grant or refuse an application for certification may take into account any factor which may be relevant or material to the determination of the matter.
- [12] In order for a court to be able to make an appropriate assessment, *Children's Resource Centre*[9] prescribes that a party seeking certification will have to set out in a draft pleading and in affidavit the basis for the proposed action. This enables a court to have more material available to determine the cause of action and ultimately to establish whether there exists a triable issue. It further enables a court to make a proper assessment of the legal merits of the claim. It is essential that the affidavit supporting the application should deal with all factors that could play a role in the Court's determination of the application. In order to exercise a discretion full disclosure by the parties is required.
- [13] Unless it is plain that the claim, is not legally tenable, certification should not be refused. The granting of certification however does not in any way foreclose an exception, or answer the question of the claim's legal merit in the affirmative.[10]
- [14] In *Mukaddam* it was stressed that:

"Courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in this case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder, instead of advance, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it."

Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of courts are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures. ... "[11]

APPLICATION OF THE LAW TO THE FACTS

- [15] In this instance I am of the view that a class and a common claim that could be determined by way of a class action were identified. It was also shown that the proposed representative would be suitable. However in this particular case the question of whether a triable issue exist is of concern. The standard to be applied in assessing whether a proposed action reflects a cause of action raising a triable issue, is firstly whether the cause of action is legally tenable, and secondly whether the facts put forth by the applicants set out a prima facie case. A case is legally hopeless if it could be the subject of a successful exception, or for that matter a special plea of prescription. A case is factually hopeless if the evidence

available and potentially available, after discovery and other steps directed at procuring evidence, will not sustain the cause of action on which the claim is based.[12]

[16] The Koevoet Members in my view failed to make out a cause of action, due to the long delay in bringing the application. It is also doubtful whether a certification will serve the interests of justice. The question that arises is whether this Court should certify a class action, in the light of the unexplained 27 years delay in instituting the claim. In *Makate v Vodacom Ltd*[13] an approach towards prescription was followed, that obliges courts to follow section 39(2) of the Constitution, and construe the Prescription Act in the light thereof, whenever rights in terms of the Bill of Rights are affected.

[17] Makate impressed the importance of access to courts, and implored the courts to interpret the law in a way that is least intrusive of the rights of individuals. Access to courts is a foundational principle of our Constitutional dispensation, however prescription is not always inconsistent with the Constitution. In my view there is no indication on the papers before me that the debt in this instance has not prescribed. The insurmountable problem the Koevoet Members face, is that in the absence of any explanation for

the delay, the action is legally untenable as prima facie it has prescribed. If an explanation was provided for the delay, the Court would have considered it and could have come to another

conclusion.

[18] The plaintiffs' right to proceed with their action is not affected and their access to the court has not been limited. The Minister may still raise a special plea of prescription, if so advised. However due to the delay, the certification of a class action is not appropriate. It is also not in the interest of justice that a class action be certified so long after the fact, in the absence of a reasonable explanation. Due to the lapse of time evidence may be difficult to obtain, discovery may be problematic and protracted litigation will follow. This will ultimately not serve justice. As a result the application should be dismissed.

COSTS

[19] Seeing that the applicants rely on a right in terms of the constitution no order shall be made for costs and the principal in *Biowatch Trust v Genetic Resources and others*[14] is applied.

[20] The following order is made.

1. The application is dismissed

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:

29 JULY 2021

DATE OF

JUDGMENT:

10 NOVEMBER 2021

ATTORNEY FOR APPLICANTS: MFENDE ATTORNEYS

ADVOCATE FOR APPLICANTS: ADV J HLONGWANE

ATTORNEYS FOR RESPONDENTS: STATE ATTORNEY

ADVOCATE FOR RESPONDENTS: ADV T MLAMBO

[1] Act 108 of 1996.

[2] In terms of Section 15 (2) (b) of the Government Service Act 1984.

[3] 2013 (2) SA 213 SCA (Children's Resources Centre).

[4] Ibid para 16.

[5] Ibid para 17, See also Nguxuza & others v Permanent Secretary Department of Welfare Eastern Cape & another 2001(4) SA 624 D-E, First Rand Bank Ltd v Chaucer Publications (Pty) Ltd 2008(2) SA 592 (C).

[6] Ibid para 23.

[7] 2013(5)SA 89 CC (Mukaddam).

[8] Ibid para 15 – 18, 34 – 35, 47.

[9] Children's Resources Centre para 39.

[10] Children's Resources Centre para 39.

[11] Mukaddam para 38 – 39.

[12] Children's Resources Centre para 35.

[13] 2016(4) SA 121 (CC) para 90 – 91.

[14] 2005(4) SA 111 TD.

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Prepared on 12 October 2026 · Esheria