IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. 2861/2018

In the matter between:

FRANS CHRISTIAN First Plaintiff

SINETHEMBA MJAKUCA Second Plaintiff

and

THE MINISTER OF POLICE First Defendant

RAYMOND MHLABA MUNICIPALITY Second Defendant

JUDGMENT - RECONSIDERATION OF COSTS ORDER

RUGUNANAN, J

[1] On 28 September 2021 this court handed down a judgment ("the judgment") in which the first defendant, the Minister of Police, was ordered to pay amounts of R70 000 and R60 000 respectively to the first and second plaintiffs for their unlawful arrest and detention together with costs.

[2] The costs order in the judgment was made prior to the disclosure of the Minister's tender that was delivered *"without prejudice of rights"* by notice to the attorneys for the second plaintiff on 7 May 2021. The intervening period until 10 May 2021 (the latter being the trial date), was a weekend. In effect the tender was made a day before trial.

[3] Due to the amount of damages awarded to the second plaintiff being equal to the amount as tendered by the Minister before commencement of the trial, the matter now comes before this court under the provisions of rule 34(11) and (12) for reconsideration of the costs order in favour of the second plaintiff only.

[4] The award of R60 000.00 to the second plaintiff was an unsuspecting consequence of the court's own assessment. It was based on a consideration of a series of prior awards to which the court was referred by counsel for the second plaintiff. The awards are itemised in paragraph [65] of the judgment in the form of an inflation adjusted listing, shifting from lowest to highest.

[5] In these proceedings the Minister essentially seeks a substitution of the costs order to the effect that the second plaintiff's taxed costs of suit only be paid up to and including 10 May 2021, and that the second plaintiff be directed to pay the Minister's taxed costs for 11, 12, and 13 May 2021, and 5 July 2021.

[6] The purpose of a tender under rule 34 is that it enables a defendant to avoid further litigation by ensuring early settlement and, failing that, to avoid liability for the costs of such litigation. Ordinarily the rule would cause the court to order the defendant to pay the plaintiff's costs incurred up to the date of the tender, and the plaintiff to pay the defendants costs thereafter.[1] This is not regarded as a necessary imperative that will be rigidly applied in all circumstances. The proviso to rule 34(12) makes it plain that the court's ultimate discretion remains unaffected (see *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at paragraph [14]).

[7] Relevant to the reconsideration proceedings it is deemed inexpedient to repeat the arguments and legal principles cited by counsel. The founding affidavit to the application censures the second plaintiff for proceeding to trial

[1] The so-called 'usual practice'; see *Mntwaphi v Road Accident Fund*, unreported Case No 701/2017 ECHCPE, 16 February 2017 at paragraph [8]

at his own risk because the damages awarded to him (for his arrest and detention) did not exceed the amount indicated in the tender.

[8] Although the award to the second plaintiff fell within the monetary jurisdictional ceiling of the magistrates' court, the motivation for granting the costs order in the judgment is attributed to the Minister's disinclination to have conceded liability for the arrest and detention when it was opportune to have done so several weeks before the commencement of the trial – this in the light of the fact that the Minister had known for some time before its commencement that the arresting officer had long been deceased. Rather than make this concession and deal directly with the *quantum* issue on the arrest and detention, a hapless defence was mounted to justify the arrest and detention on the ostensible supposition that it was authorised by a court order.

[9] In my view the aforegoing considerations serve as weighty justification for exercising a judicial discretion as a departure from the usual practice.

[10] In heads of argument counsel for the Minister submitted that:

> *"[The Minister] was not in a position to concede liability of the second plaintiff's first claim in circumstances in which the second plaintiff pursued it primarily on the basis of a malicious arrest and detention and, only in the alternative, an unlawful arrest and detention. A concession of liability based on maliciousness, has significant consequences in relation to quantum, other consequences to the officers involved and would have inevitably had an impact on the second claim for malicious prosecution …"*

[11] My point of departure with this submission is that it blinks at the formulation of the tender which is worded in the following terms:

"TAKE NOTICE that payment of the amount of R120 000 (one hundred and twenty thousand rand) is offered in full and final settlement of the plaintiffs' claim one (R60 000,00 to each plaintiff)."

[12] Claim one is pleaded in the particulars of claim as follows:

"CLAIM ONE: MALICIOUS, ALTERNATIVELY, WRONGFUL AND UNLAWFUL ARREST AND DETENTION

9. On Wednesday the 14th of February 2018 and at Adelaide, the plaintiffs were maliciously, alternatively, wrongfully and unlawfully arrested, without a warrant, by members of the South African Police Service, on a charge of contravention of court order."

[13] Claim one has been compositely pleaded. Indubitably, a literal or sensible meaning of the tender conveys that its scope incorporates what is pleaded. The argument that the Minister could not concede liability for the malicious arrest is discordant with the expressed intention of the tender. This is indicative by its language in the light of the ordinary rules of grammar and syntax (see *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph [18]*). To uphold the argument would be tantamount to this court fashioning a tender in terms that were not exactly contemplated.

[14] By attempting to lay emphasis on the *significant consequences in relation to quantum*, the extract quoted from counsel's heads of argument seeks to differentiate the claims for malicious arrest and detention, and unlawful arrest and detention. The argument purports to exclude the former claim from the scope of the tender to rationalise the reluctance to have conceded liability at an earlier stage short on a few weeks before trial.

[15] From the beginning, the particulars of claim did not make a clear distinction between these claims. They were unsatisfactorily formulated. The judgment

was at pains to point out that, in law, the claims are uniquely distinct; they ought to have been separately pleaded, and not pleaded as one claim (see paragraphs [22]-[24] of the judgment). In that respect, the particulars of claim are a classic exemplar for triggering an exception. If this had been dealt with at the earliest opportunity, a tender down the line would most certainly, and inevitably, have been formulated to accord with the exclusion now contended for. In formulating the tender this distinction was not grasped; and those responsible, clearly intended for it to be in full and final settlement of *claim one*, however ineptly it has been pleaded.

[16] My inevitable point of departure with these proceedings is that the tender made no distinction between the claims - on the one hand, for a malicious arrest and detention - and on the other, for an unlawful arrest and detention. In that regard, I am not persuaded in my discretion to depart from the manner and reasoning employed in dealing with the costs issue in the judgment.

[17] In the result it is ordered that:

"The application is dismissed with costs."

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Dates heard: 02 December 2021

Date delivered: 29 March 2022

Appearances:

For the Second Plaintiff: Adv. M Du Toit

Instructed by:	DOLD & STONE INC. 10 African Street Makhanda / Grahamstown (Ref: Mrs Wolmarans) Tel: 046-622 2348 Email: morilee@doldandstone.co.za
For the First Defendant:	Adv. K. L. Watt
Instructed by:	WHITESIDES ATTORNEYS 53 African Street Makhanda / Grahamstown (Ref: Ms. Asmal) Tel: 046-622 7117 Email: conveyancing@whitesides.co.za pa1@whitesides.co.za