



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D5778/2020

In the matter between:

TREVOR ALLAN JOHN MALONE

Plaintiff

and

THE GOVERNMENT OF THE UNITED

First Defendant

KINGDOM OF GREAT BRITAIN AND

NORTHERN IRELAND

THE MINISTER OF JUSTICE AND

Second Defendant

CONSTITUTIONAL DEVELOPMENT OF THE

REPUBLIC OF SOUTH AFRICA

ORDER

The following order is granted:

- (a) The first defendant's second ground of exception is dismissed.
- (b) Each party shall pay their own costs.

JUDGMENT

Veerasamy AJ

[1] This is an exception taken by the first defendant to the plaintiff's Intendit.

The first defendant contends, in its exception, that:

1.1 The plaintiff has failed to plead or establish the basis upon which this Court has jurisdiction to adjudicate upon the plaintiff's claim ("the first exception"); and

1.2 The first defendant is, as a matter of law, immune from the jurisdiction of this Court, having regard to section 2(1) read with sections 3 to 11 of the Foreign States Immunities Act, 87 of 1981 ("the FSIA") ("the second exception").

[2] The exceptions, in summary, contend that the first defendant, as a foreign state, is immune from the jurisdiction of this court because extradition is a sovereign act and the plaintiff's claim falls outside the operation of sections 3 to 11 of the FSIA. Therefore, this Court does not have the jurisdiction to hear the Plaintiff's claim.

[3] By the time the argument on the exception was heard, the first exception had fallen away as a result of an amendment which the plaintiff proposed to effect to his particulars of claim. The proposed amendment was communicated by way of the plaintiff's Rule 28 notice dated 26 October 2023.

[4] Both parties agree that the first exception has become academic (save for any costs issues that might arise therefrom) and that only the second exception which needed to be considered.

The Second Exception

[5] In order to give appropriate context to the second exception, a brief summary of the plaintiff's pleaded case is set out hereunder.

5.1 On 21 February 2014, the plaintiff was granted leave to reside in the United Kingdom until 9 March 2017, as a Tier 2 General Migrant.

5.2 On 2 February 2017, the first defendant advised the plaintiff, in writing, that a decision had been taken to revoke his right to remain in the United Kingdom and that he was directed to leave the United Kingdom within seven days of receipt of such notice.¹

5.3 After directing the plaintiff to leave the United Kingdom, the first defendant delivered a request to the Department of International

Relations and Cooperation of the Republic of South Africa in terms of Article 16 of the European Convention for Extradition, directing the Department to –

- 5.3.1 arrest the plaintiff;
- 5.3.2 cause the plaintiff to be detained in custody;
and
- 5.3.3 oppose any application for the plaintiff to be
released on bail. ²

5.4 The first defendant's request was to be carried out pending determination of an application by the first defendant in the Magistrate's Court at Umzumbe for the plaintiff's extradition.³

5.5 On 16 February 2019, and pursuant to the first defendant's request, a warrant of arrest was issued for the plaintiff.⁴ The said warrant of arrest was executed on 22 May 2019.⁵

5.6 The first defendant opposed the plaintiff's application for release on bail. Thus, the plaintiff was detained for 46 days, until 6 July 2019, when he was released on bail pending the determination of the first defendant's application for extradition.⁶

5.7 The extradition application was set down for hearing on 24 March 2020, on which date the first defendant withdrew same.⁷

[6] The plaintiff pleads at paragraph 15 of his particulars of claim that the first defendant, 'thereby acted wrongfully, maliciously, unreasonably and without probable cause with the *animus iniuriandi* towards the plaintiff by ⁸:

- 6.1 requesting his arrest and detention;
- 6.2 opposing his application for bail, and applying for the recusal of the magistrate who heard the bail application;
- 6.3 applying for his extradition after terminating his right to remain in the United Kingdom; and
- 6.4 subsequently withdrawing the extradition application on the date on which it was to be heard.

[7] In the alternative, the plaintiff pleads that the first defendant acted 'wrongfully, maliciously, unreasonably and without probable cause and with *animus iniuriandi* towards the plaintiff'.⁹

[8] The second exception targets paragraphs 18 and 19 of the particulars of claim, which follow after the summary of the pleadings as detailed above.

[9] Paragraph 18 of the particulars of claim states as follows:

"In the consequence of the First Defendant's conduct as set out in paragraph 15 alternatively 17, the Plaintiff -

(a) was detained in custody for 46 days;

*(b) suffered contumelia, a deprivation of his freedom and discomfort;
and*

(c) incurred legal costs in:

(i) preparing to oppose the First Defendant's application for his extradition which the Defendant subsequently withdrew;

(ii) applying for his release on bail; and

(iii) opposing (successfully) the First Defendant's application for recusal of the magistrate who heard the Plaintiff's application for bail."

[10] In paragraph 19 of the particulars of claim, the plaintiff alleges that his damages total the sum of R2,898,542.83 which it amortizes as follows:

10.1 R2,300,000 (calculated at a rate of R50,000 for the 46 days) for
'contumelia, deprivation of his freedom and discomfort'; and

10.2 R598,542.83 for his legal costs.

[11] The second exception contends that, on a proper reading of the FSIA, sections 3 to 11 of the Act are not applicable to the plaintiff's pleaded case,¹⁰ and that the first defendant is thus immune from the jurisdiction of this Court in terms of section 2(1) of the FSIA.¹¹

[12] Section 2(1) of the FSIA provides that a foreign state shall be immune from the jurisdiction of the courts of the Republic, except as provided in that Act or in any proclamation issued thereunder.

[13] Neither party contended for any proclamation having been issued as envisaged by s2(1) of the FSIA but, rather, that the exceptions were to be dealt with on the express provisions of the Act itself.

[14] The second exception can be confined to a determination of whether"

14.1 the plaintiff's claim as pleaded falls under the umbrella of s 6 of the FSIA (the further sections of the Act have no comparable bearing on the issue before me);

14.2 the sovereign act of an extradition by itself deprives this Court of jurisdiction over the plaintiff's claim; and

14.3 whether the plaintiff's claim for costs falls within the operation of s6 of the FSIA.

Reliance on customary international law

[15] Both parties relied heavily on the wealth of international law which has previously sought to interpret similar, if not identical, sections in foreign legislation.

[16] The first defendant argues that extraditions, and materially the complaints of the plaintiff as pleaded, fall outside the ambit of s 6 of the FSIA.

[17] The plaintiff argues that the evolving international customary law has started to lean towards permitting the injuries as claimed by the plaintiff under the umbrella of personal injuries which s6 of the FSIA would relate to.

[18] Unless otherwise inconsistent with our Constitution, customary international law is law in this country.¹²

[19] Consistency with our Constitution is a critical requirement for the acceptability and applicability of international law within our country.¹³

[20] Whilst customary international law is a part of our law, it can be altered by our law and, in particular, by the Constitution.¹⁴

[21] Personal liberty is entrenched in our law and is a guaranteed right of every person in the Republic in terms of s 12(1) of the Constitution. This includes the right not to be deprived of freedom arbitrarily and without just cause.¹⁵

[22] Freedom of liberty has two interrelated constitutional aspects.

22.1 The first requires that no-one be deprived of their physical freedom unless through a fair and lawful procedure,¹⁶

22.2 The second is concerned with the manner in which a person has been deprived of their freedom.¹⁷

S6 of FIAS

[23] Section 6 of the FSIA reads as follows:

6. Personal injuries and damage to property.—A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to—

(a) the death or injury of any person; or

(b) damage to or loss of tangible property,

caused by an act or omission in the Republic.

[24] The first defendant sought to persuade me that under the current international customary law regime s 6 of FSIA had to be interpreted in the narrow sense.

[25] Thus, the reference in the section to “*injury of any person*” is intended to refer to an actual physical bodily injury as opposed to any other form of injury to person which might occur.

[26] The first defendant argues that the plaintiff’s claim does not fall within the definition of personal injury when one employs the restrictive interpretation of the section. The argument further contends that the claim for legal costs falls outside of the definition of injury of any person and that, in any event, the provisions of s6 of FSIA only apply to non-sovereign acts.

[27] The plaintiff argued that the prevailing customary international law has developed beyond such a narrow interpretation and that the concept of personal injury would encompass the nature of injuries complained of by the plaintiff in his particulars of claim.

[28] In the case of *Schreiber v Canada*¹⁸ the Canadian Supreme Court of Appeal was confronted with materially the same jurisdictional question which the first defendant has raised in the exception before me.

[29] In *Schreiber*, the Court was called upon to consider the interpretation of s 6(a) of the Canadian State Immunities Act, which substantially mirrors s 6 of the FSIA.

[30] s 6(a) of the Canadian State Immunities Act provides that a foreign state is not immune from the jurisdiction of a court in any proceedings which related to *inter alia* personal injury.

[31] In *Schreiber* the Court:

- 31.1 concluded that the reference to personal injury in s 6(a) of the Canadian State Immunities Act includes mental distress and emotional upset linked to a physical injury;¹⁹
- 31.2 approved the definition of personal injury as an injury having a physical origin, with reference to the academic authority of K.D. Cooper-Stephenson, *Personal Injury Damages in Canada* (2nd Ed) 1996;²⁰
- 31.3 held that international law sets out some general principles with respect to the origins and uses of sovereign immunity, but that domestic law sets out the very specific exceptions to the general rule of sovereign immunity.²¹

[32] *The Appeal Court in Schreiber* ultimately arrived at a conclusion that the legislative intent to create an exception to state immunity would be restricted to a class of claims arising out of a physical breach of personal integrity. Such breach may have a resultant overlap between physical harm and mental injury, but the mere deprivation of freedom would not fall within the exception to the bar against suing a foreign state in terms of the Canadian State Immunity Act.²²

[33] The first defendant sought to punctuate the point that an injury must have a physical manifestation in order to fall within the operation of s 6 of FSIA by making reference to the conclusions reached in the *Republic of Nigeria v*

Ogbonana,²³ where the court found that mental distress would amount to a physical injury.²⁴

[34] The plaintiff placed reliance on *Al-Masarir v Kingdom of Saudi Arabia*,²⁵ where the Court was confronted with the interpretation of s 5 of the State Immunity Act 1978, which provides that a State is not immune in respect of proceedings of, *inter alia*, personal injury, caused by an act or omission in the United Kingdom.

[35] Giving consideration to *Schreiber* and the further international law which was available to it, in *Al-Masarir* the Court was unpersuaded that the definition of personal injury was confined to merely the physical manifestation of an injury and favoured a broader definition being given to a personal injury.²⁶

[36] The plaintiff seeks compensation, *inter alia*, for contumelia, deprivation of his freedom and discomfort.²⁷

[37] The assessment of damages in the award of an unlawful detention involves, *inter alia*, consideration of such factors as the invasion of the personality and the constitutional rights of the plaintiff.²⁸

[38] A claim for deprivation of freedom and discomfort involves a consideration of the trauma, mental anguish and distress suffered by the plaintiff whilst in custody.²⁹

[39] In the FSIA there is no internal limitation imposed on a 'personal injury'. Since the general term personal injury is not restricted in the Act, the intention of the legislature must be taken to have been that, unless there are other indications to the contrary, all recoverable loss or damage suffered by reason of a "personal injury" fall under the jurisdiction of the Act.³⁰

[40] These would relate to all injuries personally suffered by the plaintiff.³¹

[41] The *actio iniuriarum* is available where there is harm to personality interests. It involves injury to ones corpus, dignitas or fama. Deprivation of liberty involves a consideration of all of the above.³²

[42] All of these would fall under the umbrella of a personal injury sustained by the plaintiff.

[43] The first defendant must show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it.³³

[44] The first defendant is required to demonstrate that on any construction of the particulars of claim no cause of action is disclosed. The pleading is to be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self contained.³⁴

[45] For the reasons set out above, I am unpersuaded that the use of the words "injury of any person" in s 6 of the FSIA limits the plaintiff's claim to only physical injuries.

[46] I am thus disinclined to accept the interpretation as proffered by the first defendant. The plaintiff's claim would, in my opinion, fall within the operation of s6 of the FAIS.

[47] Thus, this leg of the Second Exception must fail.

Sovereign Immunity

[48] The second tier of the Second Exception lies in the argument that an extradition is a sovereign act and thus the first defendant enjoys immunity against claims arising from such act.

[49] The Court in *Al-Masarir* (as referred to by both parties) rejected the argument that acts of a sovereign nature automatically attract immunity. With reference to the act of torture, *Al-Masarir* found that even though such acts are of a sovereign nature, it is indicative that they do not attract immunity from prosecution.³⁵

[50] Extraditing a person, especially a citizen, constitutes an invasion of fundamental human rights.³⁶

[51] The protection afforded by sovereign immunity cannot insulate alleged wrongful conduct which would have resulted in the impairment of a constitutional right.³⁷

[52] Accordingly, this leg of the exception must equally fail.

Legal Costs

[53] The third tier of the Second Exception concerns the legal costs claimed by the plaintiff.³⁸

[54] The legal costs constitute compensation under the *actio legis aquilia*.³⁹

[55] This includes the economic loss suffered as a result of the first defendant's conduct. Such an action would fall under the ambit of s 6 of the FSIA, at the very least being a pure economic loss suffered by the plaintiff in having to address the alleged wrongful conduct of the defendant.

[56] Accordingly, this leg of the Second Exception also must fail.

The costs of the exception

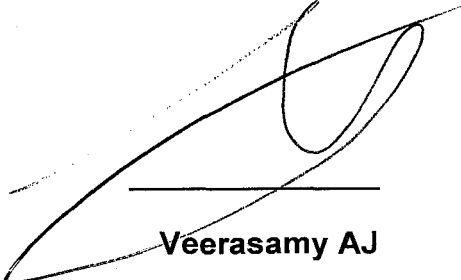
[57] The First Exception was successful. Having received the exception, the plaintiff amended its particulars of claim by way of delivery of the amended pages on 26 November 2023 in order to address the compliant raised by the first defendant. The Second Exception has been unsuccessful for the reasons set out above.

[58] By virtue of the fact that each party has enjoyed some measure of success in this matter the equitable result is that there should be no order as to costs.

The Order

[59] In the circumstances I make the following order:

- a) The first defendant's second exception is dismissed;
- b) Each party shall pay their own costs.



Veerasamy AJ

APPEARANCES

DATE OF HEARING:

7 NOVEMBER 2023

DATE OF JUDGMENT:

26 JANUARY 2023

COUNSEL FOR EXCIPIENT

(FIRST DEFENDANT):

MR A GOTZ SC

NIKHIEL DEEPLAL

INSTRUCTED BY:

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INSTRUCTED BY:

MILLAR AND REARDON

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- 1 Particulars of claim para 5.
 - 2 Particulars of claim para 7
 - 3 Particulars of claim para 7
 - 4 Particulars of claim para 9
 - 5 Particulars of claim para 11
 - 6 Particulars of claim para 12(a)
 - 7 Particulars of claim para 13 read with para 14
 - 8 Particulars of claim para 15
 - 9 Particulars of claim para 17
 - 10 Exception para 8
 - 11 Exception para 10
 - 12 Section 232 of the Constitution.
 - 13 Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) BCLR 329 (CC) para 5
 - 14 Kaunda and Others v President of the Republic of South Africa 2005 (4) SA 235 (CC) para 145
 - 15 Minister of Home Affairs v Rahim and Others 2016 (3) SA 218 (CC) para 27
 - 16 Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC); para 145
 - 17 S v Coetzee 1997 (3) SA 527 (CC) para 159
 - 18 Schreiber v Canada (Attorney General) [1998] 1 SCR 841
 - 19 Id, para 42
 - 20 Id, para 45
 - 21 Id, para 47
 - 22 Id, para 80
 - 23 Federal Republic of Nigeria v Ogbonna UKEAT/0585/10
 - 24 Id, para 24
 - 25 Al-Masarir v Kingdom of Saudi Arabia [2022] EWHC 2199

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- ²⁶ Id, para 25
- ²⁷ Particulars of claim paras 18(b) and 19(a)
- ²⁸ Motladile v Minister of Police (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023), para 17
- ²⁹ Id, para 24
- ³⁰ Santam Versekeringsmaatskappy Bpk v Kruger [1978] 4 All SA 199 (A) p 202 - 203
- ³¹ Id, p 202 - 203
- ³² De Klerk v Minister of Police 2021 (4) SA 585 (CC) para 128
- ³³ Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Limited 2018 (3) SA 405 (SCA), para 9
- ³⁴ Living Hands (Pty) Ltd v Ditz 2013 (2) SA 368 (GSJ)p374G.
- ³⁵ Al-Masarir supra fn25, paras 75 - 80
- ³⁶ Geuking v President of the Republic of South Africa and Others; 2003 (3) SA 34 (CC), para 9
- ³⁷ See generally: Director of Public Prosecutions: Cape of Good Hope v Robinson 2005 (4) SA 1 (CC)
- ³⁸ Particulars of claim para 19
- ³⁹ Minister of Safety and Security N.O. and Another v Schubach (437/13) [2014] ZASCA 216 (1 December 2014), para 21