



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 23541/2018

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

22 March 2024

EJ Francis

NTOMBELA, BONGANI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

FRANCIS J

1. The plaintiff instituted an action for damages against the defendant (the Minister of Police) for unlawful arrest and detention, and sought R500 000.00 as damages which was later amended to R1 500.000.00. It is not his case that his arrest and detention was malicious.
2. The action was opposed by the defendant who raised a special plea namely that the plaintiff had failed to serve his notice of claim for unlawful arrest and detention on the Provincial Commissioner of the Province in which the cause of action arose as defined in section 1 of the South African Police Services Act 1995 (the Police Services Act), within 6 months from the date on which the debt became due or at all. Further that the plaintiff had failed to serve a copy of the summons and particulars of claim on the National and Provincial Commissioner of Police concerned and on the Head of the Department of the defendant. Further that the plaintiff had also failed to serve a copy of the summons and particulars of claim within 5 days on the office of the State Attorney, operating within the area of jurisdiction of the court from which the process was issued. By virtue of these facts, the plaintiff has not complied with one, more or all of the aforesaid requirements of the Institution of Legal Proceedings Act 40 of 2002 (Legal Proceedings Act) and the State Liability Act 20 of 1957 (the State Liability Act) and the action is therefore unenforceable against the defendant. The defendant sought an order dismissing the action. The defendant pleaded over and denied that the plaintiff's arrest and detention was wrongful and unlawful.
3. The plaintiff in his replication pleaded that the charges against him were withdrawn on 11 December 2017. Further that on 15 May 2018 he duly served the defendant per registered mail with the requisite section 3(2) notice in terms of the Legal Proceedings Act and there was therefore due compliance with the aforesaid Act. The plaintiff pleaded further that the remaining reference to compliance with the

State Liability Act were misconceived and denied. The defendant bears the onus to illustrate the applicability of the State Liability Act at that stage of the proceedings. The defendant appeared to be interpreting the aforesaid Acts incorrectly by adding additional requirements for the institution of legal proceedings against certain departments and/or organs of state. The applicability of the State Liability Act at that stage of the proceedings was premature, irrespective of whether the State Liability Act was applicable but there was compliance with the State Liability Act.

4. However on 16 May 2023, the plaintiff served an application for condonation seeking an order condoning his non-compliance with sections of the State Liability Act and Legal Proceedings Act. He sought an order dismissing the defendant's plea with costs on an attorney and client costs and costs of the application if it was opposed.
5. The condonation application was opposed by the defendant who raised the same issues that is contained in the special plea which is not necessary to repeat.
6. However at the commencement of the proceedings on 24 July 2023, the plaintiff withdrew his application for condonation and requested that costs be reserved. The defendant conceded the merits and indicated that the only issues that remained for determination was quantum and the special plea.
7. The plaintiff was the sole witness who testified at these proceedings. The court will first deal with the evidence led and then with the special plea.
8. The plaintiff testified that he was born on 1 January 1987 and was 29 years old at the time of his arrest and 30 years old when he was released. He was arrested around August/September 2016 and was released in November 2017. He was discharged in December 2017

when the charges against him were dropped in court. After his discharge, he returned to KwaZulu-Natal (KZN) where he remained. At the time of his arrest, he was working for a construction company. In May 2018 he decided to consult with his attorney to lodge a claim for the number of days that he had been in custody. He became aware in May 2018 of his right to lodge a claim against the defendant for damages. During the consultation his attorney had asked him how long he had been in custody and what had taken place. He told him what had taken place and that he had been in custody for more than a year namely about 14/15 months. He had been denied his right to freedom during that period. He had suffered great distress about his arrest and was shocked. It was very painful to him. He had lost everything that he had to make a living. Prison was not a nice place to live in and he was always distressed whilst he was in detention. He was detained at the Boksburg Police Station cells which were dirty. There were some gangsters/inmates in the cells. The food in the cells was not healthy. He was given food but he did not know how it had been cooked and he only received a dish there. The blankets were dirty with lice. There were about 50 inmates at the Boksburg cells. Some laid on top of the beds and the others on the floors. There was a toilet and sometimes when he used the toilet, the inmates would see what he was doing and there was no proper door. The material would be used as a door and other inmates would come in and see him. He was not feeling like a living human being. He was transferred from the Boksburg Police Station to the Boksburg Prison and remained there until his release. Whilst he was there he was abused twice by inmates. They used to beat him up and he would be abused on a day to day basis. They would beat him up to join a gang and if he did not join them they would call him a stupid and a useless human being. They would beat him with anything and at times with their hands and when he raised his hands they used takkies to beat him up. They would persuade him to join a prison gang. His private clothes were taken away and he was given jail clothing which was not clean. He would receive food twice a day. He would sometimes be offered blankets and

would sleep on the floor and when an inmate was released, he would sleep on the bed.

9. The plaintiff testified that he was working for a company that was dealing with cleaning appliances. After he was released he could not resume work since his finger prints were now dirty. It was a contract job. He is still not employed. He was arrested at a shopping mall at Mtubatuba in KZN. His arrest was witnessed by many people including some of his relatives. That was around 11h30/12h00. He felt very scared when he was arrested before many people.
10. During cross examination the plaintiff said that he went home in July 2016. He was not happy with the community that he was staying with in Vosloorus and that is why he went home. People were injured at a tavern in Vosloorus which caused him to go home. One night he was sitting with his friends at a tavern. There were also guys from KZN referred to as his home boys but he was not used to them. They set across their table and had also bought liquor. He agreed that he left for KZN because the community were looking for him but did not know why they were looking for him. Two policeman arrested him at Mtubatuba and told him that they would investigate the matter against him. He was taken to a police station close to Mtubatuba and the following day he was taken to Dawn Park. He was beaten by other inmates in the cell but he did not open a case against them. When asked why not, he said that when you are in detention you not sure what might happen in the cell especially when the police are not there. He never reported the incident and was scared and did not know how long he would remain in detention. Before he was arrested, he was working in Longdale at Home of Living Brand dealing with electrical appliances and was a contract worker. When he fled to Mtubatuba he was no longer safe and was unemployed. He did not see a psychologist about what happened in prison and was not afforded such a right. Even after he was released, he only consulted with his attorney and not a psychologist. When he slept on the floor, he would put the

blanket on the floor and sleep on it. There were beds. There were no mattresses on the floor. He would sometimes sleep on the floor and other times on the bed. He was granted free bail in November 2017 and was given a date for December 2017. The court told him that there was no case against him and that his matter was finalised.

11. During re-examination the plaintiff said after he was arrested he was taken to a police station near Mtubatuba. The conditions of the cells were worse and there was not even a space to sleep. He remained sitting throughout the night and was leaning against the wall. No blankets were provided and they were given tea with two slices.
12. During questioning by the court the plaintiff said that he went up to grade 12 in 2010 but had failed it. He was 22 years old and was still allowed to do his matric despite his age. He is unmarried with two children. When he was arrested his father was still alive and his mother passed away. They are more than 8 children.
13. The plaintiff amended his particulars of claim and sought compensation in the sum of R1 500.000.00. The defendant argued that should the special plea be dismissed that the plaintiff be awarded R500 000.00 compensation.
14. It is common cause that the plaintiff was wrongfully and unlawfully arrested and detained by employees of the defendant on 17 September 2016. He remained in custody until 14 November 2017 when he was released on bail. The charges against him were withdrawn in court on 11 December 2017. The issue about whether his claim has prescribed does not arise since the summons was issued and served on 27 June 2018 well within the 3-year prescriptive period.
15. It is not necessary for me to determine how much compensation the plaintiff should be awarded due to his failure to have applied for condonation. The plaintiff had been detained for about 425 days. The

compensation that would have been awarded to him will be far more than what the defendant had proposed.

16. The court will now proceed to deal with the special plea raised by the defendant.
17. The main issue that needs to be determined in the special plea is whether the notice of claim was served within six months on the Provincial Commissioner when the debt became due. The two other issues raised by the defendant in its special plea are without substance and need not be considered by this court.
18. The plaintiff before issuing a summons against the defendant had to comply with the provisions of section 3 and 4 of the Legal Proceedings Act. He is required to give notice in writing of his intention to institute legal proceedings against the defendant within six months from the date on which the debt became due in terms of section 3(2) of the Legal Proceedings Act and set out the facts giving rise to the debt and such particulars of such debt as are within the knowledge of the creditor. If he fails to give such notice he may apply to a court having jurisdiction for condonation for such failure. The court may grant condonation. The notice must be served on an organ of state by delivering it by hand or sending it by certified mail.
19. The plaintiff in his replication pleaded that the criminal charges against him were withdrawn on 11 December 2017. He had on 15 May 2018 served the defendant per registered mail with the requisite section 3(2) notice in terms of the Legal Proceedings Act and that there had been compliance with the aforesaid Act in that the notice was served within 6 months when the debt arose. The plaintiff persisted with this argument before this court hence the withdrawal of the application for condonation since according to him there was no need to apply for condonation.

20. The plaintiff's claim is not for malicious arrest and detention but for wrongful arrest and detention. Different considerations would apply in a claim for malicious arrest and detention.
21. As stated above the plaintiff had been wrongfully and unlawfully been arrested and detained by employees of the defendant on 16 September 2016 and was released on bail on 14 November 2017. Charges were withdrawn against him on 11 December 2017. He then consulted his attorneys in May 2018 who sent a registered letter on 15 May 2017. This is supported by the registered slip which bears a post office stamp dated 15 May 2017. The aforesaid letter was not hand delivered since there is no acknowledgment of receipt thereof.
22. The defendant in their opposing affidavit resisting the condonation application had stated that the aforesaid letter of demand was received on 3 August 2017. This was not disputed by the plaintiff who did not file a replying affidavit. The plaintiff did not indicate what reasonable steps he had taken to ensure that the notice was received by the defendant. He has not stated when it was received by the recipient.
23. Even if the notice was posted and received on 15 May 2017 (which is very doubtful) it was not served within six months when the debt arose. The debt in respect of his wrongful arrest arose on 16 September 2016 which was when he was arrested. His debt in respect of the wrongful detention arose on 16 September 2016 but continued until he was released on bail which was 14 November 2017.
24. The said section 3(2) notice should have been served within six months from date of his arrest and detention. He obviously could not serve it within six months whilst he was in custody. He is a lay person and was informed of his rights to do so when he consulted his attorney in May 2017. The Legal Proceedings Act makes provision for him to have applied for condonation which he initially brought and then withdrew.

25. I find it rather strange and mind boggling that the plaintiff withdrew his application for condonation since condonation would have been granted to him bearing in mind that he had been in custody for such a lengthy period and had given an explanation about when he became aware about his right to lodge a claim for damages as a result of his unlawful arrest and detention.
26. The special plea stands to be upheld.
27. I do not believe that this is a matter where costs should follow the result. An appropriate order would be that each party is to pay its own costs.
28. In the circumstances the following order is made:
- 28.1 The defendant's special appeal is upheld.
- 28.2 The plaintiff's claim for wrongful arrest and detention is dismissed as a result of his failure to have applied for condonation.
- 28.2 Each party is to pay its own costs.


FRANCIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

**FOR PLAINTIFF : D MOODLIYAR INSTRUCTED BY LEON JJ
VAN RENSBURG ATTORNEYS**

**FOR DEFENDANT : R E MAGONGWA INSTRUCTED BY STATE
ATTORNEY, JOHANNESBURG**

DATE OF HEARING : 24, 27 JULY 2023

DATE OF JUDGMENT : 22 MARCH 2024

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to caselines. The date and time for hand-down is deemed to be 10h00 on 22 March 2024.