

IN THE HIGH COURT OF SOUTH AFRICA
(TRANVAAL PROVINCIAL DIVISION)

27/05/2011

CASE NO: 16355/94

CASE No: 22112/03

In the matter between
DR. M. D. MAARTENS
And
MINISTER OF SAFETY AND SECURITY
COMMISSIONER OF SOUTH AFRICAN POLICE
MINISTER OF JUSTICE
DIRECTOR OF PUBLIC PROSECUTIONS
LIEUTENANT
JACO JOHANNES GIDEON NEL N.O.
MR. P.J.P VAN STADEN

DEFENDANT
1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT
7TH DEFENDANT

PLAINTIFF

DATE: 2011/05/27
SIGNATURE: [Signature]

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

JUDGMENT

MAVUNDLA. J.,

[1] The plaintiff has instituted an action against the defendants claiming payment of an amount of R1 245 000, 00 in respect of alleged damages he suffered as the result of alleged unlawful arrest and detention.

[2] In his particulars of claim the plaintiff has alleged that on 8 February 1994 he was unlawfully and wrongfully arrested by the third defendant, who acted in the course and scope of his employment with the first defendant. He further alleges that the arrest took place notwithstanding the fact that before he could hand himself at Potchefstroom, he had given written indication that he did not want to make any statement. He further alleged that the members of the first defendant had well aware of the fact that there were no charges against him and that he was going to exercise his right of silence acted unlawfully in locking him up on 17 February 2000.

[3] The plaintiff had issued summons against the defendants under two separate actions under case number 22112/2003 and 16355/1994. These cases were per agreement between the parties consolidated per order of Bertelsman J on 28 March 2007. The costs of that consolidation order were made costs in the cause.

- [4] The matter was set down for hearing on 18 April 2007. It was agreed between the parties that the matter be postponed *sine die* and that only costs be argued. The issue essentially was who was to bear the costs of the postponement.
- [5] With regard to the first case the claim is in respect of unlawful arrest and detention. In respect of the second case it is in respect of unlawful arrest and detention and unlawful prosecution between 1994 to 2000. The matter was set down for hearing on 25 April 2005. The matter was postponed and costs were reserved.
- [6] It is common cause that during the pre-trial held on 24 August 2005 the plaintiff indicated that he intended to amend his particulars of claim to change the date of the 18 February to 18 August in paragraph 17 of particulars of claim. It is also common cause that the defendants, two days before the trial had raised 8 points in *limine*. The consequence of the intended amendment and the points in *limine* resulted in the matter having to be postponed.

[7] It is well so, that a point *in limine* may be raised at any stage during the trial. Equally so, a party can amend his particulars of claim at any time before judgment is given, and such can be granted provided there is no prejudice to the other party that cannot be cured by a costs order. There is no reason why the defendants did not raise the points in *limine* well in advance so as to allow the plaintiff to be better prepared for the trial. Equally so, there is no reason why the plaintiff did not amend its particulars of claim well in advance so as to enable the defendants to be better prepared for the trial. In so far as the postponement of the 25 April 2005 is concerned, I am of the view that both parties are equally to blame. I am also of the view that it is fair in the circumstances that each party should bear its own costs occasioned by the postponement of the 25 April 2004.

[8] It is common cause that the plaintiff amended his particulars of claim on 4 November 2005 as already indicated herein above. On 20 April 2006 the matter was set down for hearing on 18 April 2007. On 14 March 2007 the defendants filed a notice of

intention to amend its plea by raising a special plea that the plaintiff has not complied with the provisions of section 32, Act 7 of 1958, or Police Service Act, Act 68 of 1995 and or Act 40 of 2002.

[9] On the 2 April 2007 the first second and fifth defendants filed yet another notice of intention to amend their plea to further plead that:

- (a) In the event the court finds that Act of South African Police Service, Act 68 of 1995 are applicable on the plaintiff's claim against the first, second and fifth defendants, the plaintiff was obliged to comply with the provisions of s57 of Act 68 of 1995;
- (b) The plaintiff has failed to comply with the provisions of s57 of Act 68 of 1995 in that the plaintiff has failed to:
 - (i) serve a notice upon the first, second and third defendants;
 - (ii) institute an action within a year of his discharge against the first, second and fifth defendants;

- (iii) allege in his particulars of claim that he has complied with the provisions of s57 of the Act;
- (iv) institute an action within a year of his discharge on 18 August 2000 and his claim has consequentially prescribed.

[10] In my view, there is no reason at all why the defendants did not effect the amendments indicated in the last two previous paragraphs much earlier. The plaintiffs were entitled to prepare adequately for the trial. The belated amendments of the defendants' plea must, in my view, have prejudiced the plaintiff in preparing for trial. However, the plaintiff is not entitled to the costs of the matter having had to be postponed on the 18 August 2005.

[11] There had been consolidation of matters under case number 16355/94 and case no: 22112/03, which were to be tried jointly. The plaintiff had not as yet furnished his response to the seventh defendant's request for further particulars for trial. He

also had not as yet discovered his financial statements, nor filed expert notices to substantiate his damages claim.

[12] In my view, it would serve no purpose to try to engage in arithmetic gymnastic to determine the degrees of blame of the respective parties for the matter not having been trial ready and who must pay the other party's portion of costs occasioned by the postponement. I am of the view that it is fair in the circumstances of this case that each party should pay its own costs occasioned by the postponement.

[13] In the premises, I make the following order:

1. That each party to pay its own costs occasioned by the postponement of 25 April 2005 and 18 April 2007.


N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 27/05/2011
APPLICANT'S ATT : VAN HUYSSTEN & KRIEL INC
APPLICANT'S ADV : MR. J.S. STONE
RESPONDENTS' ATT : STATE ATTORNEY
RESPONDENTS' ADV : MR. A. PIETERSE