IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:
DATE:
SIGNATURE: CG LAMONT

Case Number: A3070/2020

In the matter between:

TSHILIDZI JANE DZWEDZI **Appellant**

And

THE MINISTER OF POLICE **Respondent**

JUDGMENT

LAMONT J

1. The appellant instituted action against the respondent claiming payment of damages for wrongful arrest and detention. The respondent filed a plea which was a bare denial. The appellant excepted to the respondent's plea. On 1 June 2019 the court are quo upheld the exception and struck out the respondent's defence. The order which was made reads "The exception is upheld with costs; the Defendants Plea is striked out". In due course the matter was set down for trial. At the hearing both the appellant and respondent were represented. The magistrate who heard the trial stated "this is a matter that has been set down for trial… The exception that was raised by the plaintiff was upheld and the defendant's plea was struck out, resulting in the only matter in issue still remaining, the issue of quantum." The respondents' representative accepted that the trial was to proceed only on quantum and that was indeed the only issue which was heard at the trial. The respondent had failed in the interim to deliver any plea.

2. It appears that the parties and the magistrate all agreed that the effect of the striking out of the respondent's defence was that the issue on the merits was decided in favour of the appellant and that the only remaining issue on quantum was still to be decided. The trial proceeded on that basis. It was submitted by the appellant that if a defence is struck out the respondent is not entitled to appear at the trial and cross-examine the plaintiffs' witnesses. The appellant referred to authority dealing with that issue. That issue is not germane to the present proceedings where the pleading was struck out i.e. the respondent could if it

wished file an amended plea. The legal position is that the striking out of the plea does not result in judgment in favour of the plaintiff on the issue. See: Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Limited (288/2017) [2018] ZASCA 09 (01 March 2018) " [8] Preliminarily, it is necessary to observe that it is unclear upon what basis Le Grange J dealt with the case in the manner he did. Having upheld the exception and struck out the plea he proceeded to enter judgment for Old Mutual, instead of granting leave to the appellants, if so advised, to amend their plea. The upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence. An unsuccessful pleader is given the opportunity to amend the plea, even when the plea has been set aside because it does not disclose a defence. The rationale for this seems to be that although the defence contained in the pleading may be bad the pleading as such continues to exist. Ordinarily therefore the court should grant leave to amend and not dispose of the matter. Leave to amend is not a matter of an indulgence; it is a matter of course unless there is a good reason that the pleading cannot be amended."

3. Whatever the legal position was the parties decided that the trial to proceed only on the issue of quantum and it proceeded on that basis. During the evidence given on behalf of the appellant at the trial it appeared that the appellant on the basis of her own evidence may not have had facts which established the probabilities of the merits in her favour. The evidence she gave may have established the probabilities of the merits in favour of the respondent. Crisply put her evidence was that she had taken an item from a shop without paying for it and was in the process

of leaving the shop when she was arrested; was subsequently detained and taken to court. There were some submissions made that the arresting officer was required to assess her evidence, namely that she had made a mistake in failing to pay, and on that basis not arrest her or detain her. It is not for the arresting officer to evaluate the evidence. The objective evidence established a taking without consent and removal of an item from the shop. At the hearing it may be that the appellant accepted some form of guilt because it appears that she was told in court that she must do community service. This would appear to be some form of punishment for something. It appears that she may have been part of a diversion program. The appellant would only have undertaken a diversion program if she accepted her guilt as it is only then that the diversion is available.

4. Be that as it may the respondent failed to file any plea and these issues were not raised at the trial. In my view it is too late to raise these issues now the trial having been concluded in the presence of both the appellant and the respondent who agreed to the procedure.

5. The appellant at the time of arrest was 40 years of age was married with 3 children. The family was disappointed and traumatized when they heard about her arrest. She had a presence in the community where she resided and where she had lived for some twenty years. She was embarrassed when she was arrested. She was detained in a cell which was dirty and cold. She slept on the ground on a mattress with five or six other people and had to bath with cold water. The cell had one toilet in it and she was compelled to use the facility in front of everyone. The plaintiff felt insignificant and not important. There was no toilet paper, she had no toiletries to

bath with and was only able to use cold water. She was only fed tea and bread and was not given an alternative meal to meat to which she was allergic. She was released in court after two days (over the weekend) in detention. The appellant suffered humiliation discomfort and her liberty was restrained for the period of detention. The assessment of awards of general damages with reference to awards made in previous cases is difficult. The facts of the particular case need to be looked at as a whole and few cases are directly comparable. The other cases are a useful guide to what other courts have considered to be appropriate but have no higher value than that. See Minister of Safety and Security v Seymore 2006 (6) SA 320 (SCA). Numerous cases were cited setting out the different value of the awards which had been made. In my view an appropriate award is the amount submitted by the appellant at the trial to be appropriate namely R 60,000.00

6. I would make the following order:-

1 The appeal is upheld

2 The respondent is to pay the costs of the appeal

3 The order made by the magistrate is set aside

4 The following is substituted therefor:

“There will be judgment in favour of the plaintiff.

The defendant is directed to pay the plaintiff R60000

The defendant is directed to pay the costs of suit”

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CG Lamont

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

I Agree.

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D P deVilliers

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

HEARD ON:	24 MAY 2021
JUDGMENT DELIVERED ON:	25 MAY 2021

APPEARANCES:

COUNSEL FOR THE APPELLANT:	ADVOCATE L SWART
INSTRUCTED BY:	JJ GELDENHUYS ATTORNEYS

NO APPEARANCE FOR THE RESPONDENT