IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION : MTHATHA

CASE NO. CA & R 16/2019

In the matter between:

NOKUTHULA MTSHEMLA	**1st Appellant**
FEZILE MATIWANE	**2nd Appellant**
and	
MINISTER OF POLICE	**1st Respondent**
STATION COMMISSIONER, MACLEAR	**2nd Respondent**
WARRANT OFFICER QOTOYI	**3rd Respondent**

APPEAL JUDGMENT

GRIFFITHS, J

[1] This is an appeal against the judgment of the Regional Court Magistrate, Mthatha, wherein he dismissed the appellants' claims for damages as against the respondents, with costs.

[2] The appellants claimed damages from the respondents for their alleged wrongful arrest and detention, again allegedly at the hands of the respondents'

employees. The magistrate found that the respondents "*were justified in arresting and detaining the plaintiffs"* and on that basis dismissed the appellants' claims.

[3] The appellants' claims as set out in their amended particulars of claim is framed in paragraph 6 thereof as follows:

> "On or about 31 July 2015 at about 02H00 am and at Ngcele Administrative Area, Tsolo the plaintiff was wrongfully and unlawfully arrested by the 3rd defendant and two other members of the South African Police Service whose names and further particulars are to the plaintiff unknown.
>
> 6.1 The plaintiff was wrongfully and unlawfully detained at the Maclear Police Station.
>
> 6.2 On 3 August 2015 at 12 H00 p.m. the plaintiff was released from unlawful detention."

[4] The gravamen of the plea to this allegation was set out in sub-paragraphs 3.1 and 3.2 of the amended plea as follows:

> "3.1 The Defendant denies the allegations contained in these paragraphs, in amplification hereto the defendant avers that at all material times hereto, the arrest and subsequent detention of the plaintiff was in accordance with law; and
>
> 3.2 Therefore reasonable (sic) and justified in the context of South African Legal System in that, the Police Officers who arrested and detained the plaintiff:

3.2.1 entertained a suspicion based on reasonable and credible information and/or ground that the Plaintiff had committed an offence which is referred to in Schedule 1 of the Criminal Procedure Act 51 of 1977 as amended; and

3.2.2 armed with the information referred to in paragraph 3.2.1 arrested the Plaintiff for the purposes of preferring charges against her; and gave a fair and honest statement of relevant facts to the prosecutor and left the matter to the latter to decide whether to prosecute or not."

[5] As regards the question of vicarious liability, the appellants referred to the third respondent (cited as "Warrant Officer Qotoyi) as being "*a member of the South African Police Service, who was at the time when the cause of action arose, stationed at Maclear Police Service Station, Maclear."* As indicated, they also referred to two unknown members of the South African Police Service. Other than this, in citing the first respondent (Minister of Police) it was stated in the particulars of claim that he *"is vicarious (sic) and strictly liable for wrongful conduct committed by the members of the African Police Service while acting in the course and scope of their employment."* Nowhere in their particulars of claim did the appellants allege that indeed the police officers referred to, in acting as they did, acted within the course and scope of their employment or duties with the first defendant. In paragraph one of the amended plea, the respondents pleaded that "*it is denied that the liability of the state against wrongful acts and/or conduct of the Members of South African Police Services arise out of vicarious liability as alleged by the Plaintiff"*, whatever that may mean.

[6] At the outset of the trial it was merely mentioned that the respondents had accepted that they should commence with leading evidence. No mention appears to have been made of the fact that they might, or might not, bear the onus with regard to the lawfulness or otherwise of the arrest, or indeed what the position was with regard to the question of vicarious liability. One has to infer from all of this in favour

of the appellants (and despite the strange plea in this regard referred to earlier) that the respondents accepted that, firstly, the arresting officer(s) did indeed act in the course of and scope of their employment with the first respondent and, secondly, that the appellants had been arrested and detained by such officers resulting in the respondents bearing the overall onus to prove that the arrest was indeed legally justified.

[7] This complicated plot, however, does not end there. The respondents led the evidence of two police officers. The first one, one Chiliza, testified that he had, subsequent to the arrest of the appellants, merely charged the appellants at the police station at the request of one Constable Van Wyk. He said that he had found the appellants in detention and had read the statement by "*warrant officer*" Qotoyi. He had no knowledge whatsoever as to how they had come to be arrested. Likewise, the second witness for the respondents, Van Wyk, testified that he had taken over the matter apparently as the investigating officer on 6 April 2016 at which stage he had undertaken certain investigations with regard to the case itself. He had had absolutely nothing whatsoever to do with the arrest of the appellants on 31 July 2015 and their detention from then to 3 August 2015. Precisely why these two witnesses were called, is simply not explained as they contributed little, if anything, to the issue before the court.

[8] It was during the evidence of Van Wyk that a snippet of startling information was revealed under cross examination, but apparently glossed over. He mentioned that Qotoyi was working for "*Netstar Vehicle Tracking Unit*" and was not a police officer, despite the fact that the appellants had alleged that he was a police officer and the respondents had in their plea alleged that the police officers who had arrested and detained the appellants had been justified in doing so. Not only this, but the respondents had apparently accepted the onus to prove the justification for the arrest, despite the fact that the person who carried out the arrest was a civilian.

[9] Thereafter the respondents were granted leave to introduce in evidence a statement by Qotoyi, who had since died. That statement confirmed that Qotoyi was indeed an employee of Netstar Vehicle Tracking Unit and that on 30 July 2015 at about 02H00 he had received a call from "*head office*" with instructions to trace a vehicle with a certain registration number. He mentioned that "*officer Soboyisi*" had accompanied him. At some stage they had gone to the yard of a certain house where the appellants had effectively admitted that the vehicle with this registration number was in their possession. The statement then proceeds as follows:

> "We told them that the vehicle is in their possession. And as we firstly introduced ourselves to them on arrival, I then further stated that they are now under arrest and we will have to proceed to the nearest police station which is Maclear. I also phoned Maclear Police Station explaining about the new developments, as they were aware that we are busy tracking in their area."

[10] That was the respondent's case. The appellants both testified and denied any knowledge of the fact that the particular vehicle concerned may have been stolen, alleging that one "Donald" had lent it to them.

[11] In view of what I have said thus far it would perhaps be apposite at this stage to once again reiterate the necessity for, and purpose of, pleadings which seems to have been entirely disregarded in the lower court. A good exposition thereof is the following[1]:

> "3.1
>
> **Introduction**

[1] Beck's Theory & Principles of pleading in Civil Actions, 6th Ed. pp 43 - 44

Before the court is asked to decide any question which is in controversy between litigants it is in all cases necessary (except as hereinafter indicated) that the matter to be submitted to it for decision shall be clearly ascertained.

The plaintiff shall state in concise terms what facts he intends to rely on and to prove and the defendant shall do the same so that on the day of trial neither party shall be taken by surprise and that it may not be necessary to have the case adjourned, thereby causing wasted expense to both litigants from which the State and the lawyers alone derive profit. It has therefore often been stated by our courts, and it cannot be too often stated, that the object of requiring the parties to file pleadings is to enable each side to come to trial prepared to meet the case of the other.

A litigant is not entitled to conceal material allegations in order to obtain the advantage of placing the onus on his or her opponent. The onus must be determined on genuine and not artificial allegations in the pleadings and if the onus should be on a particular party he or she must accept it. Litigation is not a game where a party may seek tactical advantages by concealing facts from his or her opponents and thereby occasioning unnecessary costs. Nor is a party entitled to plead in such a manner as to place the onus on his or her opponent if the facts as known to the pleader place the onus on him or her.

3.1.1

The function of pleadings

The function of pleadings may be said to be threefold.

(a) They must ensure that both parties know what are the points of issue between them, so that each party knows what case he has to meet. He or she can thus prepare for trial knowing what evidence he or she requires to support his own case and to meet that of his opponent. “The object of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial, attempt to canvass another.”

(b) Pleadings are to assist the court by defining the limits of the action. However, in the absence of agreement between the parties the court may allow amendments at any stage of the proceedings.

The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within these limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings.

(c) Pleadings place the issues raised in the action on record so that when a judgment is given such judgment may be a bar to the parties litigating again on the same issues, enabling a party to raise a defence of *res judicata* if the other party attempts to raise the same issues.

> Though it may be thought that some of the rules are highly technical, the court has a wide discretion to condone a breach of technicalities provided that no prejudice is caused to other parties, but "for the existence of procedural rules relating to pleadings there are good practical reasons"." [Footnotes excluded]

[12] The magistrate in his judgment appears to have completely misconceived the question of the onus. At no stage did he allude to the fact that the respondents indeed bore the onus of justifying the arrest and detention. Having said that, an astute listener and ultimately an astute reader of this judgment will realize that, insofar as one can rely on the statement of Qotoyi, he maintained that he was the arrestor of the appellants. Despite mentioning the presence of an *"officer Soboyisi*" nowhere in the statement, nor in the evidence of the respondents, was it mentioned that officer Soboyisi was a police officer and/or that he was instrumental in arresting the appellants. As it was presented therefore it seems that the respondents' case had travelled some distance outside the parameters of the plea in that, *inter alia*, the arresting officer was clearly not an employee of the first respondent but was a civilian.

[13] Despite the allegation in the plea that the arresting police officers had "*entertained a suspicion… that the plaintiff had committed an offence which is referred to in Schedule one of the Criminal Procedure Act…"* the case ultimately argued by the respondents appeared to be that the arrest was lawful by virtue of the fact that Qotoyi was entitled to arrest pursuant to the provisions of section 42 of the Criminal Procedure Act, dealing with a civilian arrest.

[14] In my view, and as against this background, the magistrate was entirely incorrect in finding that the respondents had discharged the burden of proof which rested on them. As alluded to, their plea raised a lawful justification of the arrest based on section 42(1)(b) of the Act. That section reads as follows:

> "**40 Arrest by peace officer without warrant**

(1) A peace officer may without warrant arrest any person-

(a)…..

(b) whom he reasonably suspects of having committed an offence referred to in
Schedule 1, other than the offence of escaping from lawful custody;"

[15] It is abundantly clear that the reasonable suspicion must reside in the mind of the peace officer as at the time of the arrest of the person concerned. Qotoyi was not a police officer and therefore not a peace officer. Soboyisi was mentioned as being an "*office*r" but at no stage did the respondents prove that Soboyisi was a "*police officer*" and therefore a peace officer. In any event, Qotoyi maintained that he had arrested the appellants, not Soboyisi, and, furthermore, there is no evidence whatsoever that Soboyisi entertained any suspicion, let alone a reasonable one. In my view, the respondents ought to have failed on this basis alone.

[16] However, even if one were to give a vast amount of leeway in this regard and to consider whether or not Qotoyi had the right, in terms of section 42 of the Act, to arrest the appellants and that, on this basis, the police officers who detained the appellants were clothed with legality in doing so, it is my view that the respondents ought to have failed on that score as well.

[17] Section 42 reads as follows:

"**42 Arrest by private person without warrant**

(1) Any private person may without warrant arrest any person-

(a) who commits or attempts to commit in his presence or whom he reasonably
suspects of having committed an offence referred to in Schedule 1;

(b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that

offence;

(c) whom he is by any law authorized to arrest without warrant in respect of any offence specified in that law;

(d) whom he sees engaged in an affray."

[18] The only possible subsection of section 42 under which it could potentially be argued that Qotoyi's arrest might fall is subsection (1)(a). However, he made no allegation in his statement that the appellants had committed, or had attempted to commit, any offence in his presence. Furthermore, nowhere therein does one find a statement to the effect that he reasonably suspected the appellants, or any one of them, of having committed an offence referred to in schedule 1 of the Act. Accordingly, in my view, this argument, even if it had any potential of being advanced, has no merit.

[19] The upshot of all this is that the magistrate ought to have found that the respondents had not established that the arrest itself was lawful. That being so, the subsequent two and a half days detention was also unlawful. It was incumbent on the police who detained the appellants to ensure that their arrest had been lawful. To simply detain the appellants, apparently on the say-so of a civilian who had arrested them, does not seem to me to be sufficient. Surely, at the very least, there should be an interrogation of some sort to ensure that the arrest was lawful. After all:

> "Justification for the detention after an arrest until a first appearance in court continues to rest on the police. Counsel for the appellants rightly accepted this principle. So, for example, if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention."[2]

[20] I would add that if, shortly after an arrest, it becomes irrefutably clear to the police that the arrest was unlawful, there would be no justification for any further detention.

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[2] Minister of Police and Another v Du Plessis 2014 (1) SACR 217 (SCA)

[21] Had Qotoyi still been alive, this conclusion would have raised the conundrum that he was cited as a policeman in the employ of the first respondent whilst he was not. In view of the fact that, as I have indicated, it was accepted by the respondents that, at the very least, the detention of the appellants was effected by police officers who must have been acting within the course and scope of their employment with the first respondent, the court *a quo* ought to have found that the first respondent was liable for any damages that the appellants may have suffered.

[22] This then leaves the question of the quantum of damages. This is not a matter where this issue ought to be referred back to the court *a quo* in view of the fact that all the necessary evidence is before us to assess a reasonable quantum of damages. The evidence of the first appellant was to the effect that she was incarcerated in a small room in which one could not sleep. It was so small that one, when sitting down, could not stretch one's legs to the wall. There was no water in the room, no place to sleep and no toilet. There were two chairs to sit on but no blanket or bedclothes. She was also not given a chance to phone her relatives. The second appellant was incarcerated in a cell. He was not given any blankets but was given something that looked like a mattress. There was no water and the toilet was dirty.

[23] We have been referred to the case of the **De Klerk v Minister of Police**[3] in which, in the minority judgment, Rogers AJA intimated that he would have awarded general damages in the amount of R300,000 for wrongful arrest and detention spanning over a period of approximately seven days. In that matter evidence was led of a clinical psychologist which indicated, *inter alia*, that the appellant had lost 11 kg whilst in prison, that upon his release he was full of bites presumably from fleas and lice and he had not slept well for about two months thereafter. There was also further evidence as to the psychological effects upon him of the arrest and attention. It has

[3] 2018 (2) SACR 28 (SCA)

been submitted that, taking this into account, each appellant *in casu* ought to be awarded the sum of R200,000.

[24] In my view, the amount submitted is excessive. As indicated, the appellants were detained for a period of approximately two and a half days. Whilst the conditions were by no means perfect, there was no evidence as to the psychological effect this may or may not have had upon them, as in the de Klerk case. I am of the view that the sum of R90,000 for each plaintiff would be apposite in all these circumstances.

[25] I would propose the following order:

1. **The appeal of both appellants succeeds with costs;**

2. **The judgment of the magistrate in regional court case number RC 399/2016 held at Mthatha is set aside and substituted with the following:**

   "(a) There will be judgment for the plaintiffs as against the first defendant in the sum of R90,000 each;

   (b) The first defendant is ordered to pay the costs of the action."

R E GRIFFITHS
JUDGE OF THE HIGH COURT

BROOKS, J. : I agree

JUDGE OF THE HIGH COURT

ATTORNEY FOR APPELLANTS	**:**	**Mr Sandlana**
INSTURCTED BY	**:**	**B. G. Sandlana & Co.**
COUNSEL FOR RESPONDENTS	**:**	**N/A**
HEARD ON	**:**	**13 MARCH 2020**
DELIVERED ON	**:**	**13 MARCH 2020**