

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NOS: 4144/2020, 1124/2019, 3806/2021, 4143/2020, 80/2021, 4342/2020

In the matters between:

LUCAS BISHA	PLAINTIFF
NTOMBIKHONA ZIKALALA	PLAINTIFF
KHOLISWA STUNGWA	PLAINTIFF
SANELE MLAMBO	PLAINTIFF
CEBO RASHALALA	PLAINTIFF
NKOSITHETHILE MAFA	PLAINTIFF

and

MINISTER OF POLICE	DEFENDANT
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JUDGMENT

BROOKS J:

[1] On 12 April 2021 the Judge President issued a directive (the directive) in the following terms:

DIRECTIONS GOVERNING THE SETTING DOWN OF UNDEFENDED

UNLIQUIDATED CLAIMS FOR DAMAGES

WHEREAS rule 31(2)(a) of the Uniform Rules of Court makes provision for the grant of judgment by default against a defendant in a claim that is not for a debt or liquidated demand, after hearing evidence;

WHEREAS a proper assessment of an appropriate award in undefended actions in which unliquidated damages are claimed can properly be made after hearing oral evidence;

WHEREAS motion proceedings are not suited to the prosecution of claims for unliquidated damages; and

WHEREAS a proper invocation of rule 31(2)(a) has resulted in default judgment applications wherein there is a need to lead oral evidence being removed from the motion court roll,

NOW, THEREFORE:

1. Default judgment applications in which unliquidated damages are claimed shall, by arrangement with the Registrar at each one of the Centres in this Division, be set down for hearing on a daily trial roll during the first two weeks and the last two weeks of each term.
2. The –
 - 2.1 Joint Rules of Practice for the Eastern Cape High Court;
 - 2.2 Directions for the Management of the High Court, Eastern Cape During the National State of Disaster dated 12 May 2020; and
 - 2.3 Case Flow Management Practice Directive dated 25 February 2019,

shall, with necessary adaptations, apply to the setting down of the default judgment applications.

[2] The six matters before this court are all applications for judgment by default against the Minister of Police (the defendant) in which unliquidated damages are claimed. Notwithstanding the promulgation by the Judge President of the directive two weeks earlier, on 28 April 2021 these matters appeared on the roll in a motion court in Mthatha over which the Judge President presided. He issued a composite order in respect thereof and in the following terms:

“1. The default judgment applications shall, in terms of section 14(1)(a) of the Superior Courts Act 10 of 2013¹, be heard by a full court of this division constituted for purposes of determining the propriety or otherwise of setting down claims of this nature in motion court and any issue ancillary thereto.

¹The section reads as follows: “Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.”

2. The full court shall sit on Friday, 18 June 2021 at 09h30.
3. Further directions determining the future conduct of these matters shall be issued in due course.
4. The costs of 28 April 2021 shall stand over for determination by the full court.”

[3] Acting in accordance with the order issued by the Judge President, this court convened a case flow management meeting with the legal representatives who had appeared in these matters on 28 April 2021. Pursuant thereto, on 12 May 2021 a case flow management directive was issued in the following terms:

“1. The parties have agreed that case no 4144/2020 Lucas Bisha v Minister of Police will proceed and the parties in all other matters have agreed to abide by the decision in that matter.

2. The plaintiff is to file heads of argument on or before 25 May 2021.

3. The defendant is to file heads of argument on or before 8 June 2021.

Legal practitioners to file and email their heads of argument to the judges’ secretaries...”

[4] In supplementary heads of argument prepared by Mr *Pienaar* SC and Mr *Mapoma*, who appeared on behalf of the defendant, the legality of the directive received specific attention. The court was referred to *Rossitter and Others v Nedbank Ltd*² in which the Supreme Court of Appeal stated³ that a practice manual or a directive duly promulgated by the Judge President of a Division of the High Court has the same force and effect as the Uniform Rules of Court.⁴ In addition, the power of a Judge President to issue directives pertaining to his or her Division is recognised in the provisions of rule 37A(1) of the Uniform Rules of Court.⁵

[5] When called upon to indicate what the plaintiffs’ attitude was towards the directive, Mr *Matotie*, who appeared on their behalf, indicated that there was no challenge to the legality of the directive, which was accepted, and that the only issue to be determined by the court was whether its content was applicable to the matters

²(96/2014) [2015] ZASCA 196 (1 December 2015).

³ Par [15].

⁴ The Supreme Court of Appeal relied upon a judgment by Alkema J in *National Pride Trading 425 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at paragraph [31]. The judgment of the full bench in *Harmony Caterers (Pty) Ltd v Ford* 2002 (5) SA 536 (WLD) sets out the history of the statutory power of a Judge President to make rules for his or her particular Division.

⁵The sub-rule reads as follows: “(1) A judicial case management system shall apply, at any stage, after a notice of intention to defend is filed – (a) To such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive; and (b) To any other proceedings in which judicial case management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate.”

before the court. The concession was well advised. The statutory authority of a Judge President to issue directives in respect of the management of cases in his or her Division, and the status of such directives, is well established. Furthermore, section 173 of the Constitution⁶ gives the High Court the inherent power to protect and regulate its own process, taking into account the interests of justice. It is clear from a reading of the directive that its purpose is to facilitate and regulate in an orderly manner the right of access to court.

[6] In essence, the argument advanced on behalf of the plaintiffs in justification of the enrolment of the applications for default judgment in the motion court subsequent to the issue of the directive is as follows. They are to be distinguished from other applications for default judgment to which the provisions of the directive would be applicable (for example applications for default judgment against the Road Accident Fund). The reason for the distinction is identified as flowing from the cause of action, the fact that each plaintiff claims an unliquidated amount as damages because he or she was arrested unlawfully, without a warrant of arrest having first been issued, by members of the South African Police Service (the SAPS) who were on duty at the time and acted within the course and scope of their employment with the defendant. In such circumstances, in terms of the provisions of section 2 of the State Liability Act⁷ the defendant is vicariously liable for the wrongdoing of members of the SAPS and will be liable for the payment of such damages as each plaintiff may prove on a balance of probabilities. Whilst it is accepted that the plaintiffs bear the *onus* of establishing the nature and extent of the damages they have suffered, the argument advanced is that where a plaintiff alleges that he or she has been unlawfully arrested by members of the SAPS, the defendant bears the *onus* of establishing that the arrest was lawful. This is because an arrest is *prima facie* unlawful. Where an arrest occurs without a warrant, the defendant must be able to establish that it was lawful, for example by establishing that the arrest was conducted in circumstances envisaged in section 40 (1) (b) of the Criminal Procedure Act.⁸ Where the defendant is in default of filing a notice of intention to defend the matter and there is no plea that raises a factual and legal basis in justification of the arrest without a warrant, so the argument goes, the plaintiffs need do no more than place the matter on the motion court roll, placing reliance on the fact that the *prima facie* unlawfulness of the arrest is not displaced by any justification pleaded on behalf of the defendant and therefore entitling the plaintiffs to seek judgment in circumstances where they are unaffected by the provisions of the directive.

⁶ Constitution of the Republic of South Africa 1996.

⁷ Act 20 of 1975.

⁸ Act 51 of 1977.

[7] There is a fundamental flaw in the argument advanced on behalf of the plaintiffs. All the authorities that the court was referred to in support of the fact that the defendant bears the *onus* of proving the lawfulness of an arrest which occurred in circumstances without the prior issue of a warrant of arrest are distinguishable from the matters before the court. In all the authorities that the court was referred to, the statement that the defendant “bears the *onus* of proof” is made against the background of a set of pleadings in which the defendant has filed a plea in response to the plaintiffs’ particulars of claim. In each instance, the fact of the arrest relied upon by the plaintiffs was admitted by the defendant. This relieved the plaintiffs of the burden of proving the arrest. It also introduced a factual basis upon which the defendant was then expected to justify the arrest without a warrant in order to avoid liability for any damages claimed by the plaintiffs. In circumstances where the arrest without a warrant is admitted by the defendant, it is trite that the defendant bears the *onus* of proof relied upon by the plaintiffs in the matters before the court. See, for example, *Zealand v Minister of Justice and Constitutional Development and Another*⁹

[8] In a judgment in which he and the other members of the full court concurred in the judgment of Mhlantla JA in the Supreme Court of Appeal¹⁰ Harms DP stated:¹¹

“The right to dignity and freedom and security of the person are core values of the Constitution and any arrest and detention of a person amounts to a *prima facie* infringement of these rights. Our common law adopted the same approach and it is for this reason that the police, if challenged, have to justify an arrest and detention. This means that the police bear the onus of proving that the arrest and detention are not wrongful.

The onus can arise only after the issue itself has arisen. The aggrieved person must claim that a particular arrest or detention was wrongful before the police are saddled with this onus.”

[9] The *dicta* of Harms DP cited in the preceding paragraph perhaps beg the question as to when the issue of arrest can be said to have “arisen” before a court that is to evaluate a claim for damages based upon an unlawful arrest.

[10] The answer to the question posed in the preceding paragraph involves a twofold enquiry. The first element relates to the appropriate manner in which a claim for damages based upon an unlawful arrest is to be presented. The second element relates to the appropriate manner in which such a claim is formulated.

⁹ 2008 (4) SA 458 (CC) paras [24] and [25].

¹⁰ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 SCA.

¹¹ Pars [20] and [21].

[11] Would it be appropriate to present such a claim in motion proceedings? The nature of motion proceedings has been restated¹² in the following terms:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.”

[12] It is trite that a decision whether to proceed by way of action or by way of motion proceedings is informed by the extent to which a material dispute of fact can be anticipated by the party launching the proceedings. When a *bona fide* dispute of fact is anticipated an action should be instituted.¹³ By its very nature, a claim for damages based upon an unlawful arrest involves inevitable disputes of fact. Accordingly, it is not appropriate to present such a claim in motion proceedings.¹⁴

[13] The element of the enquiry relating to the manner in which such a claim is to be formulated is addressed in the following statement by Theron J¹⁵(footnotes omitted):

“A delict comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote. When the harm in question is a violation of a personality interest caused by intentional conduct, then the person who suffered the harm must institute the *actio iniuriarum* (action for non-patrimonial damages) to claim compensation for the non-patrimonial harm suffered. The harm that the applicant complains of in respect of his detention is the deprivation of his liberty – a significant personality interest. He alleges that it was his wrongful arrest that caused the harm (namely, the detention before and after his court appearance).

A claim under the *actio iniuriarum* for unlawful arrest and detention has specific requirements:

- (a) The plaintiff must establish that their liberty has been interfered with;
- (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;
- (c) the deprivation of liberty must be wrongful, with the *onus* falling on the defendant to show why it is not; and

¹²*National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) par [26].

¹³*Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd* 1949 (3) SA 1155 (T) at 1161.

¹⁴ See, for example, *Malema v Rawula* (139/2020) [2021] ZASCA 88 (23 June 2021) par [29].

¹⁵*De Klerk v Minister of Police* 2020 (1) SACR 1 (CC) pars [13] and [14].

- (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.”

[14] The institution of an *actio iniuriarum* is achieved by the issue of a combined summons in which the material facts that establish the specific requirements of the action are set out clearly in the particulars of claim. This is the procedure which has been adopted by the plaintiffs in the matters which serve before this court.

[15] In its crudest form, a summary of the argument presented on behalf of the plaintiffs can be stated as being that the mere presentation of a combined summons which includes particulars of claim in which the fact of the occurrence of an unlawful arrest is pleaded is sufficient to establish that fact. In other words, upon the mere presentation of an allegation of an unlawful arrest the issue of the wrongfulness thereof can be said to have “arisen”. A determination of whether or not there is merit in this approach lies at the heart of the inquiry before the court.

[16] It is a well-established principle that once a fact alleged in the particulars of claim has been admitted in the defendant’s plea, it is eliminated from the issues to be tried, and the plaintiff is relieved of the duty of bringing evidence to establish it.¹⁶

[17] In the absence of an admission contained in a plea, the plaintiff has a duty to bring evidence to establish the facts upon which reliance is placed for the relief sought in the particulars of claim.

[18] In order for a plaintiff to succeed in his or her claim, the *facta probanda* (the facts which must be proved in order to disclose the cause of action) must be alleged in the particulars of claim. The following definition of “cause of action” was accepted by the Appellate Division in *McKenzie v Farmers’ Cooperative Meat Industries Ltd*:¹⁷

“every fact it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

[19] It follows that the *facta probanda* are the material facts which a party must prove in order to succeed in a civil action. In the absence of an admission on the part

¹⁶ *Taylor v Budd* 1932 AD 326; *Gordon v Tarnow* 1947 (3) SA 525 (A); *Van Deventer v De Villiers* 1953 (4) SA 72 (C) at 75; Section 15 of the Civil Proceedings Evidence Act 25 of 1965.

¹⁷ 1922 AD 16 at 23.

of the defendant, the *facta probanda* can only be proven by way of placing acceptable evidence before the court. In action proceedings such as those instituted by the plaintiffs, such evidence ordinarily should be *viva voce* evidence. Only once acceptable evidence has been given by the plaintiffs to establish their identity and the facts and circumstances pertaining to their arrest without a warrant can the issue of the wrongfulness thereof be said to have “arisen” before the court. Only then can the *onus* upon the defendant to establish that the arrest was not wrongful arise.

[20] It follows from the analysis of the various legal principles set out in this judgment that the applications for default judgment presented by the plaintiffs are no different from any other applications for default judgment which contain claims for unliquidated damages. They fall squarely into the provisions of rule 31 (2) (a) of the Uniform Rules of Court. Judgment can only be granted in favour of the plaintiffs after the court has heard appropriate evidence. Accordingly, they fall squarely into the category of applications for default judgment targeted by the Judge President in the directive.

[21] In their quest to avoid the impact of the directive it is of no assistance to the plaintiffs to introduce applications for the separation of the issues relating to the merits of the actions from the issues relating to the *quantum* of their unliquidated damages. Such applications are based upon the provisions of rule 33 (4) of the Uniform Rules of Court.¹⁸ The aim would be to seek an order which has the effect of isolating the issues relating to the *quantum* of the plaintiffs’ claims and postponing them to the civil trial roll for determination after appropriate evidence has been led *inter alia* from the plaintiffs. The hope would be that the remaining issues relating to the merits of the plaintiffs’ claims would then be disposed of by way of the applications for default judgment in motion court. This approach is without merit. The court has a wide discretion under the sub-rule which is to be exercised judicially with due consideration for what would be convenient.¹⁹ The sub-rule contemplates a procedure which is aimed at facilitating the convenient and expeditious disposal of litigation.²⁰ If an order of separation were to be granted, it would result in the postponement of that part of the proceedings relating to the *quantum* of the damages claimed. Inevitably, this would result in a delay before finality in the litigation is

¹⁸ The rule provides as follows:

“If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court on the application of any party shall make such order unless it appears that the questions cannot conveniently be decided separately.”

¹⁹ *Vermeulen v Phoenix Assurance Co Ltd* 1967 (2) SA 694 (O) at 697A-B.

²⁰ *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O); *Dowson and Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 C at 420E.

achieved. It would also result in an increase in the costs of the litigation. It would also result in the plaintiffs having to appear twice in court, once to give evidence relating to the fact and circumstances of the arrest without a warrant with which they were visited and on a subsequent occasion in order to give evidence relating to the non-patrimonial damages which they allege flowed from the arrest. There would be an inevitable duplication in the evidence required of the plaintiffs because the personal circumstances of the plaintiffs and the circumstances in which the arrest occurred are relevant also to the assessment of an appropriate award of damages. It is highly unlikely that a court would be persuaded that the factors of delay in the finalisation of the litigation, the increase in costs thereof and the duplication of evidence to be led from the plaintiffs are factors demonstrative of “the convenient and expeditious disposal” of the litigation. Even if I am wrong in this assessment, an order granted under rule 33 (4) of the Uniform Rules of Court in no way obviates the need for the plaintiffs to place appropriate evidence before the court to prove the occurrence and circumstances of the arrest. The need to lead oral evidence remains and the applications for default judgment would still fall within the category referred to in the directive.

[22] A final argument advanced on behalf of the plaintiffs as a means to avoid the impact of the directive on their applications for default judgment is the submission that it is open to the plaintiffs to place the necessary evidence relating to their identity and the circumstances surrounding the occurrence of the arrest in an affidavit, thereby avoiding the need to appear and give *viva voce* evidence and removing the matters from the category referred to in the directive. Reliance for the permissibility of such an approach was placed upon an unreported judgment in this court in the matter of *Minister of Police v Lusindiso Nongwejane*.²¹ The specific paragraph relied upon²² reads as follows:

“Normally the *quantum* of damages should be established by oral evidence, but in special circumstances the court may accept evidence on affidavit.²³ Neither the content of the particulars of claim nor the content of the brief affidavit filed in support of the application for default judgment disclose special circumstances which would justify the acceptance of evidence on affidavit.”

However, one might read the passage from the judgment cited above it provides no support or authority for the alternative argument advanced on behalf of the plaintiffs. That argument contends for the ability of a plaintiff to establish the merits of his or her *actio iniuriarum* by placing an affidavit before court in support of an application for judgment by default. Not only is such an approach not supported by the authority cited, and the authority therein cited in turn, but it is in direct conflict with all the legal principles discussed in this judgment in conjunction with the enquiry as to the

²¹(CA&R 63/2015) (24 November 2015)

²² Par [14]

²³*New Zealand Insurance Co Ltd v Du Toit* 1965 (4) SA 136 (T).

appropriate manner in which to proceed with a claim for unliquidated damages that is based upon an unlawful arrest.

[23] In all the circumstances, the conclusion reached by the court is that it is inappropriate to set down applications for default judgment in motion court where the claims are based upon unlawful arrest and detention and seek the recovery of unliquidated damages. The directive is applicable to such applications.

[24] There having been no adjudication upon the merits or the *quantum* of any of the matters before the court, it would be appropriate to order that they simply be removed from the roll. The further conduct thereof shall be guided by the provisions set out in the directive.

[25] The fact that no order will be made on the merits or *quantum* of the applications for default judgment before the court is relevant to the consideration of an appropriate costs order. In essence, the decision reached by the court carries the necessary implication that the plaintiffs were wrong in setting down their applications for judgment by default on the motion court roll for 28 April 2021. They did so notwithstanding the clear provisions of the directive. An examination of the court files reveals that in some instances, prior to the promulgation of the directive, the plaintiffs had presented applications for judgment by default in motion courts held on earlier dates. These were prompted by the failure on the part of the defendant to enter an appearance to defend the actions. They were met in court by a legal representative of the defendant who struck an agreement that the applications for default judgment be withdrawn with the defendant to pay the costs thereof. An order reflecting the terms of the agreement was then obtained. One can assume with safety that the underlying objective was stated to be the intention to file a notice of appearance to defend. For reasons not apparent on the material before this court, this intention was not fulfilled. This in turn led to the drafting of fresh applications for judgment by default and their presentation, ultimately, on the motion court roll of 28 April 2021. The pattern is all too familiar. Central thereto would appear to be an almost consistent failure on the part of the defendant to furnish the State Attorney with timeous and appropriate instructions subsequent to service upon those offices of summonses in which claims of this nature are set out. The frustration felt by those representing the plaintiffs, who in turn want their matters to be handled expeditiously to their conclusion, is obvious.

[26] When due consideration is given to all the factors referred to in the preceding paragraph of this judgment, the most appropriate approach would appear to be that

no order is made in respect of the costs occasioned by the conduct of the proceedings before this court or those before the Judge President on 28 April 2021.

[27] The following order will issue:

1. The applications for default judgment are removed from the roll.
2. No order for costs is made in respect of these proceedings or the costs that were reserved on 28 April 2021.

R W N BROOKS

JUDGE OF THE HIGH COURT

DAWOOD J:

I agree.

F B A DAWOOD

JUDGE OF THE HIGH COURT

TOKOTA J:

I agree.

B R TOKOTA

JUDGE OF THE HIGH COURT

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Date heard : **18 June 2021**

Date delivered : **13 July 2021**