**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU** **C of A (CIV) NO.56 2019**

**CIV/T/202/2013**

In the Matter Between

**DANIEL MAFEREKA** **APPELLANT**

**AND**

**COMMISSIONER OF POLICE** **1ST RESPONDENT**

**ATTORNEY GENERAL** **2TH RESPONDENT**

**CORAM:** K.E. MOSITO P

P. T. DAMASEB

DR. J. VAN der WESTHUIZEN

**SUMMARY**

*Police - Actions against - Limitation of - Police Act 1998, s 77 - When required - Plaintiffs instituting action against the police – for wrongful impoundment of appellant's vehicle- Defendants raising special defence of Prescription within the terms of s77 of the Act –*

*Claim not raised under the Act - claim not prescribed - Whether policeman acting 'in course and scope of his employment' as servant of State invariably acting 'in pursuance of' Police Act, or whether two concepts necessarily co-extensive - - Plaintiffs limiting themselves to allegation that policeman acting in course and scope of his employment as servant of State - No allegation in particulars, expressly or tacitly, that policeman acting in pursuance of Act - Two concepts 'in course and scope of his employment' and 'in pursuance of the Act' notionally distinct from each other - Inherent differences justifying conclusion that two concepts legally not entirely corresponding - Only once relevant facts established is it possible to determine, applying recognised principles, whether acts complained of amounting to conduct 'within course and scope of employment' or 'in pursuance of' or both or neither - In result, particulars in casu equivocal - Incumbent on defendants to prove that policeman's conduct on which plaintiff's action founded was in pursuance of Act - Such not proved - Special plea correctly dismissed.*

**DR. K.E. MOSITO P**

**BACKGROUND**

[1] In this matter, the appellant challenges the decision of the High Court that his claims against the respondents had prescribed. In the High Court, the appellant claimed damages against the respondents. Two claims are involved here. The first claim was that, on 27 March 2018, the appellant instituted an action before the court a quo for an order against the respondents for: (a), payment of the sum of M1, 892,900.00 (One million, eight hundred and ninety-two thousand and nine hundred Maloti); (b), Interest thereon at the rate of 18% *per annum* on current interest rate; (c), Costs of suit and, (d), Further and/or alternative relief.

[2] In the alternative, appellant claimed payment of the sum of M308, 900.00 (Three hundred and eight thousand, and nine hundred Maloti); (b), Interest thereon at the rate of 18% *per annum* on current interest rate; (c), Costs of suit and, (d), Further and/or alternative relief.

[3] In answer to the claim, the respondents specially pleaded prescription in terms of the Police Act 1998. They pleaded that, plaintiff's claim regarding the use, enjoyment, comfort, pleasure and convenience in the sum of M1, 892,900.00 (One million, eight hundred and ninety-two thousand and nine hundred Maloti) has prescribed in terms of the Police Service Act, 1998. They further specially pleaded that, even the alternative claim has prescribed in terms of the said Act. The pleaded that plaintiff (present appellant) ought not to have waited for 13 years to institute this action. They further pleaded that, on the basis thereof, the action fell to be dismissed with costs.

[4] It suffices to mention that, on 20 May 2019, the matter served before Moiloa J in the High Court. The learned Judge upheld the special plea based on section 77 of the Police Service Act, 1998 and dismissed the claims on the basses that the claims had prescribed. Dissatisfied with the said decision, the appellant approached this Court on appeal. I shall revert to the appeal later on in this judgment.

**THE PARTIES**

[5] As pleaded, the plaintiff is, Daniel Mafereka, is a mail Mosotho adult residing at Ha Abia in the district of Maseru. The first defendant is the Commissioner of Police, with its address of service at Police Headquarters at Maseru. In terms of section 76 of the Police Act, the Commissioner shall be liable in civil proceedings in respect of the wrongful acts of police officers under his command, in the performance or purported performance of their functions, and accordingly may be joined in proceedings in respect of such wrongdoing. It is understandable therefore that, the Commissioner of Police had to be joined in these proceedings. The second defendant is the Attorney General, who is the legal representative of the Lesotho government of Lesotho in all civil matters.

**FACTUAL MATRIX**

[6] As pleaded, at all times material to the action, the appellant was the owner of the vehicle subject of dispute herein. On 4 September1996 the Police impounded the said vehicle allegedly using it in a criminal investigation. However, no such investigations were ever carried out. In 1999, the Magistrate granted an order to have the vehicle returned to the appellant. The order was duly served on the police, but the police did not comply therewith.

[7] During that period, the vehicle was left in the open space from the date of its impoundment (that is, 4 September 1996), exposing it to extreme weather, heavy rains and winds. Despite all efforts by plaintiff, the vehicle was only released to appellant on 9 October 2012. Upon taking possession of the vehicle, appellant discovered that the following parts were damaged, viz: tyre, rims, dashboard, ball joints, and car seat. The alternator and battery had been removed. The vehicle was also in need of welding works whiled the paint had also been damaged.

[8] Appellant further alleges that during the period when the police were flouting the Court Order of May 1999, he suffered loss of his motor vehicle's full use and enjoyment for sixteen years and one month. The appellant then pleads that the cause of action (as regards the damage to the vehicle) only arose in October 2012 when he became aware of the damage. It is on the above bases that appellant claimed the sums of money aforementioned.

**ISSUES FOR DETERMINATION**

[9] The issue for determination is whether regard being had to the terms of section 77 of the Police Service Act, 1998 as well as the facts sketched above, the learned judge was correct in holding that the two claims had prescribed.

**THE LAW**

[10] A convenient starting point in considering the applicable legal principles is a consideration of section 77 of the Police Service Act. The section reads as follows:

> "**Limitation of actions**
>
> 77. Any civil action against the Crown or persons acting in pursuance of this Act or the regulations made there under, in respect of anything done or omitted to be done in pursuance thereof, shall be commenced within six months next after the cause of action arises, and notice in writing of any civil action and of the substance thereof shall be given to the defendant at least two months before the commencement of the said action; Provided that the court may, for good shown, proof of which shall lie upon the applicant, extend the said period of six months."

[11] This section has to be interpreted in order to determine what the Parliament meant by "acting in pursuance of this Act." Smalberger JA once remarked in ***Masuku and Another v Mdlalose and Others***[1] that, the fundamental issue is whether a policeman who acts "in the course and scope of his employment" as a servant of the State is invariably acting "in pursuance of" the Police Act. Differently put, are the two concepts necessarily co-extensive.

[12] I agree with the learned Judge of Appeal that, the section, in so far as it relates to a six month period within which an action must be commenced, provides for an expiry period and not a prescriptive period. A plaintiff who has failed to comply with its provisions is generally debarred from suing. I also share the Smalberger JA's view that, hitherto the only

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exception allowed is where compliance with the section was at the relevant time impossible.[2]

**CONSIDERATION OF THE APPEAL**

[13] There are two grounds of appeal for consideration before us. The first ground is that, the court a quo erred in holding that the appellant instituted his action outside the prescriptive period as a result, dismissing the action on that point. The second ground is that, the court a quo erred in holding that that the cause of action arose in May 1999 and not in October 2013 when appellant became in actual possession of the vehicle.

[14] As Smalberger JA correctly posed the question in **Masuku and Another v Mdlalose and Others[3],** the fundamental issue arising in this appeal is whether a policeman who acts "in the course and scope of his employment" as a servant of the State is invariably acting "in pursuance of" the Police Act. Differently put, are the two concepts necessarily co-extensive. In that case, the court was considering a section in *pari materia* with section 77 of our Police Act. The section reads as follows:

> "Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

[2] Minister of Safety and Security v Molutsi and Another [199(5] 4 A11 SA 535 (A) at 554 f – h.
[3] Masuku and Another v Mdlalose and Others 1998 (1) SA 1 (SCA) at

[15] Regarding the first ground of appeal, Advocate Makau contended before us that the cause of action leading to the first claim arose when the respondents unlawfully impounded the appellant's vehicle on 12 May 1999. According to this argument, the continuance of the wrong subsisted until the 9th day of October 2012 when the vehicle was released to the appellant. She argued that the 12th day of May 1999, marked the commencement of a continuing wrong which subsisted until the vehicle was ultimately released to the appellant on the 9th day of October 2012. She further contended that the refusal by the respondents to release the vehicle despite the court order enjoining them to release the same constituted the wrong complained about.

[16] She then referred to the case of **Kekeletso Mokokoana v The Officer Commanding Police at Robbery and Car Theft Unit and Another**[4] in which Maqutu J pertinently pointed out that:

> "The police are not entitled to seize people's property put it outside the charge office and forget about it while it deteriorates every day that passes."

[17] In the above case, the applicant challenged the keeping of his vehicles for a long period without a criminal charge against him being preferred. As the learned judge correctly remarked, the police and the courts are entitled to hold

[4] Keieletso Mokokoana v The Officer Commanding Police at Robbery and Car Theft Unit and Another CIV/APN/144/94

property of a suspect for so long as may be necessary for purposes of any examination, investigation, trial or enquiry.

[18] In reaction to the above attack, Advocate Sekati for the respondents relied on the judgment of this Court in ***Attorney General v 'Mahlathe Majara & 40 Others***[5]. In that case, in a special plea of prescription the appellant pleaded that 'the cause of action herein arose as far back as 1985' and went on to allege that 'the summons having been filed in October 2001, sixteen years since the cause of action arose, plaintiffs are hopelessly out of time in terms of the Government Proceedings and Contracts Act of 1965.' The special plea concluded with a prayer that the action be dismissed with costs.

[19] In my view the cases cited by Advocate Sekati is distinguishable. In that case the respondents pleaded in paragraph 4 of their declaration that they were divested of their arable land in about September 1985. This allegation was accepted as correct by the appellant in the special plea in which, it was pleaded that the cause of action arose 'as far back as 1985'. Regard being had to the fact that it was common cause on the pleadings that the acts complained of which gave rise to the respondents' cause of action had occurred 'as far back as 1985' It was on that basis that this

[5] Attorney General v 'Mahlathe Majara & 40 Others C of A (CIV) No.64/2013..

Court was of the view that it was unnecessary for evidence to be led on the point.

[20] Another distinguishing feature was that, in ***Attorney General v 'Mahlathe Majara & 40 Others*** *(supra),* the respondents' cause of action was based on a single wrongful act as a result of which they were 'divested of their land' and 'suffered loss of their interests in the land'. In the present case, the appellant complains of an original continuing wrongful act of disobedience of a court order which spanned the period May 1999 to October 2012 during which the police were holding onto the appellant's vehicle.

[21] In my view, I agree with the views expressed by the Constitutional Court of South Africa in ***Makate v Vodacom (Pty) Ltd***[6] that:

> "[192] In the case of a continuing wrong there can be no question of prescription even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred at a past time the wrong itself continues for so long as it is not abated. But the running of prescription in respect of any financial claim arising from the same wrong will not be postponed. Accordingly, if financial loss was occasioned by the original wrongful act, the debt in relation to that loss would become due and prescription would commence to run when the original wrongful act occurred and loss was suffered. The result is that the impact of prescription on claims having their source in the same right may differ depending on the nature of the claim."

[6] Makate v Vodacom (Pty) Ltd 2016 (6) BCLR 709 (CC).

[22] In my view the special plea of prescription should have not been upheld on this basis. Even if I were wrong in this view, there is another reason on which the special plea of prescription should have been rejected in the present case. The appellant in his particulars of claim did not allege that the act complained of was performed in pursuance of the Act. It would have been it would have been incumbent upon appellant to allege and prove compliance with s 77 of the Act. There is no such allegation in the appellant's Declaration.

[23] In his declaration, appellant pleaded that the respondent were acting 'in the course and scope of his employment.' This is however a different concept from saying that they were acting 'in pursuance of' the Act. As Smalberger JA correctly pointed out in **Masuku and Another v Mdlalose and Others**, the concepts 'in the course and scope of his employment' (or any of its equivalents) and 'in pursuance of' the Act are notionally distinct from each other. I agree with Smalberger JA that, they derive from different sources and deal with different incidents of liability. The former is primarily concerned with the common-law principles of vicarious liability; the latter is of statutory origin and its meaning and ambit stem from the provisions of the Act. Different policy considerations are at stake when dealing with the two concepts. I am of the opinion that the learned judge erred in invoking prescription as pleaded in respect of both claims.

[24] I must indicate that at the hearing hereof, the learned Counsel for the respondents conceded, and properly so in my view,

the learned judge erred in holding that the second claim had prescribed. This concession was properly made.

***DISPOSITION***

[25] It is clear from the aforegoing reasons that this appeal should succeed. I agree with Advocate Makau that this appeal should succeed with costs.

***COSTS***

[26] I now turn briefly to deal with the argument relating to costs. The appellant has been successful and therefore he is entitled to his costs of appeal in this Court.

***ORDER***

[27] The following order is made:

(a) The appeal is upheld with costs.
(b) The decision of the court a quo is altered to read that, "The special plead of prescription is dismissed with costs.

**DR K E MOSITO**

**PRESIDENT OF THE COURT OF APPEAL**

**I Agree:**

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**P. T. DAMASEB**

**ACTING JUDGE OF APPEAL**

**I Agree:**

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**DR. J. VAN der WESTHUIZEN**

**ACTING JUDGE OF APPEAL**

**FOR APPELLANTS:** ADV. M. RAFONEKE

**FOR 1ST-5TH RESPONDENTS**: ADV. M.E. TŠOEUNYANE

**FOR 6TH RESPONDENTS:** ADV. P. LIBE