



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

Case Number.: 13/2021

In the matter between:

MINISTER OF POLICE

Applicant

and

N[...] S[...] obo L[...] M[...]

Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

Beshe J:

[1] This is an application for leave to appeal against the judgment and order I rendered on the 8 August 2024. In the judgment I found the applicant who was the first defendant in the action liable for damages suffered by plaintiff's son as a result of being unlawfully arrested, detained and assaulted. The second defendant was absolved from liability. The application is opposed. At paragraph [51] of the judgment, I made the following finding: Applicant is liable for damages suffered by

plaintiff's son as a result of unlawful arrest, detention and assault after the traffic officers had left. As I understand it, the main thrust of applicant's complaint or ground of appeal is that:

I committed a misdirection in finding that the defendant was liable for damages – for assault on the basis that plaintiff's son was assaulted by Sergeant Thungatha after the traffic officers had left. This being so because no claim of assault of assault by Thungatha in this regard had been instituted. And that therefore the court was not called upon to adjudicate on such a claim. No such assault was pleaded. In other words, the plaintiff had not been called upon to meet such a claim. This constituted a new cause of action. So, it was argued. As would appear from what I stated hereinabove, the claim was against the Minister of Police (applicant) and the Enoch Mgijima Municipality on the basis that their employees *inter alia* assaulted plaintiff's son. In this regard, paragraph 5 of plaintiff's particulars of claim reads thus:

5. The plaintiff's minor son was assaulted by:

5.1 being shot at;

5.2 being struck with a firearm;

5.3 being thrown to the ground where he was kicked and trampled on with booted feet;

5.4 being lifted off the ground and again dropped onto the ground;

5.5 be having his private parts exposed and by having his testicles crushed.

6.1 Subsequent to the assault aforesaid, the said members of the South African Police Services arrested plaintiff's son whilst he was on the ground, placed him in hand cuffs and pulled him to his feet by the handcuffs, and forcibly pushed him into a waiting van.

In paragraph 7.1 of the particulars of claim, the following is pleaded:

In and as a result of the said assault upon the plaintiff's minor son suffered the following injuries and sequelae as a result thereof:

7.1.1

7.1.2

7.1.3

7.1.4

7.1.5

7.1.6 a bruised left arm.

7.1.7

[2] In turn, applicant pleaded as follows:

Paragraph 3.1 According to the defendant's records, the plaintiff was not unlawfully arrested and detained by members of the SAPS and in particular defendant denies that the plaintiff was assaulted by members of the defendant.

[3] As rightly pointed by applicant's counsel, *Rule 18 (4)* provides that every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

[4] It is trite that parties are limited to their pleadings, that a pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvas another. In *Minister of Safety and Security v Slabbert*¹ the court added that: *it is not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case*. Later in the same judgment² the following is stated:

'The court is not bound by the pleadings if a particular issue was fully canvassed during the trial. But there is not the slightest suggestion that matter was so canvassed. As a matter of fact, neither the plaintiff's friend nor his wife testified on his behalf in respect of his state of intoxication at the police station. The defendant was entitled at that stage, at the very least, to know that it had to establish that the legality of the continued detention was an issue.'

¹ [2010] 2 All SA 474 SCA at 478 paragraph [11].

² Page 480 paragraph [22].

[5] Trite also is the principle that pleadings are made for the court and not the court for the pleadings. That is the duty of the court to determine what the real issues are between the parties and to decide the case on these real issues.

[6] This is the approach I took during the trial, as indicated in paragraph [39] of my judgment, namely that I had a wide discretion to make findings on the evidence in relation to issues not foreshadowed in the pleadings. And came to the conclusion that the parties had ample opportunity to place facts before court in respect of those aspects that may not have been clearly pleaded.

[7] Having said that I am not of the view that the issue relating to assault by Sergeant Thungatha constituted a new cause of action if the pleadings are read as a whole, paragraphs must not be read in isolation.³

[8] In my considered view, the appeal does not have a reasonable prospect of success on this ground.

[9] I made my credible findings in my judgment, and I abide by them.

[10] Applicant argues that there are reasonable prospects that the appellate court would find that the awards granted namely R1000 000.00 and R60 000.00 in respect of assault and wrongful arrest and detention respectively are grossly excessive and award lesser amounts.

[11] The assaults by members of the applicant may not have been as egregious as that which was perpetrated by the traffic officers. But at the time of the assault by applicant's employees, plaintiff's son was in vulnerable position. Having already suffered a lot at the hands of traffic officers. Young, scantily clad in the early hours of the morning and apparently in a state of despair or traumatized. The same applies to the arrest and detention. In this regard, I am not persuaded that the appeal has reasonable prospects of success. As far as the arrest and detention are concerned, it is trite that the right to dignity and freedom and security of a person are core values

³ Jowell v Bramwell-Jones and Others 1988 (1) SA 836 WLD at 902.

of the Constitution. See *Minister of Safety and Security v Slabbert supra*.⁴ I am of the view that the award was fair to both parties.

[12] The complaint regarding the interest awarded has since fallen by the wayside. The respondent has abandoned the award of interest at the legal rate from date of demand to date of payment accepting that it will be entitled to interest from date of judgment to date of payment.

[13] Applicant also seeks leave to appeal on the ground that I did not exercise my discretion regarding costs judicially, in which case if I did, I would have ordered costs at the Magistrates Court's scale and that therefore there are reasonable prospects that another court would find that costs should have been awarded in the Magistrates Courts' scale. I gave reasons why I was of the view that costs should be awarded at High Court Scale. I adhere to those reasons. And for those reasons, I do not think that there are reasonable prospects of success on this ground too.

[14] Accordingly, the application for leave to appeal is dismissed with costs.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant : Adv: F Petersen
Instructed by : THE STATE ATTORNEY
C/o JOKO & COMPANY INC.
7 Somerset Street
MAKHANDA
Ref.: Mr S Joko

⁴ At 479 paragraph [20].

Email.: sjoko@jokoco.co.za

Tel.: 041 – 101 1053

For the Respondent : Adv: S H Cole SC
Instructed by : MBAMBO ATTORNEYS INC.
C/o ZILWA ATTORNEYS
41 African Street
MAKHANDA
Ref: Mr H Zilwa
Email: zilwa@zilwaattorneys.co.za
yzilwa@zilwaattorneys.co.za
Tel.: 047 – 531 0356

Date Heard : 17 January 2025
Date Reserved : 17 January 2025
Date Delivered : 15 July 2025