

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE: 32496/2015

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

15/08/17

Date

ML Twala

ML TWALA

In the matter between:

CEBEKHULU: BONGUMUSA K.

PLAINTIFF

Versus

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

TWALA J

1. The plaintiff instituted an action for damages against the defendant consequent upon an unlawful arrest and detention. The defendant has admitted that the arrest and detention were unlawful and this Court is called upon to determine the quantum of damages suffered by the plaintiff and the scale of the costs to be awarded to the plaintiff.
2. It is common cause that the plaintiff was on the 3rd July 2015 unlawfully arrested by police officers on a charge of drinking in public. It is not in dispute that the plaintiff was detained on the 3rd July 2015 and released on the 4th July 2015 at 09H50.
3. At the beginning of the hearing of this matter, counsel for the plaintiff brought an application to amend the plaintiff's particulars of claim to the summons. The amended was to the effect that the plaintiff was arrested at 15H00 on the 3rd July 2015 and released at 09H50 on the 4th July 2015.
4. Counsel for the defendant opposed the application on the basis that it was brought late and the defendant is being prejudiced thereby since it now cannot call witnesses to testify on the time of the arrest. The plaintiff had ample time to amend its particulars of claim but waited until the trial of the matter.

5. It is trite law that any party may amend its pleadings any time before judgment. Rule 28 (10) of the Uniform Rules of Court provides as follows:

“the court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit”.

6. I agree with the defendant that the plaintiff had ample time to amend its particulars of claim but I am unable to agree that the defendant will suffer prejudice because of the proposed amendment. The defendant has been aware from the date it was served with the summons that the plaintiff seeks compensation for its unlawful arrest and detention and has claimed damages to the tune of R150 000. The amendment only increases the number of hours for which the plaintiff was detained from 16 hours to 18 hours. The plaintiff did not propose any amendment to its quantum of damages. Therefore the defendant has not been taken by surprise by the amendment.
7. It is therefore my considered view that the proposed amendment does not prejudice the defendant in the conduct of its defence and it is therefore allowed. Paragraphs 3 and 7 of the plaintiff's particulars of claim are accordingly amended.
8. Counsel for the plaintiff addressed the Court from the bar that the plaintiff was arrested at 15 H00 on the 3rd July 2015 and released at 09H50 on the 4th July 2017. He was handcuffed to another detainee and put in a police van which drove around for some time before he was taken

to the Jeppe Police Station. At the police station he was first kept standing all the time in a room before he was detained in a dirty cell with a toilet that was not working and was never given food for the night. He was handed a dirty rug and sponge to lay on for the night. He was afforded an opportunity to make one call to his family or friend. He was frightened all the time as he did not know what was going to happen to him. Nothing came from the charge of drinking in public and he was released the next morning. To date he remains scared of the police and this incident has affected him psychologically.

9. Counsel for the defendant contended that the plaintiff, by not taking the stand and testifying about the conditions he experienced during his arrest and detention, prejudices the defendant from cross examining him. There were no expert reports before Court regarding the psychological trauma the plaintiff suffered in the hands of the police. The defendant did not waste the Court's time and made a tender on both the merits and quantum in this case. The plaintiff did not have dependants at the time he was arrested and detained.

10. Section 12 (1) (a) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides as follows:

“(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) Not to be deprived of freedom arbitrarily or without just cause

(b)

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a)

(b) *to security in and control over their body;*

(c)

11. Section 35 (2) (e) of the constitution provides as follows:

“(2) Everyone who is detained, including every sentenced prisoner, has the right-

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense of adequate accommodation, nutrition, reading material and medical treatment.”

12. In the case of **Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA)**, the Supreme Court of Appeal stated as follows:

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much – needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.”

13. It is not in dispute that the plaintiff suffered the arbitrary deprivation of personal liberty, human indignation by virtue of his unlawful arrest and detention. He contended through his counsel that he was frightened all the time he was under arrest and detention and that he now fears to see the police as he does not know what they could do to him. The plaintiff is entitled to be compensated for the infringement on his rights to equal protection and benefit of the law, human dignity, freedom and security of a person, freedom of movement and the conditions of detention that are not consistent with human dignity.
14. I am of the view that the defendant had the right to tender evidence in rebuttal of the conditions the plaintiff contends he experienced at the hands of the police and in detention. The defendant did not take this opportunity nor did it dispute the conditions in the police cell as described by plaintiff's counsel. The defendant chose not to take this opportunity to lead its own evidence regarding the conditions in the police cell on the day of detention of the plaintiff. However, the unhygienic condition of the cell in which the plaintiff was detained is not the only factor that is taken into consideration when determining the quantum of damages.
15. It is on record that it was the first time the plaintiff had an episode of this nature with the police. He found himself being locked up in a strange place and strange surroundings. That on its own, is in my view, quite a traumatic experience deserving a fair and reasonable compensation. It is my respectful view therefore that a fair and reasonable amount would be the sum of R90 000.
16. Counsel for the plaintiff contended that this case is of importance to the plaintiff-hence he brought the action in this Court. The plaintiff is entitled

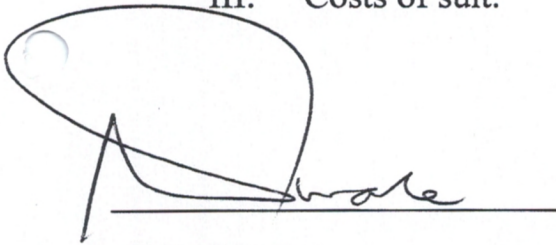
to his costs on the High Court scale because of the importance of this matter to him. That the amount of damages claimed and/or awarded should not be the only determining factor when the issue of costs is considered. In the alternative, should the Court consider awarding costs on the Magistrate Court scale, then the Court should consider awarding counsel fees in terms of the rules of the magistrate's court. Further, that it was agreed between the parties at the pre-trial that the matter need not be transferred to another Court.

17. I do not agree with counsel for the plaintiff that because this matter is important to the plaintiff it therefore deserves the attention of this Court. The legislature has purposely increased the jurisdiction of the Magistrate Court because it is equally competent and capable of resolving disputes of this nature between the parties. It cannot be that litigants should litigate in the High Court as long as they feel their matters are important to them even when the quantum thereof falls within the jurisdiction of the Magistrate Court. It cannot be said that the defendant should therefore be mulct with costs on the High Court scale when this could have been avoided by litigating in the Magistrate Court.
18. However, the distinguishing factor in this matter is that the parties agreed at the pre-trial conference that the matter does not have to be transferred to another Court. This Court does not have the power to allow a party to resile from an agreement deliberately reached at a pre-trial conference unless there are special circumstances present otherwise it would negate the purpose of Rule 37 of the Uniform Rules of Court.

19. It is my respectful view therefore that the plaintiff is entitled to be awarded costs on the High Court scale since it was agreed between the parties that the matter should not be transferred to another Court.

20. In the circumstances, I make the following order:

- I. The defendant is liable to pay to the plaintiff a sum of R90 000
- II. Interest thereon at the rate of 9% per annum from 14 days after the date of this order
- III. Costs of suit.



TWALA J

**JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

**INSTRUCTED BY PLAINTIFF;
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ADV. JR BAUER

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ADV. N MAKOPO

Date of hearing: 10 August 2017

Date of judgment: 16 August 2017