

IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA  
NORTH GAUTENG, PRETORIA

Case number 50509/11

in the matter between

6/2/2013

LOINICE LINDEN ~~DELETE WHICHEVER IS NOT APPLICABLE~~ Plaintiff

and

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

4/02/2013  
DATE

SIGNATURE

MINISTER OF POLICE

First Defendant

MINISTER OF FINANCE

Second Defendant

THE SOUTH AFRICAN REVENUE SERVICES

Third Defendant

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JUDGMENT

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BAM AJ

1. The plaintiff issued summons against the defendant's, claiming monetary damages in the amount of R743 520, with interest *a tempore morae* and costs. The said amount included general damages of R700 000 and special damages for past and future medical expenses of R43 520. (The claim against the second defendant was withdrawn on 13:03:2012.)
2. The third defendant filed a Notice of Exception against the plaintiff's Particulars of Claim. After an amendment to the particulars was affected by the plaintiff, the third defendant again filed a Notice of Exception in terms of Rule 23(1), dated 13 March 2012, against the plaintiff's amended pleadings.

3. In her particulars of claim plaintiff averred that she suffered damages as a result of the conduct of certain officers in the employment of third defendant after her arrival on the OR Tambo Airport from Sao Paolo. It was stated by plaintiff that she was badly treated by the said officers, who apparently suspected her of smuggling narcotics. The plaintiff further averred that she was so treated because she was a black woman. I deem it unnecessary, for the purposes of this judgment, to repeat the specific allegations in regards to how the plaintiff was treated, as it appears in paragraph 13 of her particulars of claim.

4. In paragraph 14 of the particulars the plaintiff stated:

*"In the premises, the officers' conduct was wrongful at common law and in breach of her rights in terms of ss 9, 10, 12, 14, 21 and 33 of the Constitution."*

5. Section 9 of the Constitution entrenches the right to *Equality*; section 10 with *Human dignity*; section 12 with *Freedom and security of the person*; section 14 with *Privacy*; section 21 with *Freedom of movement and residence*; and sec 33 with *Just administrative action*.

6. The reference to the sections of the Constitution seems to be the third respondent's main concern. In this regard it was contended by mr Berger SC, appearing on behalf of the third respondent, that the applicant's claim for damages is based on an alleged infringement of her constitutional rights and her common law rights, without stating what is actually claimed under each. Mr Berger further submitted that a plaintiff can only seek damages available at common law and not additional damages if it is said that constitutional rights were also violated. Basing his argument on the case of *Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)* par [67], mr Berger submitted that our law does not, in such circumstances, recognize a claim for damages for a violation of a constitutional right where adequate damages, for the same conduct, could be awarded at common law.

7. In the *Fose* case the plaintiff sued the Minister of Safety and Security for damages arising out of a series of assaults (Claims B1 and B2). In his particulars of claim the plaintiff alleged the following.

*Fose* par [12].

*"15. The conduct referred to in paras 9 and 11 above constitutes an infringement of the plaintiff's fundamental rights as enshrined and entrenched in chap 3 of the Constitution of the Republic of South Africa Act 200 of 1993, as amended, more particularly the plaintiff's right to:*

*15.1 human dignity (s10);*

*15.2 freedom and security of the person (s 11(1) and 11(2);*

*15.3 privacy (s 13); and*

*15.4 (Not to) be arrested and detained (except) in accordance with the provisions of ss 25(1) and 25(2) of the Constitution.*

In par [13] of *Fose* the following is stated:

*"For claims 'B1' and 'B2' damages in a total amount of R130 000 are claimed, comprising R50 000 for pain and suffering, R50 000 for loss of enjoyment of the amenities of life and shock, R10 000 for contumelia and R20 000 as special damages in respect of past and future medical expenses. Claim 'C' is pertinently limited to recovering 'constitutional damages' in the sum of R200 000 which amount is stated to include 'an element of punitive damages'. Such damages are being sought in consequence of the same events and conduct which found claims 'B1' and 'B2' but only in respect of the infringement of plaintiff's sec 3 rights as detailed in par 15 of the particulars of claim. In claim 'C' plaintiff is therefore limiting his relief to the recovery of specific damages over and above those to which he would be entitled at common law in consequence of the aforementioned events and conduct. These additional damages are characterized by plaintiff as 'constitutional damages' which include 'an element of punitive damages'. (My underlining.)*

In paragraphs [66] and [68] the following is stated.

*"[66] In the present case the Court is confronted with the narrow issue of whether, in addition to the damages which the plaintiff has pleaded claims 'B1' and 'B2', he is entitled to any further constitutional damages which, on the plaintiff's argument, would include an amount for the vindication of the infringed rights in question and for punitive damages."*

*"[67] In the present case there can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question, requiring no further vindication by way of an additional award of constitutional damages."*

8. The applicant's contention is, as submitted by mr Trengove SC, who appeared on behalf of the applicant with ms Fourie, that the plaintiff is not claiming to be separately compensated for wrongs at common law and the infringement of her constitutional rights. What the plaintiff seeks, according to mr Trengove, is "*vindication of both the common law wrong she suffered and the violation of her constitutional rights*", and "*but the remedy she claims, is expressly limited to an award of damages at common law ...*"
9. It does not appear from the plaintiff's particulars of claim that she is seeking further "*vindication by way of an additional award of constitutional damages*" for the averred infringement of her constitutional rights. The fact that the plaintiff alleged in her pleadings that the officer's conduct also infringed her constitutional rights, does not, in my view, mean that she envisaged to be compensated additionally to the compensation she seeks in terms of the common law for the wrongs done to her. The drafting of the plaintiff's particulars of claim in that regard, in my opinion, does not offend against the law stated in the *Fose* case, alluded to above.
10. I could find no reason to say that the plaintiff was not entitled, or justified, in law, to aver in her particulars of claim that her constitutional rights were also infringed. Accordingly the third respondent's exception that the plaintiff's particulars of claim are vague and embarrassing is unsubstantiated.

#### ORDER

THE THIRD RESPONDENT'S EXCEPTION AGAINST THE PLAINTIFF'S PARTICULARS OF CLAIM IS DISMISSED WITH COSTS, INCLUDING THE COSTS OF TWO COUNSEL.

  
A J BAM ACTING JUDGE OF THE HIGH COURT  
4 February 2013