

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1071/2003

In the matter between:

HUBRECHT WILLEM STEENBERGEN FIRST PLAINTIFF
ZACHARIAS JOHANNES CILLIERS SECOND PLAINTIFF
JACOBUS JOHANNES ALBERTUS HILLS THIRD PLAINTIFF
GABRIEL JOHANNES DE BEER FOURTH PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY DEFENDANT

CORAM: RAMPAL J

HEARD ON: 22 OCTOBER 2004

JUDGMENT: RAMPAL J

DELIVERED ON: 17 FEBRUARY 2005

[1] The matter came before me by way of an exception. The case was initiated by way of action proceedings. Four disgruntled men collaborated to sue a national cabinet

minister. Of the four plaintiffs three were police officers stationed at Frankfort. The fourth co-plaintiff was a municipal employee of the same town. The defendant was the cabinet minister responsible for safety and security.

[2] The composite summons contained two claims in respect of each of the four plaintiffs. The cause of action in respect of the first claim of each plaintiff is unlawful arrest. The cause of action in respect of the second claim of each plaintiff is the publication of defamatory statements. I shall deal with the situation of the first plaintiff. It is representative of the situation of each and every plaintiff involved in this matter.

[3] The defendant took an exception to the composite summons. The defendant excepted to each of the first claims but to none of the second claims. The ground of the exception was that the aforesaid pleading, in other words the summons, was vague and embarrassing. The thrust of the exception is that none of the plaintiff avers the material facts upon which he relies in support of the conclusion that his arrest was unlawful as was his subsequent detention.

[4] The first claim of the first plaintiff is particularised or formulated as follows in the summons:

4.1 “1.1 Eerste eiser is **HUBRECHT WILLEM**

STEENBERGER 'n volwasse man en offisier in die diens van die **SUID-AFRIKAANSE POLISIEDIENS**, FRANKFORT, met die rand van Superintendent woonagtig te hoek van Beckwith-en Willelaan, FRANKFORT, Vrystaat Provinsie.”

4.2 “2. Verweerder is die **MINISTER VAN VEILIGHEID EN SEKURITEIT** IN SY AMPTELIKE HOEDANIGHEID VAN PER ADRES DIE Staatsprokureur, Fedlife gebou, St Andrewstraat, BLOEMFONTEIN, Vrystaat Provinsie.”

4.3 “3.1 Gedurende of ongeveer **April 2000** en te of naby FRANKFORT binne die jurisdiksiegebied van bogemelde Agbare Hof is die eisers onregmatiglik gearrester deur werknemers van die verweerder handelende in die bestek en binne die omvang van hul diensverhouding by die verweerder en onregmatig aangehou in die polisie-selle.”

4.4 “3.2 Eerste eiser is gearrester soos voormeld op **5 April 2002** en onregmatig aangehou tot en met **9 April 2002** op welke datum hy op borg vergelaat is.”

4.5 “5. As gevolg van die verweerder se werknemers se

voormelde optredes het eerste eiser skade gely in die bedrag van **R760,560.00** wat soos volg saamgestel en bereken word:

5.1 **R10,560.00** synde die koste deur eerste eiser aangegaan om hom teen die voormelde klagte en gepaardgaande Departementele ondersoeke te verdedig.

5.2 **R250,000.00** synde vir *contumelia*, vryheidsberowing en ongerief gely deur eerste eiser;

5.3 **R500,000.00** synde vir krenking van eerste eiser se eergevoel en aantasting van sy eer en waardigheid.”

4.6 “9. Eisers het voldoen aan die bepalings van artikel 57 van die Wet op die Suid-Afrikaanse Polisie diens, Wet nr 68 van 1995 en het op **18 Februarie 2003** per aangetekende pos kennis aan die verweerder gegee van die besonderhede aangaande die beweerde handeling of versuim soos voormeld en van die voorneme om sodanige regsgeding in te stel.”

4.7 “**10.1 EERSTE EISER:**

10.1.1 Betaling van die bedrag van **R760,560.00**

10.1.2 Rente op die voormelde bedrag bereken teen
15,5% *a tempore morae* per jaar.

10.1.3 Koste van die geding.”

[5] It will be noted that I have skipped paragraphs 4, 6, 7 and 8 of the declaration. It is not a mistake as the reader may think. These paragraphs have no bearing on claim one a delictual action based on unlawful arrest as simple logic dictates. They form part of claim two, a delictual action based on publication of defamatory statements. I painstakingly had to comb through the composite declaration to figure out which averments should be allocated to which claim. This is a task which a judge should never have to undertake. The pleader should never be allowed to put his adversary through such a cumbersome process.

[6] Rule 18(4) provides that, “every pleading shall contain a clear and concise statement of material facts upon which a pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularities to enable the opposite party to reply thereto”.

Let me bring the rule nearer home. It requires, in the context of this case, that every declaration by the plaintiff shall contain a clear and concise statement of material facts upon which the plaintiff relies for his action, with sufficient particularity to enable the defendant to reply to such a claim.

[7] The gravamen of the first claim is set out in paragraph 4.3 and paragraph 4.2 *supra*. The first plaintiff alleges that the defendant's employees unlawfully arrested him at Frankfort on 5 April 2002. He further alleges that following such arrest the defendant's employees unlawfully detained him in the police holding cells until 9 April 2002 on which date he was released from such detention on bail.

[8] In adjudicating the merits or demerits of an exception that the plaintiff's declaration is vague and embarrassing, I am bound to accept as true the factual allegations as particularised in the plaintiff's declaration annexed to this summons.

“When considering the validity of an exception to the particulars of claim on the basis that such particulars of claim do not disclose a cause of action, the proper judicial approach is that the allegations in such particulars of claim must be accepted as true. I am indeed urged to do so by the plaintiff in paragraph 8 of its written heads of argument where I am referred to *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E-F. This is indeed the correct legal position on which the plaintiff, the defendant and the *amicus curiae* are agreed. See also *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) at 754B-755B.”

Vide Mojaelo J in **CHRISTIAN LAWYERS’ ASSOCIATION v NATIONAL MINISTER OF HEALTH AND OTHERS** 2004 (10) BCLR 1086 (T) at 1096 D – E.

- [9] Therefore I accept for the purposes of dealing with the exception as taken, that the first plaintiff was arrested at Frankfort on 5 April 2002; that he was detained at Frankfort until 9 April 2002 and that he was released from detention on bail. These are some of the material allegations of fact necessary for the plaintiff to rely upon in support of his first

claim. But can they, alone and without more, support a claim that his arrest was unlawful? The answer is negative. Here the first plaintiff without making a concerted effort to give a systematic and adequate exposition of this claim by pleading the material facts upon which he relies for his claim merely declares (*vide* paragraph 3.1) that his arrest was unlawful as was his detention (*vide* paragraph 3.2). But he avers no material facts upon which the alleged unlawfulness of his arrest is based. Is the case still pending? Accepting the truth of the plaintiff's particulars, as I have to, inevitably means that the proceedings have not yet terminated. The first plaintiff is still on bail. Therefore this action is premature.

[10] The arrest of an individual has two legal dimensions. In the first place the arrest may be unlawful because it was effected without lawful justification. In the second place it may be unlawful because it was effected without a reasonable or probable cause. (THOMPSON AND ANOTHER v

MINISTER OF POLICE AND ANOTHER 1971 (1) SA 371 (ECD) at 373 E – J, per Eksteen J, as he then was, and the

authorities referred to thereat.)

There is an important distinction between two types of arrest. In delictual claims based on malicious arrest, the defendant is liable when he has deprived the plaintiff of his civil liberty without reasonable or probable cause. In this type of arrest, it is of paramount importance for the plaintiff to aver in his declaration and to prove at the hearing that the defendant was actuated by malice and no lawful motive to arrest the plaintiff.

In delictual claims based on wrongful arrest, however, the defendant is liable when he has restrained the plaintiff's civil liberty without lawful justification. Here the plaintiff is not by law required to allege in his declaration or to prove at the trial that the defendant acted with malice or want of probable cause.

- [11] These then are the two different delictual dimensions of an unlawful arrest. Each forms its own different and distinct cause of action with its own separate and peculiar defence.

It is essential for the plaintiff to make it clear in his declaration on which form of arrest or unlawfulness he will rely. Where a plaintiff's declaration does not clearly and concisely set out the *facta probanda*, that is the material facts as in the instant case which highlight a class of unlawfulness relative to the act of arrest complained of, then the claim is not adequately particularised. A summons with deficient particulars or declaration is a defective pleading.

- [12] In the instant case I am in the dark as to some material factual averments which ought to have been embodied in the summons as to the particulars of the crime the plaintiffs were suspected with committed, the nature of his arrest, the unlawfulness thereof and the ultimate fate of the plaintiff or the outcome of such criminal proceedings initiated against him. Instead of pleading these material facts pertinent to these critical issues the first plaintiff took a quantum leap from the domain of the facts of the matter to the domain of the conclusions of law.

A summons which propounds the plaintiff's own conclusions of law without beefing it up with the material facts was held to be a defective pleading. **BUCHNER AND ANOTHER v JOHANNESBURG CONSOLIDATED INVESTMENT CO LTD** 1995 (1) SA 215 (T) at 216 per De Klerk J.

- [13] The alleged unlawfulness of the arrest and detention are the plaintiff's own conclusions drawn from inadequately pleaded facts. They are not material facts upon which such conclusions can legitimately be drawn. The factual vacuum in the summons between so little that was pleaded and so much that was not renders the summons in respect of the first claim vague and embarrassing. This vague pleading embarrasses the defendant. He cannot properly reply on account of the ambiguous cause of action in the summons as it stands. Such an ambiguity should be cured. It is not a minor cosmetic blemish, but a fundamental defect in the manner in which the cause of action in respect of claim one, has been pleaded. The scanty facts as pleaded do no support the conclusion contended for. In my view the

defendant will be substantially prejudiced by this great factual lacuna in the plaintiff's declaration because it is not possible from the scantily pleaded facts to know the real case the defendant has to meet. The true nature of the defendant's complaint was that the plaintiff's declaration was vague and embarrassing. That is also how I view the matter. Such vagueness substantially prejudices the defendant. Rule 23 (1) of the Uniform Rules of Court regulates that before an exception can be taken to a pleading, *in casu* a declaration, on the grounds that it is vague and embarrassing, the defendant must first afford the plaintiff an opportunity of removing the cause of the complaint:

“The embarrassment and consequent prejudice complained of can indeed often be removed by an appropriate amendment providing further and better particulars.”

(TROPE AND OTHERS v SOUTH AFRICAN RESERVE

BANK 1993 (3) SA 264 (AD) at 268 B per F H Grosskopf JA).

In the instant case no such amendment was filed despite the complaint and the opportunity extended to the plaintiff to remove the cause of the complaint. There was no such an amendment in the paginated court record and I could find none in the court file. Hardly any mention thereof was made in the index.

[14] In **BUCHNER AND ANOTHER v JOHANNESBURG CONSOLIDATED INVESTMENT CO LTD** 1995 (1) SA 215 (T) at 216 H – J, De Klerk J had this to say about the rule that the pleading has to contain a clear and concise exposition of the cardinal facts:

“The necessity, when pleading, to plead material facts does not have its origin in Rule 18 of the Uniform Rules of Court. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff’s own conclusions and opinions

instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based."

I am in respectful agreement.

[15] In **TROPE AND OTHERS v SOUTH AFRICAN RESERVE**

BANK *supra* at 273 A – B, F H Grosskopf JA said:

"It is trite that a party has to plead – with sufficient clarity and particularity – the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts (*Mabaso v Felix* 1981 (3) SA 865 (A) at 875A; Rule 18(4). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. (*Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 792J – 793G.)"

In my view the plaintiffs in their declaration flagrantly violated the salient principle of pleading. Such a flawed declaration cannot be allowed to stand. Its vagueness really embarrasses the defendant. Its substantially prejudices him

in formulating his defence or plea.

[16] Accordingly I make the following order for the reasons set out above:

The exception is well taken. The declaration is vague and embarrassing. The exception is upheld. The offending declaration of the plaintiff is set aside. The plaintiffs are granted leave to amend their declarations within 60 days from the date this order is delivered.

M.H. RAMPAL, J

On behalf of the plaintiffs:	Adv. S. J. Reinders Instructed by: Lovius Block Attorneys BLOEMFONTEIN
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On behalf of the defendant:	Adv. Viwe Notshe Instructed by: The State Attorney BLOEMFONTEIN
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