

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

Case no. 2889/2016

Date heard: 13/06/18

Date delivered: 31/07/18

Reportable

In the matter between:

THANDEKILE NELSON SABISA

1st Plaintiff

LAWRENCE NZIMENI MAMBILA

2nd Plaintiff

and

MINISTER OF POLICE

Defendant

RULING IN TERMS OF RULE 39 (11)

NHLANGULELA DJP

[1] The purpose of this judgment is to answer the question whether a duty to begin to lead evidence at the trial lies with the plaintiff or the defendant. That issue arose out of a pleaded defence that the plaintiff's arrest and detention was not unlawful where a warrant of arrest had been used to effect the arrest. In turn, on the application by the plaintiff acting in terms of Rule 39(11) of the Rules of this Court, the court was asked to give a ruling on that issue.

[2] The provisions of Rule 39 (11) are couched in the following terms:

“Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice.”

[3] The phrase “onus of adducing evidence” that is used in sub-rules 39 (11), (13) and (14) is not the same as the phrase “burden of proof” used in Rule 39 (5) of the Rules of this court. Whereas the latter phrase is referred to as the onus of proof in the ordinary/primary sense, the former is not. In ‘The South African law of Evidence, 2nd Edition, the authors state at 168, correctly so in my view, that:

“In a criminal trial, the prosecution always has the right (or duty) to begin. The position in a civil trial is governed by the Rules of court. Rule 39 (11) of the High Court provides that “[e]ither party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence”. That ruling is subject to the proviso that it may be altered subsequently, “to prevent injustice”. It also goes on to provide in Rule 39 (13) that where the onus of adducing evidence on any issue is on the defendant, the plaintiff shall first call his evidence on any issue “in respect of which the onus is upon him, and may then close his case. If absolution from the instance is not granted it is then incumbent on the defendant to call evidence on all issues in which the onus is on him. In terms of Rule 39 (14), the plaintiff has the right to call rebutting evidence on any issue in which the onus was on the defendant. The meaning of this rule is obscured by the fact that the word “*onus*” is sometimes used to signify the onus in its true and original sense (the legal burden) and sometimes to signify the duty to adduce evidence in order to avoid certain procedural consequences. Rule 39 (11) has been

interpreted by GJ Claassen J in *Intramed (Pty) Ltd v Standard Bank of South Africa* 2004 (6) SA 252 (W) at 255 G-H:

‘Upon a mere reading of Rule 39 (11) it seems abundantly clear to me that the term onus of adducing evidence’ has two meanings. It refers firstly to the duty to commence leading evidence but secondly to the incident of the onus of proof. This construction of the subrule follows logically from the provisio to the subrule.’

The second meaning is a subject of discussion in this matter.

[4] The case of *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) gives a broad conception of what the term “onus of adducing evidence really is. The following is stated at 711:

“The general principle governing the determination of the incidence of *onus* is the *Corpus Iuris: semper necessitas probandi incumbit illi qui agit* (D. 22.3.21). In other words he who seeks a remedy must prove the grounds therefor. There is, however, also another rule, namely, *ei incumbit probatio qui dicit non qui negat*. (D22.3.2.) That is to say the party who alleges, or as it is sometimes stated, the party who makes the positive allegation, must prove. (cf. *Kriegler v Minister and Another* 1949 (4) SA 821 (AD) at p. 828). Together with these two rules must be read the following principle, namely: *agere etiam is videtur, qui exceptione utitur nam reus in exceptione actor est*, (D. 44.1.1). This principle is stated thus by DAVIS, A.J.A, in *Pillay v Krishna and Another*, 1946 AD 946 at p. 952:

‘where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded, quoad that defence, as being the claimant; for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.’”

[5] As already indicated, in this case the defendant has set up a special defence that the arrest and detention was authorised by a lawful warrant. The defendant avers that the arrest and detention of the plaintiff was not unlawful, but lawful. In relation to the special defence the defendant is regarded as the claimant who must satisfy the Court that it is entitled to succeed on it.

[6] The reading of the particulars of claim of the plaintiff, together with the defendant’s plea, illustrate the point that the defendant has raised a claim that the arrest and detention were lawful. The particulars of claim read as follows:

“ 5.
When arresting the Plaintiff the aforesaid Police members:-

- 6.1 were on duty and acting within the course and scope of their employment with the Defendant;
- 6.2 did not have any valid or justifiable reason to arrest and detain the Plaintiff;
- 6.3 did not have any grounds to suspect that the Plaintiff had committed an offence that justified his arrest and detention;
- 6.5 did not produce any warrant for the arrest of the Plaintiff and did not have any justification for executing a warrant of arrest on the Plaintiff, even if one was available...”

[7] In the plea, the defendant avers that:

“2. **AD PARAGRAPHS 4 THEREOF:**

The allegations made in this paragraph are denied. The defendant pleads that plaintiff was lawfully arrested on 18 April 2016 with a valid warrant of arrest.

“3. **AD PARAGRAPH 5 THEREOF:**

3.1 Save to admit that the members of the South African Police Service who arrested the plaintiff were on duty and acting within the course and scope of their employment with the defendant the remainder of the allegations made in this paragraph are denied.

3.2 The defendant pleads that:

- a) Plaintiff was lawfully arrested on 18 April 2016 with a valid warrant of arrest;
- b) The warrant of arrest was produced and shown to the plaintiff; and
- c) The members of the South African Police Services were justified in executing the warrant of arrest.”

[8] With regard to the issue of arrest, the upshot of the pleadings as aforementioned is that the plaintiff found the legal basis for his claim on unlawful arrest and detention. In turn, the defendant’s defence is predicated on the lawfulness of arrest and detention. That the arrest and detention occurred is admitted by the defendant. The plaintiff alleges in paragraph 5.4 of his particulars of claim that even if reliance is placed on a warrant of arrest justificatory grounds for executing it must still be given by the defendant. And it is trite law that the particulars of claim and defence as set out in the pleadings do not constitute the evidence, but are the material facts relied upon in support of a claim and defence; the object of the pleadings being

to define the issued to as to enable the other party to know what case he has to meet. See *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-E.

[9] I can find no objectionable matter in the manner in which both parties have pleaded their claim and defence respectively. To that extent the contention made on behalf of the plaintiff that the particulars of claim established arrest and detention as being a cause of action in a correct one. In the realm of the *Mechin* case *supra*, the plaintiff is the *onus* bearing party for the case pleaded by him in the ordinary / primary / original sense of that term. It is defendant who pleads a legal justification in a form of a lawful and valid warrant of arrest. Nothing detracts from that pleading regardless of the absence of a replication to the pleaded defence. On those bases the plaintiff could only adduce evidence to prove that he was arrested and detained by the police, but for the defendant's admission of those allegations it may be inconvenient, if not unnecessary, for the plaintiff to step into the witness box only to state facts that are already common cause between the parties.

[10] The authorities which support the legal principle that arrest and detention is *prima facie* wrongful and unlawful are legion. See, *inter alia*, the *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) 587 – 589. Further, this Court has stated in *Mhaga v Minister of Safety and Security* 2001 (2) All SA 534 (Tk) that once arrest and detention are admitted the onus of proving lawfulness of arrest rests with the State.

[11] It was argued strenuously on behalf of the defendant that the plaintiffs cannot be excused from a duty to begin to lead evidence because he agreed to do so in paragraph 8 of the Rule 37 Conference Minute. In support of this argument reference was made to the *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another* 2010 (4) SA 122 (SCA), which is the authority for the proposition that a settlement agreement incorporated in a Rule 37 Minute disposing of the merits of the case was binding and enforceable in law unless special circumstances

exist to permit one of the parties to resile from the agreement . Paragraph 8 in question reads:

**“8. DISPUTES REGARDING THE DUTY TO
BEGIN OR THE ONUS OF PROOF: RULE 37
(6) (g):**

8.1 The parties agreed that there is no dispute regarding the duty to begin, the plaintiff bears duty to begin and overall onus during trial in respect of liability and quantum; however

8.1.1 it was further agreed that in view of admission of Plaintiff’s arrest by the Defendant and/or on behalf of its members, the evidential burden shall shift to the Defendant to justify the arrest and detention in so far as it is admitted.”

[12] The contents of paragraph 8 of the minute evidence awareness by both parties that the evidential burden on the issue of lawfulness of arrest and detention “shall shift to the defendant.” Therefore, paragraph 8 of the settlement agreement is reconcilable with the general principles referred to in the *Mechin* case, *supra*. Consequently, there is no merit in the argument that the plaintiff is resiling from the terms of paragraph 8.

[13] It was also submitted on behalf of the defendant that the particulars of plaintiffs claim disclosed three causes of action namely: (i) arrest and detention; (ii) defective warrant of arrest; and (iii) unjustified execution of a warrant of arrest. I do not agree. I can only read one cause in this manner. That is, the plaintiff’s claim for payment of damages is predicted on wrongful or unlawful arrest and detention. This comes out clearly if one has regard to the particulars of claim, and read as a whole.

[14] Had it been appreciated that the plaintiff's case is based on one cause of action, wrongful/unlawful arrest and detention, which is fully encapsulated in the plaintiff's particulars of claim there would have been no need for the argument that the defence that the arrest and detention were lawfully executed in terms of a lawful warrant of arrest as raised in the plea warranted an averment in the particulars of claim or in a replication that the warrant was irregular. On those considerations the issue of whether the special defence raised is a partial or complete defence in nature would not have detained the Court in a protracted argument as that issue has a bearing on evidence to be adduced in support of that defence and a final determination by the Court against the *conspectus* of the entire evidence. Most importantly, what ought to be appreciated with regard to the onus to begin to adduce evidence is that the ruling to be made therein has nothing to do with a decision on the merits of the case that have to be determined at the trial.

[15] In so far as it became necessary for arguments to be entertained based on the heads of arguments filed, the costs structure has to be that which is applicable in the opposed motion court.

[16] In the result the ruling is made as follows:

- a) The defendant shall begin to adduce evidence at the trial.
- b) The defendant to pay costs incurred in the hearing of arguments on a scale applicable in the opposed motion court.

Z.M. NHLANGULELA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
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