THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1082/17

In the matter between:

MINISTER OF POLICE **APPLICANT**

and

MFANUKA JACOB MASINA **RESPONDENT**

Neutral citation: *Minister of Police v Masina* (1082/17) [2019] ZASCA 24 (28 March 2019)

Coram: Tshiqi, Wallis, Zondi and Van der Merwe JJA and Matojane AJA

Heard: 27 February 2019

Delivered: 28 March 2019

Summary: Extinctive prescription – Commencement – Debt due when the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises – knowledge of legal procedures and remedies not required.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Raulinga J sitting as court of first instance):

1 The application for leave to appeal is granted with costs.
2 The appeal is upheld with costs.
3 The order of the high court is set aside and replaced by the following order:
'The application is dismissed with costs.'

JUDGMENT

Matojane AJA (Tshiqi, Wallis, Zondi and Van der Merwe JJA concurring):

[1] During May 2012 the respondent, Mr Mfanuka Jacob Masina, then 34 years old, was allegedly shot in the right ankle by a member or members of the South African Police Service (SAPS), while he attending a community protest meeting. He instituted an action against the Minister of Police (Minister) to recover damages in the aggregate amount of R660 000.

[2] The Minister defended the action and delivered two special pleas to the particulars of claim. The first special plea related to the failure to timeously comply with s 3(1) and (2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act) and the second plea was a special plea of prescription as contemplated by s 11(*d*) of the Prescription Act 68 of 1969 (the Prescription Act).

[3] On 19 February 2016 Mr Masina's attorneys brought an application in terms of s 3(4)(*b*) of the Act for condonation of the respondent's non-compliance with the notice provisions, and also sought costs in the event of opposition. The court below (Raulinga J) sitting in the Gauteng Division of the High Court, Pretoria), upheld the application

and ordered the Minister to pay the costs of the application on the scale as between attorney and client.

[4] The court a quo refused the Minister's application for leave to appeal. The Minister petitioned this court in terms of s 17(2)*(b)* of the Superior Courts Act 10 of 2013. The application for leave to appeal was referred for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013. The parties were directed, to address the court on the merits if called upon to do so.

[5] In terms of s 3(4)(*b*) of the Act, the court may grant an application for condonation if satisfied that:
(a) The debt has not been extinguished by prescription;
(b) Good cause exists for the failure by the creditor;
(c) The organ of the state was not unreasonably prejudiced by the failure.

[6] It is for the applicant for relief under this section to produce evidence to satisfy the court hearing the application that the requirements of the section have been met. In the high court, the argument revolved around the question of whether Mr Masina's claim had prescribed.

[7] In the affidavit in support of the condonation application Mr Masina stated that he had been shot on 16 May 2012 while participating in the protest action. His claim for damages against the police arose and became due then. Accordingly, the debt would ordinarily have prescribed on 15 May 2015. The summons in the present action was served on 19 May 2015.

[8] Mr Masina sought to overcome this problem by claiming that prescription had not commenced running prior to February 2013. His reasons for saying this were set out in the following paragraphs from his founding affidavit:
'7.18 Months after being shot I learned that an acquaintance of mine, Mr Mthombosi Perseverance Mngadi, who also partook in the protest action on 16th day of May 2012, was also shot by members of the SAPS on the same date, and that Mr Mngadi laid a complaint with the SAPS against the specific members of the SAPS who shot him.

7.19 I was never able to establish the identity of the police officer, alternatively police officers who shot me and therefore never proceeded to lay a complaint with the SAPS. I was unaware of any legal remedy, and I was under the impression that there was nothing I could do due to the fact that the identity of the specific SAPS members was unknown to me.

7.20 I have never been party to civil litigation, and I do not have any knowledge of the legal system.

8.1 During or about February 2013 I was approached by Mr Mngadi, as referred to above, who requested me to consult with his attorneys regarding the events on 16 May 2012 as he had instructed his attorney to institute a claim against the Minister of Police after also being shot on the same date.

8.2 I agreed to give a statement to Mr Mngadi's attorneys in order to assist him with his claim that he had instituted against the Minister of Police. At no stage prior to being approached by Mr Mngadi did I have any knowledge that any claim could be instituted against the Minister of Police as a joint debtor.

8.3 On 10 September 2013 I give a statement to Mrs Willene van Zyl of Pieter Nel Attorneys at Carolina. I enquired with Mrs. van Zyl as to the possibility of a claim being instituted against the Minister of Police on my behalf, whereupon I was informed that I would need to formally instruct Pieter Nel Attorneys prior to any claim being instituted on my behalf.

. . .

8.5 During or about June 2014 I again consulted with Mrs Willene van Zyl of Pieter Nel Attorneys and instructed Pieter Nel to institute a claim against the Minister of Police for the unlawful conduct of an employee, alternatively the employees of the Minister of Police.'

[9] Thus the case for Mr Masina was that prior to being approached by Mr Mngadi in February 2013, he did not have knowledge that a claim could be instituted against the Minister as joint debtor for the wrongful actions of the members of the SAPS and that prescription did not commence to run against him before February 2013. The appeal, therefore, turns on the question whether the court below should have been satisfied on the facts of this case that the debt had not been extinguished by prescription.

[10] Section 12 of the Prescription Act reads:

'(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully 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 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 by exercising reasonable care.'

[11] Section 12(3) has two elements. In the first place, it requires 'knowledge of the identity of the debtor'. The second is 'knowledge of the facts from which the debt arises'. The factual situation is that Mr Masina knew that he had been shot by the police. He argued that, because he did not know the identity of the policeman who shot him, he believed that there was nothing that he could do. On this basis, it was submitted that he did not have knowledge that his claim lay against the Minister and therefore that he did not have knowledge of the identity of the debtor.

[12] Where knowledge of the identity of the debtor is concerned, the question is one of fact, not of knowledge of the applicable law relating to the citation of that debtor or any formalities, such as the giving of notice, that must be satisfied before an action may be commenced. Those matters are within the province of legal procedure and remedies. In the same way, when dealing with the facts giving rise to a claim, the courts have consistently held that the plaintiff does not have to have knowledge of the legal consequences of those facts. In *Claasen v Bester*[1] this court in referring to cases that have dealt with the question when prescription begins to run for the purposes of ss 12(1) and (3) of the Prescription Act stated that:
'These cases do not leave open the question posed and not answered in *Van Staden*. They make it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. There is no reason to distinguish delictual claims from others. The principles laid down have been applied in several cases in this court, including most recently *Yellow Star Properties v MEC, Department of Planning and Local Government* [2009] 3 All SA 475 (SCA) para 37 where Leach AJA said that if the applicant 'had not appreciated the legal consequences which flowed from the facts' its failure to do so did not delay the running of prescription.'

[1] *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA) para 15.

See also *ATB Chartered Accountants (SA) v Bonfiglio* [2010] ZASCA 124;[2011] 2 All SA 132(SCA) paras 14 and 18.

[13] Mr Masina knew full well that his claim lay against the police. That he did not know whether the SAPS, the Minister or the Commissioner of the South African Police Service should be cited, is immaterial. He should have taken steps to enforce his claim immediately. As I have said, knowledge that the Minister should be cited as the nominal defendant in an action against the police is a matter of legal procedure.

[14] Mr Masina relied on the judgment of this court in *MEC for Education, KZN v Shange*[2] to support his contention. In *Shange* the MEC for Education appealed against the high court's grant of condonation to a learner for non-compliance with s 3 of the Act. A teacher's belt tip had struck and injured the learner's eye while the teacher was at the time punishing another learner in June 2003. The teacher informed the 15 year old learner that it was a mistake and the learner accepted it as such.

[15] In January 2006 the learner, then 18 years old, was advised that he should complain to the Public Protector. An advocate at the office of the Public Protector advised him that he should consult an attorney as he had a claim against the MEC. He instructed an attorney to proceed with the claim. On 2 February 2006 the attorney sent a s 3 notice to the Minister of Education rather than the MEC. In December 2008 summons was served on the MEC. The MEC delivered a special plea for dismissal of the claim, based on her not having received a s 3 notice. This prompted the learner's attorney to first, dispatch a notice in terms of s 3 to MEC for Education and then bring an application for condonation in terms of s 3(4)*(a)* of the Act.

[16] The *Shange* case is distinguishable from the present case in that the learner, who was 15 years old at the time, had a bona fide belief that his teacher's explanation put an end to the matter. This according to the court adequately explained the delay in any steps having been taken until January 2006. The court found that being a rural learner, it could not be expected of him to reasonably have known not only that the teacher was his debtor but also that the MEC was a joint debtor. Only when he was

[2] *MEC for Education, KZN v Shange* [2012] ZASCA 98; 2012 (5) 313 (SCA) (*Shange*).

informed of this fact in January 2006 did he know the identity of the MEC as his debtor for the purposes of provisions of s 12(3). Mr Masina's reliance on the *Shange* judgment was misplaced.

[17] For these reasons the court below should not have been 'satisfied' that the debt had not become extinguished by prescription. Furthermore, although this was not argued before the high court, it is difficult to see the basis for the court being satisfied that there was good cause for Mr Masina's failure to give timeous notice to the Minister of Police. There was no explanation for his failure to try and pursue a claim after February 2013 until June 2014. Furthermore, there was no explanation for the failure of his attorneys to pursue the matter expeditiously once he instructed them to do so in June 2014. The notice was only sent to the Minister of Police in September 2014. The particulars of claim were prepared in February 2015, and the summons was issued on 28 April 2015. It was only sent to the sheriff on 15 May and served on 19 May after the expiry of the three-year prescriptive period. This delay was also unexplained.

[18] The court below granted Mr Masina costs of the application for condonation on an attorney and client scale, even though such a request was never made by Mr Masina. The court did not give reasons for the punitive cost order it made. Mr Masina sought an indulgence from the court and should not have been awarded costs unless the opposition for the condonation application was unreasonable.

[19] The following order made:

1 The application for leave to appeal is granted.
2 The appeal is upheld with costs.
3 The order of the high court is set aside and replaced by the following order:
'The application is dismissed with costs.'

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Judge K E Matojane
Acting Judge of Appeal

APPEARANCES:

For Appellant:	M S Phaswane
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
For Respondent:	N C Hartman
Instructed by:	Voster & Brandt Attorneys, Pretoria
	Hill McHardy & Herbst Attorneys, Bloemfontein