

SOUTH AFRICA / JUDGMENT

J.S v Minister of Police (892/2020) [2021] ZAECGHC 29 (18 March 2021)

[2021] ZAECGHC 29**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

892/2020

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, GRAHAMSTOWN)****CASE****NO: 892/2020****Date****heard: 11 March 2021****Date****delivered: 18****March 2021****In**

the matter between:

J[...]

S[...]

Plaintiff

and

MINISTER OF

POLICE

Defendant

/ Excipient

JUDGMENT

LOWE, J:

INTRODUCTION

- [1] Plaintiff has instituted action against Defendant claiming damages on the basis of a claim for unlawful arrest on 4 February 2020 and subsequent detention until 6 February 2020.
- [2] Plaintiff was a minor at the time and has pleaded considerable detail in the factual allegations as to why it is alleged that the arrest and detention was unlawful.
- [3] Defendant gave notice of exception hereto on the basis that the particulars of claim lacked averments to sustain the cause of action alternatively were vague and embarrassing, in terms of Rule 23(1).
- [4] In due course as Plaintiff did not amend her particulars of claim, Defendant filed a notice of exception. It would seem that in the main this persisted with the stance that the particulars of claim did not make out a cause of action though referring occasionally to an allegation as being vague and embarrassing.
- [5] In due course the exception came before me for argument and determination.

THE EXCEPTION

- [6] In argument Mrs Molony for Defendant quite correctly accepted that the Particulars most certainly disclose a cause of action but persisted in the argument

that at least part of paragraphs 11.1 to 11.13 of the particulars of claim were vague and embarrassing, impossible to plead to and in instances confusing.

- [7] Paragraph 11 of the particulars of claim plead as follows:

“11. In effecting the said wrongful and unlawful arrest and detention of the Plaintiff, the aforesaid Police Officials:

11.1 invoked the power to arrest for a purpose not contemplated by legislature, and

11.2 invoked the power to arrest, to frighten and harass the Plaintiff, by punishing her through arrest and detention, and

11.3 invoked the power to arrest for an ulterior purpose, and

11.4 arrested the Plaintiff without ever considering any explanation or statement from the Plaintiff, setting out her innocence in connection with the alleged crime, and

11.5 acted without taking into consideration the facts conveyed to them by the Plaintiff at the time of her arrest, and

11.6 acted without critically analysing any information at their disposal, before arresting the Plaintiff, and

11.7 acted in a way which ignored the Plaintiff's Constitutional rights as enshrined in the Bill of Rights and the Constitution, and contrary to the presumption of innocence of the Plaintiff, and

11.8 acted without exercising a discretion to arrest in a fair and balanced manner, and

11.9 failed to exercise their discretion properly in that the Plaintiff should never have been arrested and detained at all, had the relevant Police Official/s taken due account of all of the above circumstances, and

11.10 acted in arresting and detaining the Plaintiff in circumstances where there was no urgency to arrest her, and

11.11 failed to consider when detaining the Plaintiff, whether the Plaintiff is a flight risk, poses a danger to society, will interfere with the investigation and will stand trial, and

11.12 failed to consider Section 28 of the Constitution, and in particular that the Plaintiff, as a minor, her best interests are of paramount importance, and

11.13 failed to consider and comply with the Child Justice Act, 75 of 2008, specifically Section 20 thereof."

[8] Arrest and detention are in fact separate legal processes, one may be lawful and the other not and vice versa[1]. Such an arrest must now be both statutorily and constitutionally justified[2].

[9] Both causes rest in the actio iniuriarum and rest on the wrongful deprivation of liberty. The improper use of the legal process to affect the liberty of a person involves, in instances, malicious prosecution liability hinging on malice (intention to injure) and no reasonable and probable cause.

[10] It is in essence the argument put up in the exception that paragraphs 11.1 to 11.7 in essence allege mala fides on the part of the arresting officials which impacts also on the remainder of paragraph 11.

[11] It is important to note that as an arrest or detention is prima facie wrongful it is unnecessary to plead or prove same, it being for Defendant to allege and prove the lawfulness thereof.

[12] It is however necessary to plead and prove the unlawfulness of an arrest, if the jurisdictional factors were present therefor, but it is argued that the discretion to arrest was wrongly exercised.

[13] This must also be seen in the context that Plaintiff was a minor at the time, and detention of a child is a measure of last resort as per Section 28(1)(g) of the Constitution.

[14] In *MR v Minister of Safety & Security* [3] the Constitutional Court held that even where the provision of Section 40(1) of the Criminal Procedure Act are present, the arrest indicated “may”, not “must”, be made as the officers have a discretion to arrest on consideration of the prevailing circumstances, a fact specific enquiry and a discretionary decision.

[15] Whilst it was not necessary to plead the unlawfulness of the detention, this being prima facie wrongful, the onus falling on Defendant to justify same, once the usual jurisdictional grounds therefor are established, the enquiry

necessarily goes to whether the arrest was “necessary” as the right to arrest is not peremptory. It is however necessary to plead the latter issue as appears hereafter.

[16] In this matter it is alleged that the arrest itself was unlawful but further that the discretion to arrest was improperly exercised

especially as Plaintiff was a minor.

[17] In my view, whilst Plaintiff went much further than was required in her pleadings in respect of the discretionary issue, this is not such as in each instance to create prejudice to Defendant in the sense referred to hereafter.

THE APPROACH TO EXCEPTIONS AS A PLEADING BEING VAGUE AND EMBARRASSING

[18] In essence an exception that a pleading is vague and embarrassing, as in this matter, goes to lack of detail and lucidity such as to embarrass the pleader thereto. This is a question of degree[4].

[19] If taken on exception, as opposed to Rule 30, the exception can succeed only when the vagueness strikes at the root of the cause of action pleaded, requiring serious prejudice to the other party[5].

[20] The exception must go to the whole cause of action such as to be vague and embarrassing – some defect or incompleteness[6].

[21] It must strike at the formulation of the cause of action not legal validity[7].

[22] Serious prejudice must be demonstrated as to the difficulty in pleading thereto.

[23] In *Erasmus*[8] it is put thus:

“The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows:

- (a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest: the reader must be unable to distill from the statement a clear, single meaning.

- (b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of.
- (c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.
- (d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.
- (e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.
- (f) The excipient must make out his case for embarrassment by reference to the pleadings alone.
- (g) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness."

THIS MATTER

- [24] The cause of action pleaded is clearly an unlawful arrest and unlawful detention based on prima facie wrongfulness and in addition the failure to properly apply the discretion to arrest as set out more fully above.
- [25] The distinction is that there is no need to plead the unlawfulness of an arrest and detention, which is assumed. However the allegation that the arrest was exercised in the absence of the proper application of the discretion or for an ulterior purpose or that this was exercised mala fide or with malicious intent, causes the onus to shift to Plaintiff in this regard.
- [26] From the authorities it is clear that an arrest must be based on the intention to bring the person to justice, thus for a purpose contemplated by the legislature. To arrest, when the jurisdictional requirements are satisfied, but for an ulterior purpose, is unlawful[9].
- [27] There is in this a distinction to be drawn between the object to arrest and the motive of the arrestor. The traditional common law grounds of review are used to test the legality of the exercise of the discretion to arrest[10].
- [28] Once the jurisdictional factors are satisfied it is for Plaintiff to plead and prove that the discretion was exercised in an improper manner[11], and Plaintiff bears the onus in respect of such latter issue.

[29] The particulars of claim and exception must be viewed in this context.

[30] Having carefully considered the exception itself, and Defendant's arguments as set out therein and in argument, it seems to me that the purpose of paragraph 11 of the particulars of claim was to address the second issue referred to above, that is to raise the issue that the discretion to arrest was not properly exercised, the arresting officer not being obliged to affect the arrest, despite the jurisdictional factors being present.

[31] In my view, whilst widely pleaded, and probably beyond that absolutely necessary, the central theme, in paragraph 11, is the cause of action based on the improper exercise of the discretion, should it be found that the prior jurisdictional factors were in fact present, meeting the presumption of unlawfulness.

[32] In my view, judged against the overriding cause of action as discussed above the pleading evokes no prejudice or embarrassment in the sense required.

[33] The exception must accordingly be dismissed with costs.

ORDER

[34] In the result, the following order will issue:

1. The exception is dismissed.
2. Defendant is to pay Plaintiff's costs of the exception.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearances

Obo Plaintiff:

Adv W H Olivier

Instructed by:

CJ Bouwer Attorneys

c/o Wheeldon Rushmere & Cole Attorneys, Grahamstown

Obo Defendant/Excipient:

Adv N Molony

Whitesides Attorneys, Grahamstown

[1] Raduvha v Minister of Safety and Security and Another 2016 (2) SACR 540 (CC), [39].

[2] Raduvha (supra)

[3] 2016 (2) SACR 540 (CC).

- [4] Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008
- (4) SA 639 (C).
- [5] Meechan and Another v VGA Chartered Accountants Partnership t/a PKF (VGA) Chartered Accountants [2020] 2 All SA 510 (GJ).
- [6] Venter (supra) at 644A
- [7] Venter (supra) at 643I – 644A.
- [8] D1-299 to 300.
- [9] Minister of Safety & Security v Sekhoto & Another 2011
- (5) SA 367 (SCA) [28] – [44].
- [10] Sekhoto (supra)
- [28] – [47].
- [11] Sekhoto (supra)
- [45] – [53]; MR (supra).
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