IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: **YES**

Date: ***19th March 2019*** Signature:

CASE NO: 2017/22851
DATE: 19TH MARCH 2019

In the matter between:

MOFOKENG, TEBOGO Respondent / Plaintiff

and

MINISTER OF POLICE Applicant / Defendant

JUDGMENT

ADAMS J:

[1]. I shall refer to the parties as referred to in the main action. The defendant in the main action is the applicant in this application for leave to amend, and the respondent herein is the plaintiff in the main action.

[2]. A central issue in this opposed application by the defendant for leave to amend his plea relates to whether or not the proposed amendment of the plea would render the plea excipiable. The defendant applies for leave to amend his plea in accordance with Uniform Rule 28(4). The defendant opposed the application.

[3]. The plaintiff's cause of action is for damages based on unlawful arrest and detention. In his particulars of claim, the plaintiff pleads his case as follows:

> '(3) On 23 June 2014 and at Sharpeville, in the province of Gauteng, the plaintiff was wrongfully and unlawfully arrested under Sharpeville Police CAS 202/06/2014 and thereafter wrongfully and unlawfully detained at the Sharpeville police station by a member of the South African Police Services unknown to him and stationed at Sharpeville Police Station until released from custody on 24 June 2014 purportedly on a charge of contempt of court. Plaintiff's notice in terms of the Constitution is attached hereto and marked as Annexure 'A'.
>
> (4) The plaintiff's arrest and subsequent detention were unlawful in that:
>
> (4.1) The said member of the SAPS who arrested the plaintiff knew, alternatively, ought to have known that no reasonable or objective grounds or justification existed for either the arrest or the detention of the plaintiff;
>
> (4.2) Knew or ought to have known that the plaintiff will never be prosecuted for the alleged crime for which she was arrested;
>
> (4.3) failed in his official duty to perform such duties as required by law with due regard to his powers and functions and in a manner that was reasonable under the circumstances;
>
> (4.4) failed to consider whether the detention of the plaintiff was necessary at all.

(5) In the event it is found by this Honourable Court that the jurisdictional facts for arrest were present, which is still denied by the plaintiff, then and in that event the plaintiff pleads that the said member of the SAPS who effected the arrest failed to exercise his discretion to arrest reasonably, properly, constitutionally and lawfully in that:

(5.1) He failed to appreciate that he had a discretion whether to arrest without a warrant or not; or

(5.2) he appreciated that he had a discretion whether to arrest or not but nevertheless failed to consider and apply that discretion reasonably, properly and lawfully; or

(5.3) he failed to apply his mind in considering whether or not to effect the arrest in that:

(5.3.1) he failed to consider and investigate all facts and / or information before him;

(5.3.2) he acted arbitrarily and capriciously in exercising a discretion whether or not to arrest;

(5.3.3) he failed to apply his mind in considering and deciding on possible and milder means of bringing the plaintiff before court;

(5.3.4) he failed to appreciate that there were no grounds for infringing upon the plaintiff's constitutional rights because the plaintiff presented no danger to society, the plaintiff might not have absconded, the plaintiff could not have harmed the others or herself, the possible sentence that would be imposed would have been minimal.'

[4]. On the 12th of October 2017 the defendant gave notice of intention to amend his plea. The effect of the intended amended is that the defendant would

plead as follows to the aforegoing paragraphs 3, 4 and 5 of the particulars of plaintiff's claim:

'(4.1) The defendant admits that the plaintiff was lawfully arrested without a warrant on the 23 June 2014, at or near Sharpeville, Gauteng, by members of the South African Police Services and he was detained in police custody.

(4.2) The defendant admits that the plaintiff remained in custody until he was released on 24 June 2014 at the Vereeniging Magistrates court.

(4.3) The defendant pleads that the arrest of the plaintiff was lawful in that the plaintiff was reasonably suspected to have committed offences, harassment and contempt of court, referred to Schedule 1 of the Criminal Procedure Act, 51 of 1977.

(4.4) The plaintiff's arrest was legally justified in terms of section 40(1)(b) of the of the Criminal Procedure Act.

(4.5) The defendant avers that the detention of the plaintiff until 24 June 2014 was lawful and justified in terms of section 50 of the Criminal Procedure Act, 51 of 1977.

(4.6) The defendant denies that there were no reasonable or objective grounds or justification for the arrest and detention of the plaintiff.

(4.7) The defendant further denies that the arresting officer failed to exercise his discretion.

(4.8) The defendant denies that the arresting officer failed to appreciate that he had a discretion.'

[5]. The plaintiff objected to the defendant's intended amendment of his plea. The main ground of the plaintiff's objection to the intended amendment is that the proposed amendment, if permitted, would give rise to a plea which does not disclose a defence to the plaintiff's claim, which, in turn, would mean that the

defendant's amended plea would be excipiable. Closely linked to this ground of objection to the intended amendment is the contention by the plaintiff that the plea would fall foul of the mandatory requirements of Uniform Rule of Court 18(4) and (5) in that the plea would not set forth a clear and concise statement of the material facts with sufficient particularity to enable the plaintiff to reply thereto. The plaintiff therefore contends that the proposed amendment would render the plea excipiable on the basis that it would give rise to a pleading which does not disclose a cause of action against the plaintiff.

[6]. In sum the defendant's case, as pleaded in the proposed amended plea, is that the arresting officer suspected the plaintiff of having committed offences, namely harassment and contempt of court, which are offences referred to in schedule 1 of the Criminal Procedure Act, 51 of 1977 ('the CPA'). The defendant therefore pleads this essential fact that the plaintiff was arrested because he was suspected of having committed schedule 1 offences. The defendant also admits the facts relating to the arrest and detention of the plaintiff by members of the SAPS, as pleaded by the plaintiff in his particulars of claim. Thereafter, the defendant pleads the legal conclusion that the arrest and detention of the plaintiff was justified in terms of the provisions of section 40 (1) (b) of the CPA.

[7]. The plaintiff opposed the defendant's proposed amendment on two grounds, namely that the intended amendment lacks averments which are necessary to sustain a defence to the plaintiff's claim; and that the amendment fails to set forth a clear and concise statement of material facts with sufficient particularity to enable the plaintiff to reply. What the plaintiff says is that the proposed amendment would render the defendant's plea excipiable on the grounds set out in his notice of objection and in those circumstances the amendment ought not to be allowed.

[8]. In my judgment, the defendant does set out the facts which constitute the premises on which his defence is based, that being that the arresting officer had a reasonable suspicion that the plaintiff had committed offences which are referred to in schedule 1 of the CPA. This is a fact pleaded by the defendant, which, if read with his admission that the plaintiff was indeed arrested and detained as alleged by him in his particulars of claim, in my view sets forth in clear and concise terms the material facts with sufficient particularity to enable the plaintiff to replicate (if necessary).

[9]. It is trite that a court should endeavour to look benevolently instead of over – critically at a pleading, and it must be looked at as a whole. If there is any uncertainty in regard to a pleader's intention an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable. In that regard see: *Amalgamated Footwear & Leather Industries Jordan & Co Ltd*, 1948 (2) SA 891 (C) at 893.

[10]. The plaintiff avers that the proposed amended plea lacks averments which are necessary to sustain a defence. In essence, it is the plaintiff's argument that the amended plea is excipiable because it does not comply with rules 18(4) and 18(5) of the uniform rules.

[11]. These rules provide:

> '(4). Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.
>
> (5). When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.'

[12]. It is so that proper pleading involves pleading statements of fact, rather than law, facts that are material only, facts rather than evidence and facts in summary form. As is expressly stated in rule 18(4), those facts must be pleaded with sufficient particularity to enable a party to reply to them. Statements of opinion or conclusions have no place in pleadings. In that regard, Mr Msaule, who appeared on behalf of the plaintiff, referred me to *Buchner & another v Johannesburg Consolidated Investment Co Ltd*, 1995 (1) SA 215 (T), in which case De Klerk J, after referring to rule 18(4) set out the position thus:

> 'The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based.'

[13]. Plaintiff's Counsel also referred me to the unreported judgment of *Windvogel v Minister of Police*, [2013] JOL 30984 (ECP), a judgment of Plasket J, which was handed down on the 28th of June 2013. The court in that matter, which, according to Mr Msaule, is on all fours with this matter, noted that no particularity was provided as to when on the 24th of October 2010 and where in Port Elizabeth the arrest of the plaintiff in that matter occurred. The court also noted that no clear and concise statement of the material facts forms part of the plea as to what it was alleged the plaintiff did in order to commit the offence of malicious injury to property or to attempt to commit that offence. The problem was compounded, so Plasket J held, because the defendant pleaded that the arrest was either justified by s 40(1)(b) or by s 40(1)(a) of the Criminal Procedure Act 51 of 1977. These sections authorise peace officers to arrest in different circumstances namely, in the case of s 40(1)(b), when the peace officer reasonably suspects that the arrestee has committed a Schedule 1 offence and, in the case of s 40(1)(a), when the arrestee commits or attempts

to commit an offence in the presence of the peace officer. No facts were pleaded in that regard, so the Judge concluded, to justify either or both of the alternative conclusions that are pleaded. The court also concluded that the plea was simply a bald conclusion, not based on any material facts, that the arresting officer's discretion to arrest was not exercised unreasonably or irrationally – and hence unlawfully. Plasket J accordingly concluded that the exceptions taken to the defendant's plea were well – taken and therefore upheld them.

[14]. The *Windvogel* matter is clearly distinguishable from the matter before me. *In casu* the defendant intends pleading that factually the arresting police officer reasonably suspected the plaintiff of having committed the offences in question. That was not the case in the *Windvogel* matter. This, in my view, is an important distinction. Secondly, in the *Windvogel* matter the defendant pleaded that the arrest and detention was justified in terms of the provisions either of section 40(1)(b) or section 40(1)(a) of the CPA. These sections authorise peace officers to arrest in different circumstances. No facts were pleaded in that regard, so the Judge found, to justify either of both of the alternative conclusions that were pleaded. This, in my view, was an important consideration in the *Windvogel* matter, and an aspect which led to the conclusion reached in that matter.

[15]. I am therefore of the view that the proposed amended plea complies with the provisions of rule 18(4) and (5) in that in the amended plea indeed contains a clear and concise statement of the material facts upon which the defendant relies for his defence. The defendant states that the plaintiff was suspected of having committed the offences in question. The suspicion was reasonable. The defendant, in my judgment, is stating the facts that are material, in summary form. What more should the defendant have stated, I ask rhetorically. To require that the defendant's statement contained more than what is in the intended plea would require of the defendant to state evidence in addition to stating the material facts.

[16]. In the circumstances, I am of the view that there is no merit in the plaintiff's objections to the proposed amended defendant's plea. If regard is had to the legal principles relating to the excipiability of pleadings on the basis that same does not disclose a cause of action, it cannot be said that the proposed plea, read as a whole, does not disclose a cause of action. The defendant's defence, as spelt out clearly and concisely by the intended amended plea, is that the arrest and detention was justified as the plaintiff was reasonably suspected of having committed a schedule 1 offence.

[17]. The defendant should therefore be granted leave to amend his plea as per his notice of intention to amend.

Costs

[18]. The defendant, in applying for leave to amend his plea, is asking for an indulgence from the court. This means that he is liable to pay the cost of the application for leave to amend.

[19]. The plaintiff, on the other hand, should pay the cost of the opposition to the application. This cost order would however be cancelled out to a lesser or greater extent by the cost order to which the defendant is entitled. Additionally, I am of the view that quantum of the plaintiff's claim, however one views it, cannot possibly be close to an amount which exceeds the jurisdiction of the Magistrates Court. The plaintiff was arrested on the 23rd of June 2014 and released on the 24th of June 2014, which means that the plaintiff was detained for approximately 24 hours. In my view, this action should have been instituted in the Magistrates Court, and by proceeding in the High Court the plaintiff is abusing the processes of this Court. This action alone is deserving of censure especially since we are here dealing with public funds.

[20]. Conversely, it is also true that the conduct of the legal representatives on behalf the Minister of Police leaves much to be desired. The rules of this court have been totally disregarded by them. They have delayed, unnecessarily so, the finalisation of the defendant's application for leave to appeal and therefore the main action between the parties. The defendant's notice of intention to amend was delivered as far back as the 12th of October 2017. The plaintiff objected on the 20th October 2017 to the intended amendment and the application for leave to amend was filed only on the 11th of May 2018.

[21]. Both parties in this matter are not before court with clean hands.

[22]. I am therefore of the view that no order as to cost would be fair, reasonable and just to all concerned. Therefore, in the exercise of my discretion I intend granting no order as to costs. This also relates to the wasted costs occasioned by the postponement of the hearing of the opposed application on Tuesday, the 12th of March 2019, which is the date on and time at which the application was to be heard according to the official opposed roll published. On that day the defendant asked that the matter stand down to enable his Counsel to prepare to argue the application on the merits. Up to that point the defendant intended withdrawing the application, but the plaintiff refused to accept such withdrawal and insisted that the application be argued.

Order

Accordingly, I make the following order:

1. The defendant is granted leave to amend his plea as per his notice of intention to amend in terms of rule 28 dated the 12th of October 2017.

2. There shall be no order as to cost relative to this application for leave to amend.