IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 2929/2021
CA59/2024

In the matter between:

SIPHOSAKHE SETMAN **APPELLANT**

and

MINISTER OF POLICE **RESPONDENT**

APPEAL JUDGMENT

DAWOOD J:

Introduction

[1] The appellant herein appeals, with leave of the court *a quo*, the order upholding the special pleas and dismissing the appellant's action with costs. The court *a quo* had adjudicated upon the special pleas by way of a stated case in terms of Rule 33 (1).

[2] The respondent had in its amended plea raised the following special pleas: -

(a) that the defendant failed to comply with the provisions of section 5 (1)(b)(ii) of The Institution of Legal Proceedings Act 40 of 2002 (hereinafter referred to as the *"Act"*) in that the plaintiff failed to serve the summons on the Provincial Commissioner; and

(b) that the plaintiff's claim had prescribed as summons was only served on the defendant on the 12 April 2022, by which date the plaintiff's claim had already prescribed.

[3] The disputes identified in the stated case by the parties were the following[1]:-

(a) whether or not the plaintiff must have caused his summons to be served on both the National Commissioner and the Provincial Commissioner in order to comply with the provisions of section 5 (1)(b) of the Act, or upon just one of them.

(b) whether the plaintiff's claim had prescribed as the summons was only served on the National Commissioner on 12 April 2022, more than 3 years from the date on which the debt became due on the 24 January 2019 or 28 January 2019.

(c) The questions of law identified were the following: -

(i) whether the plaintiff complied with the provisions of section 5 (1)(b)(ii) of the Act;

[1] See page 85 of the bundles Vol 1 paragraphs 14 and 15.

(ii) whether the plaintiff's claim has prescribed in terms of section 11 (d) of the Prescription Act 68 of 1969 (Prescription Act);

(iii) whether or not the service on the State Attorney interrupted the running of prescription.

(d) The common cause facts were the following: -

(i) It was accepted by both parties that indeed there was no service on the Provincial Commissioner.

(ii) It was further accepted that service on the National Commissioner (although the return of service states it was on the Minister of Police) occurred on the 12 April 2022, by which date the appellant's claim had already prescribed.

(iii) The parties during argument in the court *a quo* accepted that indeed service of the summons was effected on the state attorney.

(iv) The return of service of the summons was handed up during the hearing of the appeal and it reflects that service was effected on state attorney on the 11 October 2021, within the 3-year period.

(v) The parties further accepted that an appearance to defend was filed by the State Attorney on behalf of the defendant, dated 9 November 2021, within the 3-year period from the date the claim arose. The appearance to defend reflects the Minister of Police as the defendant and states that the defendant hereby gives notice of his intention to defend the plaintiff's action. It is signed by a state attorney saying, "Attorneys for the Defendant".

(vi) The appearance to defend was also handed up at the appeal as it also did not form part of the record despite it being accepted by the parties during argument in the court *a quo*.

[4] **Legal position**

(i) Section 5 of the Act reads as follows: -

"**Service of process**

5 (1) (b)(ii) Minister for Safety and Security is the defendant or respondent, may be served on-

(aa) the National Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act No.68 of 1995); or

(bb) the Provincial Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 of the province in which the cause of action arose; or…"

(ii) Section 15 (1) of the Prescription Act 68 of 1969 reads as follows:

"Judicial interruption of prescription

(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

(iii) It is accepted in this case that there was no service on either the provincial or national commissioner within the 3-year period, and if a legalistic approach was adopted that would be the end of the matter in that the plaintiff's claim would have prescribed.

(iv) Our courts have, however, adopted a purposive approach[2] which obliges judges to interpret the law in a way that promotes the Constitution and the rights entrenched therein.

(v) It is accepted that the purpose to be achieved in this matter was that the respondent gets notice of the proceedings against it and receives effective legal representation.

(vi) This purpose appears to have been achieved in this case if one has regard to the fact that after service of the summons on the State Attorney an appearance to defend was entered on behalf of the respondent. This was followed by a plea wherein not only were the special pleas raised but there was also an extensive plea over on the merits of the claim.

[5] There are numerous authorities that have dealt with the approach to be adopted by the courts, which culminated in *Miya's* case.[3]

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[2] Currie and de Waal define purposive approach in the following terms—

'Purposive interpretation is aimed at teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values. In this regard the Constitutional Court has approved the following statement by the Canadian Supreme Court in *R v Big M Drug Mart Ltd*:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter [of Rights and Freedom] itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be…a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection''

[3] Minister of Police and another v Miya (1250/2022) [2024] ZASCA 71 (6th of May 2024).

(a) The principle adopted in *Miya's* case is on all fours with the facts in this case although the relief sought there was to declare the particulars of claim a nullity, the effect is the same as a dismissal of the plaintiff's claim which was sought herein.

(b) The defendant/respondent's contention is that this appeal relates to the finding of prescription and whether the service of summons on the state attorney interrupted the running of prescription of the debt against the respondent.

(c) The court *a quo* in fact upheld both special pleas of prescription and non-service on the Provincial Commissioner. The Act in fact envisages service on either the National Commissioner or the Provincial Commissioner by using the word or thereby signifying that service on either would be appropriate. That special plea accordingly ought to have been dismissed on the basis that service on both the National and Provincial Commissioner was not required by the Act.

(d) The respondent correctly argues that the respondent and not the state attorney is the debtor and that the Prescription Act states that the running of prescription shall be interrupted by the service on the debtor of any process (a process is any document whereby legal proceedings are commenced) whereby the creditor claims payment of a debt.

(e) The respondent contended in its heads of argument and in court that *Miya's* case is distinguishable in that it dealt with a failure to serve summons on the head of department which renders the summons a nullity and did not decide the issue of prescription in terms of the Prescription Act.

(f) In *Miya*'s case, the summons was served on the state attorney and not the defendant. The state attorney filed a notice of intention to defend on behalf of the defendant and thereafter a plea. In the amended plea the defendant there had alleged that service on the state attorney alone is fatal and renders the claim prescribed irrespective of the minister's participation in the proceedings from inception. In argument the defendant submitted that the claim had prescribed due to non-service on the debtor, the minister, and according to section 15 (1) of the Prescription Act 68 of 1969, the running of prescription shall be interrupted by the service on the debtor of any process.

(g) The contention of the respondent's counsel that *Miya*'s case did not deal with the issue of prescription is accordingly incorrect. At paragraph 9 of the judgment, it is explicitly stated that counsel for the respondent/defendant argued that the appeal primarily rests on the issue of prescription which was not dealt with by the high court. He argued, as in this case, that the failure to serve the debtor cannot be condoned as the service on him or his office was required to interrupt prescription. He further argued in *Miya'*s case that the failure to serve cannot be condoned as the Prescription Act is also peremptory on the issue of service on the debtor. This is the very same argument that was adduced in this court by the respondent's counsel.

(h) The court in *Miya* specifically stated at paragraph 10 of the judgment that it would start the analysis of the merits with the issue of prescription and stated that prescription does not arise in the context of this matter. The court *inter alia* held that service on the state attorney was within the 3 years before prescription would begin to run. It further held that the tenor of the high court's finding is simply that prescription had been interrupted without saying so in so many words. The court accordingly held in *Miya* that 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 …"

(i) At paragraphs 13 and 14 the court in *Miya* held as follows:-

"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.'

(j) 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 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.'

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'.*

(k) *Miya*'s case at paragraphs 15 and 16 (*supra*) found that *Molokwane*'s case is all in fours with the present matter and that the principles of interpretation that were dealt with in *Molokwane* … apply to this matter and that the question to be considered in interpreting this section is not about how the knowledge was obtained, but whether knowledge of the action was obtained.

(l) Paragraphs 18 and 19 the court stated: -

"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.

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."

(m) It is evident in this case that the Minister indeed obtained knowledge of the action as the state attorney entered an appearance to defend on behalf of the respondent and subsequently filed a plea on his behalf. The Minister must have, as in *Miya*'s case, given instructions to the state attorney or agent acting on his behalf, to defend the matter by filing a notice of intention to defend. The Minister, as in *Miya*'s case, became aware of the proceedings against him as he responded to it. There was in this case, as in *Miya'*s case, no prejudice alleged by the Minister, and none is found to exist having regard to the plea over where a comprehensive defence is set out in respect of the merits of the matter. There was effective service on the Minister if one has regard to the fact that it actively participated in the proceedings from the time the appearance to defend was entered on its behalf by the state attorney, who from that point onwards acted as agents of the respondent.

(n) In *Miya*'s case, it was held that since service on the state attorney was indeed effected within the 3 years before prescription could be said to run, it inferred that the high court had found that prescription had been interrupted. The non-service on the Minister became moot when it fully participated in the proceedings from the time that an appearance to defend was filed on his behalf.

(o) This court is bound by the findings in *Miya* and respectfully agrees therewith that since the purpose of the legislation was achieved within the period of 3 years as demonstrated by the fact that an appearance to defend was filed as well as a plea on behalf of the defendant, the claim in the circumstances cannot be said to have prescribed. The purpose of the Act was achieved despite non-compliance with the letter of the law. The *dicta* of the court *a quo* in Miya's case which was cited with approval by the Supreme Court of Appeal in *Miya's* case, is of equal application here where it was explicitly stated that the state attorney does not replace the respondent as the debtor who was not served with the court process, but the respondent became aware of it and responded to it.

[6] In the circumstances the following order is made: -

(i) The appeal is upheld with costs on scale "*B*" including the costs of two counsel where so employed.

(ii) The order of the High Court is set aside and replaced with the following order:

The defendant's special pleas are hereby dismissed with costs.

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F.B.A DAWOOD
JUDGE OF THE HIGH COURT

I agree.

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S.A COLLETT
ACTING JUDGE OF THE HIGH COURT

I agree.

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B. METU
ACTING JUDGE OF THE HIGH COURT

Appearances

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Heard:	25 November 2024
Delivered:	11 February 2025