

Minister of Justice and Constitutional Development and Others v Pennington and Another

(162/2022) [2023] ZASCA 51 (14 April 2023)

FACTUAL BACKGROUND

The first respondent (“Mr. Pennington”) and his wife, the second respondent (“Mrs Pennington”) (hereinafter collectively referred to as “the Respondents”), instituted action against the first to third appellants, being the Minister of Justice and Constitutional Development (“the First Appellant”), the Minister of Police (“the Second Appellant”), and the Minister of Home Affairs (“the Third Appellant”), respectively (hereinafter collectively referred to as “the Appellants”).

Mr. Pennington and Mrs Pennington claimed damages from the Appellants, which damages were premised on the arrests, acquittals, convictions and failure by the First Appellant to prosecute the appeal against the conviction of Mr. Pennington.

The Respondents, in their particulars of claim, pleaded that that they suffered, “damages for a series of wrongs committed by the 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.”

In relation to the damages allegedly suffered, the Respondents pleaded that by virtue of Mr. Pennington’s alleged wrongful arrest and conviction, he was precluded from taking up employment or conducting business in South Africa and was thus unable to provide for Mrs. Pennington and their family, in that, he was unable to earn an income. The damage, on Respondents’ version, was exacerbated by the fact that this state of affairs endured for a period of almost 21 (Twenty-One) years (6 September 1994 to 18 June 2015).

In responding to the Respondents’ claim, the Appellants raised a special plea that the Respondents’ claim had prescribed, in other words, that the Respondents could no longer legally sue for the damages claimed.

By **Ashly Fowler** (Candidate Attorney),
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This special plea of prescription was based on the Appellants’ contention that the Respondents’ claims had prescribed since the summons was only issued in June 2016, which is more than 3 (Three) years after the alleged unlawful conduct relied upon. Specifically, the Appellants’ contended that the claim was based on the 1994 arrest of Mr. Pennington and the Respondents’ allegations, that by 31 December 1998, servants of the First Appellant were aware that they could not compile a proper record for the prosecution of the appeal.

ISSUE

Whether or not the Respondents’ claim for damages had prescribed.

HELD

The Respondents’ claim against the First Appellant could not be sustained since the arrest of Mr. Pennington in 1994, the criminal charges against him and the subsequent criminal trial, were neither unlawful nor malicious.

Accordingly, the Respondents’ only remaining claim was one for loss of income against the First Appellant for the purported “*wrongful, unreasonable delay, and/or refusal and/or failure to properly deal with [Mr. Pennington’s] appeal despite [Mr. Pennington’s] efforts to compel the state to do so and that during the entire period, [Mr. Pennington] was awaiting the finalization of the appeal, he was precluded from generating income.*”

The SCA, therefore, only had to determine whether the aforesaid claim had prescribed. In coming to its conclusion, the court took into consideration an application made by the Respondents to the Gauteng Division of the High Court, Johannesburg, for an order setting aside his conviction and sentence due to the failure of the Director of Public Prosecutions (“the DPP”) to prosecute the appeal.

According to the court, in support of the aforesaid application, it would have been necessary for the Mr. Pennington to have made out a case that the DPP acted unlawfully and in breach of their legal duty to ensure that the appeal was prosecuted without undue delay. This meant that by the date of the launch of the 2012 application, Mr. Pennington had all the necessary facts at his disposal, sufficient enough to found a cause of action. Therefore, prescription in respect of this claim would have commenced in **May 2012**, and would thus have prescribed **3 (Three)** years later, that is, in **May 2015**. Accordingly, when the Respondents issued summons in respect of this matter on **17 June 2016**, their claim had prescribed more than **1 (One)** year earlier.

The appeal was, therefore, upheld and the Respondents' claim against the Appellants was dismissed.



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