



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**  
Case no: 1250/2022

**In the matter between:**

**MINISTER OF POLICE**

**APPELLANT**

**and**

**THAMSANQA RONNY MIYA**

**RESPONDENT**

**Neutral citation:** *Minister of Police v Miya* (1250/2022) [2024] ZASCA 71 (06 May 2024)

**Coram:** MOKGOHLOA, MEYER and KGOELE JJA and BAARTMAN and BLOEM AJJA

**Heard:** 15 March 2024

**Delivered:** 06 May 2024

**Summary:** Civil claim – interpretation of s 2(2)(a) of State Liability Act 20 of 1957 – whether failure to serve summons on the head of the department renders the summons a nullity – purpose of the Act achieved.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Mazibuko AJ sitting as court of first instance):

The appeal is dismissed with costs, which costs shall include the costs consequent on the appointment of two counsel.

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## JUDGMENT

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**Kgoele JA (Mokgohloa and Meyer JJA, Baartman and Bloem AJJA concurring):**

[1] A little less than a decade ago the Constitutional Court, to underscore the approach our courts should employ in applying the laws in this country, including the interpretation of the Constitution, statutes, and contracts in matters before them remarked:

‘Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustration of real justice and equity through technicalities. The kind of justice that our constitutional dispensation holds out to all our people is substantive justice. This is the kind that does not ignore the overall constitutional vision, the challenges that cry out for a just and equitable solution in particular circumstances and the context within which the issues arose and are steeped. We cannot emphasise enough, that form should never be allowed to triumph over substance....’<sup>1</sup>

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<sup>1</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 18.

[2] Central to the issues in this appeal is the question whether the non-compliance with the provisions of s 2(2)(a) of the State Liability Act 20 of 1957 (State Liability Act) renders the summons a nullity. This is a similar question already pronounced by this Court per Makgoka JA recently in *Minister of Police v Molokwane (Molokwane)*.<sup>2</sup> Whereas in *Molokwane* the non-compliance relates to the failure to serve the summons on the State Attorney in terms of s 2(2)(b) of the State Liability Act, the converse occurred in this matter. This appeal concerns the failure to serve the appellant, the Minister of Police (the Minister), in terms of s 2(2)(a), albeit that it was served on the State Attorney. The Gauteng Division of the High Court, Pretoria (the high court), dismissed the special plea the Minister raised in this regard. It concluded that the non-compliance with s 2(2)(a) did not render the summons a nullity. The appeal is with leave of the high court.

[3] The appeal is opposed by the respondent, Mr Miya. In the main action, Mr Miya sued the Minister and the National Director of Public Prosecution (NDPP) for damages allegedly suffered on 19 December 2017, at Vosloorus. The allegations against them are that he was unlawfully arrested and detained for three days by members of the police acting within the course and scope of their employment with the Minister. The trial began with a determination of a special plea against the Minister only.

[4] The salient factual background relevant to the adjudication of the special plea are common cause. They are that: the cause of action arose on 19 December 2017; summons was issued on 5 May 2019; the statutory notice in terms of the Institution of Legal Proceeding Against Certain Organ of the State Act 40 of 2002, as amended

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<sup>2</sup> *Minister of Police v Samuel Molokwane* (730/2021) [2022] ZASCA 111 (15 July 2022).

(the statutory notice), was served on the Minister; summons was served at the State Attorney's office on 7 May 2019; Mr Miya never served the summons at the office of the Minister as required in terms of s 2(2)(a); on 11 July 2019 the State Attorney filed a notice of intention to defend on behalf of both the Minister and the NDPP; almost two years later the Minister filed his amended plea on 22 February 2022 wherein he introduced the special plea which is the subject of this appeal.

[5] The contents of the amended plea were that: the cause of action arose on 19 December 2017; the summons was issued on 5 May 2019; the summons was served on the State Attorney on 7 May 2019 and not on the head of the Department concerned; s 2 (1) of the State Liability Act and rule 4(9) of the Uniform Rules of Court are obligatory; the service on the State Attorney alone is fatal and renders the claim prescribed irrespective of the Minister's participation in the proceedings from its inception.

[6] It is important to set out the provisions of section 2(2) of the State Liability Act in full at the outset. It provides:

‘(2) The plaintiff or applicant, as the case may be, or his or her legal representative *must* –  
 (a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, *serve a copy of that process on the head of the department concerned at the head office of the department*; and  
 (b) *within five days* after the service of the process contemplated in paragraph (a), *serve a copy of that process on the office of the State Attorney* operating within the area of jurisdiction of the court from which the process was issued.’ (Emphasis added.)

[7] Before the high court, the Minister submitted that the provisions of s 2(2) of the State Liability Act are obligatory; failure to serve the summons on the Minister is fatal; service on the State Attorney alone renders the summons a nullity. In the alternative, the Minister submitted that the claim had prescribed due to non-service

on the debtor, the Minister, in terms of s 2(2)(a). Although the arguments of both parties centered around the decision in *Molokwane*, the Minister argued that the facts therein were distinguishable. The difference, according to him, stems from the fact that in *Molokwane* summons was served on the Minister who is the debtor, which is not the case in this matter. As a basis for this argument, the Minister pinned his colours of the mast on s 15(1) of the Prescription Act 68 of 1969 (the Prescription Act). This section provides that the running of prescription shall ‘be interrupted by the service on the debtor of any process . . .’.

[8] In dismissing the special plea, the high court agreed with the submissions by Mr Miya to the effect that undoubtedly the Minister, who is the debtor, became aware of the summons; he responded to the summons by filing relevant court processes in his defence; and the omission to serve on him did not render the summons void as its purpose was consequently achieved. The high court did not pronounce on the issue of prescription.

[9] Before us, and in a somewhat different approach from the one advanced in the high court, counsel representing the Minister attempted to persuade this Court to reconsider its findings in *Molokwane*. He argued that the appeal primarily rests on the issue of prescription which was not dealt with by the high court; what was said in *Molokwane* was *obiter* because in this matter the debtor was not served; even though the Minister became aware of the summons and filed all the necessary court processes, service on him or his office was still required to interrupt prescription; the failure to serve cannot be condoned as the Prescription Act is also peremptory on the issue of service on the debtor. Furthermore, counsel representing the Minister submitted that the failure to adjudicate the issue of prescription is so egregious,

renders the matter *res judicata*, and violated the Minister's right to a fair hearing in terms of s 34 of the Constitution.

[10] I start my analysis of the merits with the issue of prescription because, in my view, it ought not detain us much save to say that prescription does not arise in the context of the facts of this matter. First, the plea of prescription was pleaded in the alternative. This much is acknowledged by the Minister's counsel in his arguments. Second, the service on the State Attorney was within the three years before prescription would begin to run. The tenor of the high court's finding is simply that prescription had been interrupted without saying so in so many words. It is demonstrably clear that once the bridge regarding effective service was crossed, the need for the high court to have analysed the issue of prescription no longer existed. Additionally, the Minister was timeously served with the statutory notice. It is trite that it is 'a process' that serves to interrupt prescription.<sup>3</sup> The defence of prescription together with the arguments related thereto were therefore ill-conceived.

[11] I now turn to the main issue of whether the non-compliance with service on the Minister is fatal to the main action. To recap, the arguments supporting the reconsideration of the *Molokwane* judgment were couched along the following confines: the State Attorney is not a debtor as defined by the Prescription Act; it was never the intention of the Prescription Act that the mere 'knowledge' of the debtor regarding the institution of the proceedings should be sufficient to interrupt the running of prescription in circumstances where the summons was not served on him; and that the finding in that regard in *Molokwane* was *obiter*.

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<sup>3</sup> *Molokwane* fn 2 para 24.

[12] As already indicated above, it is common cause that the main issue in this appeal concerns the interpretation of s 2(2) of the State Liability Act. It is by now trite that when a legislative provision is to be interpreted, consideration should be given to the language used in the light of the ordinary rules of grammar and syntax; the process of interpretation is objective, not subjective; and a sensible meaning should be preferred rather than an insensible one.<sup>4</sup> Furthermore, the Constitutional Court has made it clear that when interpreting legislation, the purpose of the impugned section must be fulfilled, and if it is fulfilled, a mechanical approach is to be deprecated.<sup>5</sup>

[13] Consistent with the above principles as propounded in various judgments, most recently, this Court rejected similar arguments raised by the Minister in *Molokwane*. It remarked:

‘This approach received the imprimatur of the Constitutional Court in *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) para 25. There, it was held that the adoption of the purposive approach in our law has rendered obsolete all the previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision. The question was thus ‘whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose’. A narrowly textual and legalistic approach is to be avoided.’<sup>6</sup>

[14] The court further held:

‘There is also the injunction in s 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Thus, where a

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<sup>4</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

<sup>5</sup> *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) para 25.

<sup>6</sup> *Molokwane* fn 2 para 16

provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted. The right implicated in this case is that of access to courts, enshrined in s 34 of the Constitution. Consistent with this injunction, the interpretation of s 2(2) of the State Liability Act must be one which promotes this right, by considering the underlying purpose of the section, rather than merely its text. This purposive approach is far more consistent with our constitutional values, than reading the section narrowly and strictly, as preferred by the appellants.’<sup>7</sup>

The observations expressed in the preceding paragraphs accord with the remarks quoted above which were made by the former Chief Justice Mogoeng in the *City of Tshwane v Afriforum*.

[15] *Molokwane* is on all fours with the present appeal as it dealt with almost similar facts and exactly the same legal points raised in this matter. Looking at the facts of this appeal from all angles, there is no doubt that the principles of interpretation that were dealt with in *Molokwane* albeit with specific reference to s 2(2)(b) apply to the facts of this matter. In my view, the same purposive interpretative approach employed by this Court in *Molokwane* applies *mutatis mutandi* to s 2(2)(a).

[16] The argument that *Molokwane* is *obiter* has no merit as well. It is clear that, in *Molokwane*, this Court dealt with the interpretation of s 2(2) as a whole, not disjunctively as counsel for the Minister wants to portray.<sup>8</sup> This much is buttressed by the fact that a simple syntax reading of ss 2(2)(a) and 2(2)(b) reveals that the subsections are conjoined twins as there is a word ‘and’ between them. Paragraph 12 of *Molokwane* is instructive as the purpose of the whole s 2(2) was clearly spelled out therein. I agree with the remarks made therein that the question to be considered

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<sup>7</sup> *Molokwane* fn 2 para 17.

<sup>8</sup> *Molokwane* paras 11 and 12.



in interpreting this section is not about how the knowledge was obtained, but whether knowledge of the action was obtained.

[17] There is a further reason why the approach suggested by the counsel representing the Minister is untenable. Applying a narrow approach, as suggested by him, will in my view lead to an insensible conclusion that the State Attorney's office acted without the instruction of the Minister when it filed the plea and subsequent amended plea on behalf of the Minister. However, the Minister's counsel conceded from the bar that when the State Attorney's office filed the Minister's plea and subsequently the amended plea, it acted on the instructions of the Minister. The concession therefore throws the Minister's approach completely out of balance.

[18] Apart from the fact that there was no basis laid by the Minister to demonstrate that the principles already pronounced in *Molokwane* are clearly wrong, this Court is not persuaded by the submission that the mere fact that the non-service relates to the Minister changes the picture. The particular facts and circumstances of this matter are telling, including the context within which the issues arose which are: the statutory notice was served on the Minister; the Minister gave instructions to the State Attorney, an agent acting on his behalf, to defend the matter by filing a notice to defend; the Minister participated in all the stages of proceedings until at trial. All of these demonstrate that the Minister was fully aware of the proceedings against him. There was not even an iota of prejudice decried by the Minister as a result of this failure.

[19] It is for these reasons that I conclude that the fact that the summons was not served within the prescripts of s 2(2) of the State Liability Act with particular reference to s 2(2)(a), is, on the facts of this case, not fatal. This much is best

accentuated by the following conclusion of the high court which serves as the epicenter of the interpretation it affirmed:

‘It is not my finding that the State Attorney accepted the summons on behalf of the first defendant nor that the State Attorney replaced the first defendant as a debtor. The first defendant remained a debtor who was not served with the court process but who ultimately became aware of the summons (plaintiff’s claim) as he responded to it.’

The decision of the high court to dismiss the special plea was therefore correct. The appeal must fail.

[20] As far as costs are concerned, Mr Miya argued that he is entitled to costs consequent on the employment of two counsel. I am of the view that the ground that was heavily relied upon by the Minister to the effect that this Court should reconsider the decision in *Molokwane*, is a substantial issue. Mr Miya, as an ordinary citizen, had to defend the judgment in his favour by all the means he had. This, in my view, justified the employment of two counsel. The issue is exacerbated by the fact that the Minister came to this Court to defend the indefensible.

[21] The following order is thus made:

The appeal is dismissed with costs, which costs shall include the costs consequent on the appointment of two counsel.

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A M KGOELE  
JUDGE OF APPEAL

## Appearances

For appellant: T C Kwindu

Instructed by: State Attorney, Pretoria

State Attorney, Bloemfontein

For respondent: M R Maphutha (with A Seshoka)

Instructed by: Makhafola & Verster Inc., Pretoria

Makubalo Attorney, Bloemfontein