



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

Not Reportable

Case no: 162/2022

In the matter between:

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT
OF THE REPUBLIC OF SOUTH AFRICA**

FIRST APPELLANT

**MINISTER OF POLICE OF THE
REPUBLIC OF SOUTH AFRICA**

SECOND APPELLANT

**MINISTER OF HOME AFFAIRS
OF THE REPUBLIC OF SOUTH AFRICA**

THIRD APPELLANT

and

FRANKLIN D PENNINGTON

FIRST RESPONDENT

GAIL JACKSON PENNINGTON

SECOND RESPONDENT

Neutral citation: *Minister of Justice and Constitutional Development and Others v Pennington and Another* (162/2022) [2023] ZASCA 51 (14 April 2023)

Coram: PONNAN ADP, MOCUMIE, WEINER and GOOSEN JJA and
KATHREE-SETILOANE AJA

Heard: 13 March 2023

Delivered: 14 April 2023

Summary: Civil procedure – special plea of prescription – Prescription Act 68 of 1969 – when respondents had sufficient facts at their disposal – whether claim prescribed in terms of s 12(3).

ORDER

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

- 1 The appeal is upheld with costs, including those of two counsel.
- 2 The order of the high court is set aside and replaced with the following:
‘The special plea of prescription is upheld with costs, including those of two counsel where so employed.’

JUDGMENT

Kathree-Setiloane AJA (Ponnan ADP and Mocumie, Weiner and Goosen JJA concurring):

[1] Mr Franklin Pennington (first respondent) and his wife, Mrs Gail Pennington (second respondent), instituted an action in the Gauteng Division of the High Court, Pretoria (the high court) for damages against the appellants. The first appellant is the Minister of Justice and Constitutional Development of South Africa (Minister of Justice), the second appellant is the Minister of Police of South Africa (Minister of Police), and the third appellant is the Minister of Home Affairs of South Africa (Minister of Home Affairs).

[2] In response, the appellants raised a special plea that the respondents’ claims had prescribed. They also raised a plea of non-joinder contending that in relation to their malicious prosecution claim, the respondents had failed to cite the National Prosecuting Authority (NPA) or the National Director of Public Prosecutions (NDPP) as a defendant to the action, and that in relation to that claim, they fell to be non-suited on that account.

Common cause facts

[3] The common cause facts, upon which the various claims are founded, are these:¹ The first and second respondents were arrested during 1991 on charges of fraud, forgery, and uttering. They were acquitted of those charges in 1992. The first respondent was thereafter arrested on 6 September 1994 on various charges once again including fraud, forgery, and uttering. After his arrest, the first respondent was released on bail. The criminal proceedings in the Regional Court, Johannesburg (the regional court) began on 3 April 1995. The first respondent was convicted on 2 June 1997 and sentenced to a term of imprisonment on 17 November 1997. He noted an appeal against his convictions and sentences. On 18 June 2015, the high court set aside the first respondent's convictions and sentences. The respondents issued summons in respect of this matter on 15 June 2016.

Particulars of claim

[4] The respondents plead, in their particulars of claim, that they suffered 'damages for a series of wrongs committed by servants of the [appellants], in relation to a 1994 arrest of the [first respondent], criminal charges, the criminal trial, conviction and sentence, and an inordinately long delay in having a hearing in his appeal which was successful, and all the convictions and sentences being set aside'.

[5] In addition to the common cause facts referenced above, the respondents plead, under the heading 'The Criminal Trials', *inter alia*, that:

- (a) Simultaneously with his third arrest, the Minister of Home Affairs declared the first respondent to be a prohibited person in terms of the Alien's Control Act,² and issued him with a s 41(1) permit.³ Although this permit allowed him to remain in South Africa pending the conclusion of the trial, it prohibited him from taking up employment or conducting business during this time; and
- (b) The first respondent was released on bail but was precluded from leaving South Africa pending finalization of the trial and appeal.

¹ The parties agreed on a list of common cause facts.

² Aliens Control Act 96 of 1991 (Aliens Control Act).

³ Section 41(1) of the Aliens Control Act provides that:

'The Minister may issue to a prohibited person a temporary permit on the prescribed form to enter and reside in the Republic for the purpose, and subject to other conditions mentioned therein.'

[6] The respondents plead under the heading 'APPEAL', *inter alia*, that:

- (a) The trial record and exhibits were still in the possession of the presiding magistrate after the trial. He only handed over the trial record (without the exhibits) to the clerk of the regional court a year later;
- (b) During the following year, the first respondent repeatedly requested the appeal clerk at the regional court to prepare the record for appeal;
- (c) The first respondent was advised during December 1998 that the typed record had been returned to the appeal clerk but not the exhibits;
- (d) Since no later than 31 December 1998 the servants of the Minister of Justice knew or should have known that the trial record was in such a poor state that it would be impossible to provide a proper record suitable for the appeal. Despite that knowledge, they pretended that they would be able to provide a proper record, and opposed every attempt by the first respondent to have his conviction and sentence set aside on the grounds that it was impossible to provide a proper record suitable for the appeal;
- (e) In October 2003, the first respondent was informed by Advocate P Nel (Mr Nel) of the office of the Director of Public Prosecutions (DPP) that the appeal had been enrolled for hearing on 18 November 2004;
- (f) This was the first of approximately 70 instances of contact that the first respondent had with Mr Nel alone, over the ensuing 13 years in relation to the provision of the trial record and enrollment of the appeal for hearing;
- (g) In the following ten years, the first respondent would make more than 130 requests to various government entities concerning the provision of the trial record and the enrollment of the appeal for hearing, to no avail;
- (h) On 1 December 2001, the first respondent made application to the high court to compel the DPP to provide the trial record and enroll the appeal. This application was dismissed based on an undertaking given by Mr Nel that the record would be ready by 17 March 2004;
- (i) After numerous requests to, *inter alia*, the office of the DPP to be provided with the trial record, as per the undertaking above, the first respondent launched a further application in the Western Cape Division of the High Court, Cape Town in 2011. It was dismissed for lack of jurisdiction. The DPP responded by saying that it had not heard

from the first respondent for seven years, and had been advised by his former attorney that he had died;

- (j) In April 2012, the first respondent made application to the high court for an order setting aside his conviction and sentence due to the failure of the DPP to prosecute the matter. This application was dismissed on 18 April 2013;
- (k) The DPP set the appeal down for hearing on 13 August 2012. It was postponed *sine die* to allow the DPP time to reconstruct, paginate, index, copy and distribute the record;
- (l) The first respondent was provided with a copy of the reconstructed record during March 2013. This was 16 years after he first noted the appeal; and
- (m) On 18 June 2015, the criminal appeal was disposed of, and the convictions and sentences of the first respondent were set aside.

[7] The respondents plead that the appellants are liable for damages in the amounts sought because:

- (a) 'the State' failed, *inter alia*:
 - (i) in its duty to ensure that the first respondent's trial was prosecuted without unnecessary, unreasonable or undue delays;
 - (ii) in its duty by failing to ensure that the appeal was prosecuted without undue delay despite all of the first respondent's efforts to ensure that it was finalized;
 - (iii) to ensure that the record was prepared for the purposes of prosecuting the appeal, and to prepare the record without any unnecessary, unreasonable, unwarranted or undue delay;
 - (iv) in one or more ways, to enroll the appeal for hearing, due to the undue, unnecessary, intentional, alternatively negligent, and consequently unlawful delay in reconstructing the record, despite the respondents' constant and concerted attempts to prosecute the matter to finality.
- (b) The third arrest and the laying of criminal charges and the criminal trial pursuant thereto were wrongful, unlawful and in breach of the rights of the respondents or one of them; and
- (c) The third arrest of the first respondent directly led to the Minister of Home Affairs issuing the permit, in terms of the Aliens Control Act, obliging him to remain in South Africa pending the finalization of the criminal proceedings against him. This permit prohibited the first respondent from taking up employment or conducting business

pending finalization of the trial and appeal. In doing so, it unjustifiably violated the first respondent's constitutional rights to freedom of movement and residence, and to freedom of trade, occupation, and profession.

[8] In relation to the damages suffered, the respondents plead that:

'The fact that the [first respondent] [was] arrested and subjected to the criminal trial, and that [he] was precluded from taking up any employment or conducting business in South Africa pending the outcome of the trial and the appeal, following the third arrest, caused the dissipation of both [respondents'] assets, direct loss of income, pain and suffering, loss of amenities of life and a decline in the [first respondent's] mental and physical health as well as consequential damages in that the [first respondent] was unable to provide for the [second respondent] and his family.

This was exacerbated by the fact that the State, by virtue of the conditions of his residence, imposed by the [third appellant], as a direct consequence of the [first respondent's] third arrest, by employees acting within their scope and duties as employees of the [second appellant], precluded him from taking up employment or conducting business in South Africa, which condition endured from 6 September 1994 to the conclusion of the appeal hearing on 18 June 2015, a period of almost twenty one (21) years. This condition still persists.

The inordinate delay, and/or refusal and/ or failure on the part of the [first appellant] to properly prepare the record for the appeal to be prosecuted without undue delay, rendered the permission granted by the [third appellant] to the [first respondent] to remain in South Africa pending the conclusion of the criminal proceedings against him [by] prohibiting him from taking up employment or conducting business, thereby denying him the means of supporting himself or his family, unfair, unreasonable, irrational and therefore unlawful.'

[9] The respondents furthermore allege that they would not have suffered the damages but for the (a) wrongful arrest; (b) criminal trial; (c) unjustifiable convictions and sentences; (d) wrongful, unreasonable delay and/or refusal and/or failure to properly deal with the first respondent's appeal, despite his efforts to compel the State to do so; and (e) the fact that during the entire period that the first respondent was awaiting the finalization of the appeal, he was precluded from generating any income. The respondents accordingly plead that they suffered the damages as set out below:

First Respondent:

'Loss of income: R 300 000 000.00

Injuria due to wrongful arrest and prosecution: R 20 000 000.00

Pain and suffering and loss of amenities of life: R 10 000 000.00

Contumelies R 10 000 000.00.’

Second Respondent:

‘Loss of maintenance and support: R 50 000 000.00

Pain and suffering: R 10 000 000.00.’

The respondents consequently claim that the first respondent is entitled to payment of R340 000 000, and the second respondent to payment of R80 000 000, jointly and severally, from the appellants, the one paying the others to be absolved.

Special plea of prescription

[10] The appellants’ special plea of prescription is directed at: (a) the third arrest of the first respondent, which occurred on or before 6 September 1994; (b) the alleged malicious prosecution of the first respondent, which commenced during September 1994 and was finalized prior to December 1998; and (c) the fact that, on the respondents’ allegations, by 31 December 1998, servants of the Minister of Justice were aware that they could not compile a proper record for the prosecution of the appeal. The appellants consequently contend that the respondents’ claims, as pleaded in the particulars of claim, have prescribed as the summons was only issued in June 2016, which is more than three years after the alleged unlawful conduct relied upon.

[11] The high court dismissed the special plea of prescription.⁴ Its reasoning is terse and amounts to this:

‘From a conspectus of the particulars of claim, the causes of action relied upon are broad and covered different alleged actions and omissions of various [appellants] who have been cited in this matter.

...

What is definitive in determining this matter is the fact that the [respondents] are not relying on a single self-standing claim based on unlawful arrest. What is clear is that there was a

⁴ The high court made an order, in terms of rule 33(4) of the Uniform Rules of Court, separating the determination of the special plea and a legal point (plea of non-joinder) from that of the merits and quantum. The parties had entered into a prior agreement that the merits and quantum be separated.

chain of events that followed the initial arrest, and which culminated in the appeal being upheld. This accords with the adequate cause test espoused by Neetling *et al.*

I consequently find that there is a sufficiently close and continuous connection between the alleged conduct of the [first appellant] through to that of the [third appellant] and the consequences complained of, which only terminated on 18 June 2015. Prescription in my view, only started running after that.’ (Footnotes omitted.)

[12] The question raised by the plea of non-joinder was whether any of the appellants could be held liable for the alleged malicious prosecution of the first respondent, instead of the NPA or the NDPP, which had not been joined as parties to the action. In supplementary reasons, the high court held that it is ‘not persuaded that the complaint of non-joinder is based on legal substance’ because s 179 of the Constitution:⁵

‘[C]ould not be any clearer in so far as the functionary who bears responsibility for the actions of the prosecuting authority. At any rate what is pleaded is that the clerk of the court (“the appeals clerk at the Johannesburg Regional Court”) was unable to compile a record for purposes of prosecuting the intended appeal by the [respondents]. The clerk of the court also resorts under the Minister of Justice.’ (Footnote omitted.)

[13] The high court dismissed both the special plea of prescription and the plea of non-joinder and reserved the costs. The appellants appeal against both these orders. They do so with the leave of the high court.

Analysis

[14] The claims of the respondents are premised on the unlawful arrest and detention of the first respondent; his malicious prosecution; and the inordinate delay in the finalization of the appeal noted by him against his conviction and sentence. The respondents contend, to the contrary, that this construction of the particulars of claim ignores the allegation that their claim is based on a series of wrongs committed during the period from 1994 to June 2015, and that during that period, the first respondent

⁵ Section 179(6) of the Constitution provides:

‘The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.’

was prohibited from earning money. However, during argument in the appeal, counsel for the respondents conceded that, despite the formulation of their pleaded claims:

- (a) the third arrest of the first respondent in 1994, the criminal charges against him, and the subsequent criminal trial were neither unlawful nor malicious;
- (b) the bail conditions precluding the first respondent from leaving South Africa, pending the finalization of the trial and the appeal, were not unlawful.
- (c) the decision of the Minister of Home Affairs to issue the first respondent with the s 41(1) permit prohibiting him from taking up employment, or conducting a business in South Africa pending the conclusion of the criminal trial was not unlawful.

[15] It was accordingly conceded that the respondents' claim against the Minister of Police could not be sustained. Counsel for the respondents also accepted that the particulars of claim does not contain a damages claim against the Minister of Home Affairs, despite the allegation that the inordinate delay in preparing the appeal record rendered the prohibition, by the Minister of Home Affairs, against the first respondent being employed or conducting a business pending the conclusion of the criminal proceedings, unlawful. It was also accepted, during argument in the appeal, that the respondents have not laid any basis, in their particulars of claim, for the following heads of damages: *injuria* due to wrongful arrest and prosecution; pain and suffering, loss of amenities of life and *contumelia* in respect of the first respondent; and loss of maintenance and support and pain and suffering in respect of the second respondent.

[16] Consequently, the respondents' only remaining claim is one for loss of income against the Minister of Justice because of the purported 'wrongful, unreasonable delay and/or refusal and/or failure to properly deal with the first [respondent's] appeal, despite the first [respondent's] efforts to compel the state to do so'. And 'that during the entire period that the first [respondent] was awaiting the finalization of the appeal he was precluded from generating an income'. Thus, as things stand, the only question for determination in the appeal is whether this claim has prescribed.

[17] However, before commencing with that determination, I make the following observations arising from the concessions made on behalf of the respondents during argument in the appeal. The respondents' claim has been described as a broad catch-all one directed at the three appellants and their servants, ranging from members of

the police and the prosecutorial services, who were involved in the decision to proceed with the arrest and criminal charges, to the presiding magistrate and the clerk of the regional court (all acting in the course and scope of their employment). The particulars of claim are difficult to comprehend even though it is prefaced by a 'summary overview'. This summary has not made it any easier to identify, in each instance, the respondents' cause of action.

[18] The particulars of claim also does not comply with rule 18 of the Uniform Rules of Court. Instead of pleading a concise statement of facts with sufficient particularity to enable the appellants to answer thereto, the particulars of claim are impermissibly interspersed with chunks of evidence. The damages claimed are also unclear and imprecise. Given these deficiencies in the particulars of claim, it is difficult to see how the respective appellants are supposed to understand the basis of the action, and the damages sought in each instance against each of them. It is, therefore, unsurprising that counsel for the respondents readily conceded, during argument in the appeal, that 'the particulars of claim are not a model of clarity'.

[19] In view of the respondents' concessions referenced above, the cause of action ultimately reduced itself to (and on which the special plea falls to be determined) 'the unlawful conduct of the employees of the Minister of Justice in failing to deal with the appeal without delay'.

[20] In terms of s 11(d) of the Prescription Act 68 of 1969 (the Act), the debts that form the subject-matter of the respondents' claims prescribe within three years from the date that prescription commences to run. Section 12(1) of the Act provides that prescription commences to run as soon as the debt in question is due, ie when it is owing and payable. Section 12(3) of the Act provides that '[a] debt shall not be due until the creditor has knowledge of the identity of the debtor and 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'. In other words, a debt

becomes due when the creditor or claimant acquires a complete cause of action for its recovery. This is the entire set of facts which a plaintiff must prove to succeed.⁶

[21] On the argument advanced by the appellants, prescription in relation to the unlawful conduct of the servants of the Minister of Justice commenced running on 31 December 1998, as, on the pleadings, the respondents were aware by that stage of the fact that the servants of the Minister of Justice knew that 'it was impossible to provide a proper record suitable for the appeal'. There is thus much to be said for the contention that prescription commenced to run on that date.

[22] However, there may well be a further (and perhaps narrower) basis upon which the special plea can be decided. The respondents plead in the particulars of claim that, in April 2012, the first respondent made application to the Gauteng Division of the High Court, Johannesburg, for an order setting aside his conviction and sentence due to the failure of the DPP to prosecute the appeal. This application was dismissed on 18 April 2013.

[23] In support of that application, it would have been necessary for the first respondent to have made out a case that the DPP (and the servants of the Minister of Justice) acted unlawfully and in breach of their legal duty to ensure that the appeal was prosecuted without undue delay. This signifies that by the date of the launch of this application in April 2012, the first respondent had all the necessary facts at his disposal, sufficient to found a cause of action. Prescription in respect of this claim would, therefore, have commenced to run at the latest on the day after this application was launched in April 2012. And, it would have prescribed three years later, in May 2015. Accordingly, on the most generous construction for the respondents, by the time the respondents issued summons in respect of this matter on 17 June 2016, the respondents' claim had prescribed, more than a year earlier.

[24] For these reasons, the appeal against the dismissal of the special plea must be upheld.

⁶ *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 321; *Santam v Ethwar* [1998] ZASCA 102; 1999 (2) SA 244 (SCA).

[25] In the result, the following order is made:

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the high court is set aside and replaced with the following:

‘The special plea of prescription is upheld with costs, including those of two counsel where so employed.’

F KATHREE-SETILOANE
ACTING JUDGE OF APPEAL

Appearances

For the appellant: M M W van Zyl SC with C G V O Sevenster

Instructed by: The State Attorney, Pretoria
The State Attorney, Bloemfontein

For the respondent: T Möller

Instructed by: Lombard & Kriek Inc, Tygervalley
Honey Attorneys, Bloemfontein