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

CASE NO: 220/2011
DATE HEARD: 08/08/2013
DATE DELIVERED: 23/08/2013

REPORTABLE

In the matter between

THE MINISTER OF SAFETY & SECURITY	**APPLICANT**
and	
ADDITIONAL MAGISTRATE, N MOLO N.O.	**1ST RESPONDENT**
KEITH CHIPPS	**2ND RESPONDENT**

JUDGMENT

Nature of matter: Application for review– special pleas - This is an unopposed application for an order reviewing and setting aside a decision of the first respondent, given in the course of an action instituted by the second respondent against the applicant for damages for wrongful arrest and detention.

Order: [10.1] The decision of the first respondent granting an application to amend the second respondent's particulars of claim and dismissing the special plea is reviewed and set aside.
[10.2] The trial is to be set down again before the first respondent in order for her to consider the arguments presented by the parties on the special pleas, and to give judgment on the special pleas.
[10.3] There is no order as to costs.

ROBERSON J:-

[1] This is an unopposed application for an order reviewing and setting aside a decision of the first respondent, given in the course of an action instituted by the second respondent against the applicant for damages for wrongful arrest and detention.

[2] Summons was issued on 13 October 2004. The second respondent initially alleged in his particulars of claim that he was arrested without a warrant at 21h30 on 17 July 2004 and detained until 12h00 on 18 July 2004. In his plea, the applicant admitted that the second respondent was arrested without a warrant on 17 July 2004 at 0h30 and released at 10h00 the same day. The applicant pleaded further that the arrest was lawful because the second respondent had contravened s 154 (1) (c) of the Liquor Act 27 of 1989, loosely known as being drunk in a public place.

[3] The second respondent subsequently amended his particulars of claim (apparently without opposition) to allege that he was arrested on 16 July 2004 at 21h30 and detained until 12h00 on 17 July 2004. The applicant delivered an amended plea, in terms of which he raised two inter-related special pleas. The first was that the second respondent's claim had prescribed, because the amendment had introduced a new cause of action and had been effected more than three years after the arrest. The second was that the second respondent

had failed to give the required notice in terms of s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 of his intention to institute proceedings based on the new cause of action. The applicant pleaded over to the merits of the amended claim and admitted that the second respondent had been arrested on 16 July 2004 at 23h00 and detained until 17 July 2004 at 11h05. In pleading over, he again pleaded that the arrest was lawful in that the second respondent had contravened s 154 (1) (c) of Act 27 of 1989, adding that the offence had been committed in the presence of the arresting officer, thereby presumably relying on s 40 (1) (a) of the Criminal Procedure Act 51 of 1977.

[4] The special pleas were argued separately before the first respondent and it is the decision she reached following the hearing of argument which is the subject of this review. According to the transcribed record, she commenced her judgment as follows:

> "This is an opposed application for the amendment of the particulars of claim, and thereafter the respondent raised a special plea by way of application."

She concluded as follows:

> "The application for amendment is allowed. That the applicant effects the amendment within 10 days, whereafter the respondent will be granted a further 15 days to respond to the amendment. And the application for a special plea is dismissed. The costs shall be the costs in the cause. Since the applications were dealt simultaneously, then the

> issue of costs …. the Court feels to order the costs simultaneously, that is the costs in the main (indistinct)."

[5] It is clear from this judgment that the first respondent was of the view that an application for an amendment was before her, as well as the special pleas. Her written reasons for judgment confirmed that she believed that what was before her was an opposed application by the second respondent to amend his particulars of claim. After setting out the grounds on which the amendment was opposed, she referred to the special plea as a "plea over" by the applicant. It therefore seems that she was of the view that a decision on the special pleas was conditional upon her decision on the amendment.

[6] The first respondent therefore gave judgment on an application which was not before her. This constitutes a gross irregularity. I do not think it can be said that her dismissal of the special plea can be interpreted to mean that she applied her mind to what was actually before her, namely the special pleas as distinct from an application to amend. Her focus was on an application to amend the particulars of claim. In the result her judgment should be set aside and the matter remitted to her in order for her to give judgment on both special pleas, after considering the arguments which were presented on behalf of the applicant and the second respondent.

[7] It is necessary to comment on the conduct of the applicant in raising the special pleas. In argument before the first respondent, the applicant's legal representative, an attorney employed at the office of the State Attorney,

submitted in support of the defence of prescription, that the effect of the second respondent's amendment was that he had been arrested twice, that is on the 16 July 2004 and again on the 17 July 2004. The amendment therefore introduced a new cause of action because it was not the same arrest as pleaded in the original particulars of claim. Counsel who appeared for the second respondent in the court a quo described this argument as "misleading" and "deplorable", and submitted that the special pleas were "opportunistic".

[8] Given the fact that the applicant admitted the arrest on 16 July 2004, the conduct of the applicant in raising the special pleas requires comment. The applicant litigates with public funds and must do so responsibly and honourably. (See *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (ECD) at paras [16] – [17].) Moreover, in raising the special pleas the applicant apparently seeks to prevent a court from reaching a decision which deals with the real issue between the parties, so that justice may be done. As was said in *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at para [79]:

> "A decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution."

In the present matter the applicant or those advising him should have borne in mind s 34 of the Constitution which provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent or impartial tribunal or forum."

[9] Although the order to be made in this matter presupposes that the first respondent should give judgment on the special pleas, the applicant will be wise to heed the remarks in this judgment and consider whether or not he wishes to continue to raise those defences, in accordance with the guidelines set out in *Njongi* (*supra*).

[10] The following order will issue:

[10.1] The decision of the first respondent granting an application to amend the second respondent's particulars of claim and dismissing the special plea is reviewed and set aside.

[10.2] The trial is to be set down again before the first respondent in order for her to consider the arguments presented by the parties on the special pleas, and to give judgment on the special pleas.

[10.3] There is no order as to costs.

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J M ROBERSON
JUDGE OF THE HIGH COURT

PLASKET J:-

I agree

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C M PLASKET
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv N Sandi, instructed by Netteltons Attorneys, Grahamstown