



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

In the matter between:
(PLAINTIFFS)

CASE NO:

<u>SHIRLEY ELIZE BOY</u>	<u>4732/2019</u>
MANTHABELENG AGNESIA MPELE	4733/2019
ABRAM SEKALELI	4734/2019
PHUMELA PETROS LEBONA	4735/2019
KHOTSO JULIUS NYATI	4736/2019
TSHOKOLO JOHN MOTHEBE	4737/2019
MALUSI AARON BUYAPHI	4858/2019
LINEO AGNES MOFANA	4859/2019

and

MINISTER OF POLICE

(DEFENDANT)

CORAM: MOLITSOANE, J

HEARD ON: 06 DECEMBER 2022

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 22 May 2023

- [1] The eight claimants instituted separate actions for alleged unlawful arrest and detention against the defendant. The claims of the claimants were consolidated and heard as one. The plaintiffs' cases were closed and the defendant has launched an application for absolution from the instance.
- [2] The application is premised on the following: In the particulars of claim, the plaintiffs pleaded that their arrest followed from the conduct of the employees of the defendant who acted negligently in arresting them. Simply put, the contention by the defendant is that the plaintiffs failed to prove that the employees of the SAPS acted negligently and /or such negligence resulted in unlawful arrests and detention.
- [3] At the commencement of the proceedings, there was a dispute about the duty to begin. The contention of the plaintiffs was that in cases of unlawful arrest and detention, once the arrest was conceded, as in this case, the onus shifted to the defendant to justify the arrest and consequently, the burden of proof having shifted, the duty to begin fell on the defendant.
- [4] The defendant, on the other hand agreed with the contention of the plaintiffs as a general proposition. It was, however, submitted on behalf of the defendant that the plaintiffs' case was premised on negligence, and but for this, had the plaintiffs pleaded their cases in a conventional manner, that is, without basing it on alleged negligent conduct of the employees of the defendant, which conducted preceded the arrest and detention, then in that case, the duty to begin would have befallen the defendants.

[5] Having listened to the submissions I ordered as follows:

- a) That the duty to begin was on the plaintiffs;
- b) That the plaintiffs bore the burden of proving negligence as pleaded;
- c) That the plaintiffs bore the onus to prove malice as pleaded;
- d) That whereas the defendant bore the onus of proving the lawfulness of the arrest, [in view of the admission of the arrest in the pleas] the plaintiffs carry the burden to prove that the arresting officers failed to exercise their discretion to arrest reasonably.

[6] In arriving at the conclusion for the above order, this court was guided by the pleaded cases of the plaintiffs. The different cases of the plaintiffs were pleaded in the particulars of claim in essentially the same way, except for things like personal particulars, the arrest date, the detention, and ultimately the release of each claimant.

[7] For the sake of a discussion in this case, I will use the case of the first claimant, to wit, Shirley Elize Boy to demonstrate the reason for the orders. It is trite law that the test for absolution from the instance is not whether the evidence led by the plaintiff established what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably could or might find for the plaintiff.¹

[8] At this stage of the pleadings issues of credibility are not adjudicated upon unless it has been established that the evidence of the witness(s) constituted what is not true.

¹ See *Claud Neon Lights (SA) Ltd v Daniel*.

[10] The purpose of pleading is to define the issues so as to enable the other party to know what case he has to meet. While a pleader's first duty is to allege the facts upon which he relies, his second duty is to plead the conclusions of law which he claims follow from the pleaded facts. The parties are limited to their pleadings.'

[9] What has precipitated an order that the plaintiffs had a duty to begin as well as this application for absolution from the instance is the manner in which the claimants pleaded their case. The purpose of pleadings is to define the issues between the parties and crystallise the facts in dispute. The Court in *Hanger v Regal and Another*² said the following:

"[9] In order to avert absolution, therefore, a plaintiff needs to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim², since without such evidence no court could find for the plaintiff. The material facts upon which a plaintiff relies in support of its claim must be set out in the particulars of claim in a 'clear and concise statement. 'In other words:

' The plaintiff must...state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in Court and tender evidence to disprove the plaintiff's allegations.'

[10] In *Trope v South African Reserve Bank*³, the Court said the following:

² 2015(3)SA 115(FB).

³ 1992(3) SA 208(T) at 210G-J.

“It is, of course, a basic principle that the particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations ...”

[11] The Plaintiffs have pleaded their cases as follows:

“3.1 On or about 17th January 2018, the Plaintiff was unlawfully and wrongfully arrested by the employees of the defendant, members of SAPS, at or near Welkom on the charges of Kidnapping, Human Trafficking, and other charges, where after she was detained at Welkom Police Station for about two days before appearing in court around the 20th of January 2018. The Plaintiff was arrested without warrant notwithstanding her plea that she didn’t commit any offence.

3.2. The Plaintiff was thereafter unlawful detained at Welkom police station at the instance of the said arresting officers for two days and later transferred to Kroonstad correctional centre where she was unlawfully detained for more than twenty-eight (28) days.

3.3. ...

3.4. ...

3.5.

4. The Plaintiff’s arrest was unlawful on the following grounds:

- 4.1. The employees of the Defendant did not have the reasonable grounds to arrest her,
- 4.2. They didn't appreciate that they had the discretion to arrest or not to arrest her without a warrant arrest,
- 4.3. They neglected, refused, and /or failed to exercise the aforesaid discretion, alternatively to exercise it properly,
- 4.4. They acted negligently (my emphasis) by relying on the third parties suspicion that Plaintiff was involved in the commission of Human Trafficking, Kidnapping, Money laundering, and other charges.
- 4.5. They neglected, refused, and or /failed to investigate or scrutinize the information they received from the third party which led to the arrest of the Plaintiff.
- 4.6. It is clear that the Defendant's employee's suspicion was not reasonable and it was not based on the solid ground as required by the law.
- 4.7. They arrested Plaintiff arbitrarily and without just cause.

5. ...

6. ...

7. ...

8. ...

9. In-and-as a result of the said negligence, Plaintiff was unlawfully arrested and unlawfully (my emphasis) detained for a period of more than 28 days. She suffered damages in the total amount of

R1 000 000 (One million Rand) for unlawful arrest and unlawful detention, being damages for *inter alia*, pain and suffering, discomfort, humiliation, past loss of earnings, degradation and contumelia.

- [12] It is clear from the above that the plaintiffs complicated the issues for themselves when they pleaded negligence of the employees of the defendant. An arrest or detention is *prima facie* wrongful and there was no need for the plaintiffs to plead in the manner that they did. The fact that they had pleaded that “*in and as a result of the ...negligence, Plaintiff was unlawfully arrested and unlawfully detained*” required that they lead the evidence first, in order to prove their allegation of negligence. This also implies that according to the plaintiffs, the unlawful arrest and subsequent unlawful detention was a sequel to some other negligent conduct of the employees of the defendant which needed to be proven first.
- [13] That the cause of action is founded on unlawful arrest and detention cannot be disputed. It is also important to bear in mind that in an application for absolution from the instance the test as indicated above is not whether the evidence led by the plaintiff would finally be required to be established but simply whether there is evidence upon which a court applying its mind reasonably to such evidence could find or might find in favour of the plaintiff.
- [14] The testimony of the Plaintiffs was geared at individually trying to show that they could not have been involved in human trafficking. On the other hand, cross-examination of the plaintiffs was geared at establishing that individual plaintiffs were part and parcel of the alleged human trafficking on the premises of their employer.

- [15] The court is obliged to look at the overall evidence in the adjudication of whether the plaintiffs have established a prima facie case. The case for the plaintiffs is in broad outline that they were employees of one Mr Rune. He had employed them in various capacities in his different businesses around Matjhabeng Municipality. Most of them were Lesotho citizens. It does not appear that they had work permits to work in South Africa. Looking at their different work in isolation could easily give an impression that they were innocent workers just earning honest living. It is for this reason that they assert that they were 'arrested arbitrarily and without a just cause'.
- [16] In the Rule 37 conference meeting minutes the parties agreed “*that the documents in the trial bundle shall be what they purport to be without admitting necessarily to the correctness of the contents thereof.*” It is submitted on behalf of the defendant that the Court is entitled to consider documentation in the bundle as referred to during evidence. While this might be so, the difficulty I have relates to the probative weight this court has to attach to the bundle in view of the rider that the correctness of the contents thereof is not necessarily admitted.
- [17] In my view these documents do little to advance the case of the defendant or that of the plaintiffs at this stage. The evidence gleaned from the affidavits and bail proceedings cannot translate into conclusive evidence. Further the version of the defendant as put to the witnesses is not evidence unless repeated under oath. In my view it cannot, notwithstanding, the manner in which the plaintiffs pleaded their cases be said that there is no evidence upon which this Court might or could find for the plaintiffs. The application can therefore not succeed. I accordingly order as follows:

Order

1. The application for absolution from the instance is refused;
2. The costs shall be costs in the cause.

P.E. MOLITSOANE,J

On behalf of the Plaintiffs:

Instructed by:

Adv J. Nkhahle

Kambi Attorneys

BLOEMFONTEIN

On behalf of the Second Respondent: Adv. G Wright

Instructed by:

The State Attorney

BLOEMFONTEIN