IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

Case No.3019/12
Date Heard: 27/6/13
Date Delivered: 28/6/13
Not Reportable

In the matter between:

FRANCOIS EDWARD WINDVOGEL **Plaintiff**

and

MINISTER OF POLICE **Defendant**

Civil procedure – exceptions taken to defendant's plea on basis of being vague and embarrassing – rules 18(4) and (5) - failure of paragraphs 4.1 to 4.5 of plea to contain clear and concise statement of material facts and to answer the point of substance – exceptions to above paragraphs upheld with costs

JUDGMENT

PLASKET, J:

[1] The plaintiff, who instituted a damages claim against the defendant for unlawful arrest and detention as well as an unlawful assault upon him, perpetrated, he says, by employees of the defendant acting within the course and scope of their employment as policemen, has taken a number of exceptions to the defendant's plea. They relate only to the claim in respect of unlawful arrest and detention. The defendant, while initially opposing the exceptions, has now withdrawn that opposition and so, in effect, abides the court's decision.

[2] In his particulars of claim, th plaintiff alleges that he was arrested without warrant by members of the South African Police Service (the SAPS) on 24 October 2010 and that he was detained for a period of 25 hours before being released on

bail. He alleges that his arrest was unlawful because the members of the SAPS who arrested him did not entertain a reasonable suspicion that he had 'committed an offence, whether in their presence or otherwise' and that, even if they had formed a reasonable suspicion, they 'failed to exercise their discretion to arrest and detain the Plaintiff reasonably and rationally and that, consequently, such discretion was exercised unlawfully . . .'.

[3] To these allegations, the defendant pleaded, in paragraph 4 of its plea-over (it having also taken a special plea that is not relevant to this judgment):

'The Defendant admits only that:

4.1 The Plaintiff was arrested by members of the South African Police Services on 24 October 2010 at Port Elizabeth on a reasonable suspicion that he had committed and/or attempted to commit an offence Malicious Damage to Property under Docket Cas No. 592/10/2010.

4.2 Plaintiff was lawfully arrested and detained without a warrant of arrest in terms of the provisions of section 40(1)(b) alternatively section 40(1)(a) of the Criminal Procedure Act of 1977 as amended;

4.3 The relevant peace officer acted in line with the provisions of section 205(3) of the Constitution of RSA, as amended;

4.4 The Defendant contends further that the subsequent detention and/or deprivation of the Plaintiff's liberty was lawful in terms of section 50(1) as read with section 39(3) of the Criminal Procedure Act as amended ***alternatively*** was an act of law;

4.5 The relevant arresting officer exercised his discretion properly, lawfully and within the bounds of rationality;

4.6 Save for the above admissions the Defendant denies further contents hereof and puts Plaintiff to the proof thereof.'

[4] The plaintiff excepts to paragraphs 4.1 to 4.5 of the plea on the basis that these paragraphs are vague and embarrassing or lack averments which are necessary to sustain a defence. In essence, it is the plaintiff's argument that paragraphs 4.1 to 4.5 of the plea are excipiable because they do not comply with rules 18(4) and 18(5) of the uniform rules.

[5] These rules provide:

'(4) Every pleading shall contain a clear and concise statement of the 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.
(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.'

[6] It has been stated that proper pleading involves pleading statements of fact, rather than law, facts that are material only, facts rather than evidence and facts in summary form.[1] As is expressly stated in rule 18(4), those facts must be pleaded with sufficient particularity to enable a party to reply to them. Statements of opinion or conclusions have no place in pleadings. In *Buchner & another v Johannesburg Consolidated Investment Co Ltd*[2] De Klerk J, after referring to rule 18(4) set out the position thus:

'The necessity to plead material facts does not have its origin in this Rule. 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.'

[7] It is apparent from paragraph 4.1 that no particularity is provided as to when on 24 October 2010 and where in Port Elizabeth the arrest that is referred to occurred and no clear and concise statement of the material facts forms part of the paragraph as to what it is alleged the plaintiff did in order to commit the offence of malicious injury to property or to attempt to commit that offence. The problem is compounded in paragraph 4.2 because the defendant pleads that the arrest is either justified by s 40(1)(b) or by s 40(1)(a) of the Criminal Procedure Act 51 of 1977. These sections authorise peace officers to arrest in different circumstances namely, in the case of s 40(1)(b), when the peace officer reasonably suspects that the

[1] Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed) Vol 1: 2009 at 565. See too H J Erasmus and D E Van Loggerenberg *Superior Court Practice*: 1994 at B1-129 to B1-130B; D R Harms *Civil Procedure in the Supreme Court*: 1990 at B-140 to B-141.
[2] *Buchner & another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 216I-J.

arrestee has committed a Schedule 1 offence[3] and, in the case of s 40(1)(a), when the arrestee commits or attempts to commit an offence in the presence of the peace officer. No facts are pleaded in this regard to justify either or both of the alternative conclusions that are pleaded. The same can be said of paragraph 4.5: it is simply a bald conclusion, not based on any material facts, that the arresting member's discretion to arrest was not exercised unreasonably or irrationally – and hence unlawfully. I accordingly conclude that the exceptions taken to paragraphs 4.1, 4.2 and 4.5 of the plea are well-taken.

[8] Paragraph 4.3 is to the effect that the arresting policeman 'acted in line with the provisions of section 205(3) of the Constitution'. This section deals with the objects of the SAPS which are to 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. Paragraph 4.4 is to the effect that after the arrest, the plaintiff's detention was lawful in terms of s 50(1) and s 39(3) of the Criminal Procedure Act. The references to all three of these statutory provisions that are referred to in paragraphs 4.3 and 4.4 amount to legal conclusions but they are not based on any material facts because none are pleaded in paragraphs 4.1, 4.2 and 4.5. They are, as a result, also excipiable.

[9] In the result, the following order is made.

(a) The plaintiff's exceptions to paragraphs 4.1 to 4.5 of the defendant's plea are upheld with costs.

(b) The defendant is granted leave to amend paragraph 4 of his plea within ten days of the date of this judgment.

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C Plasket

Judge of the High Court

[3] Malicious injury to property is an offence referred to in Schedule 1 and the schedule includes an attempt to commit any of the listed offences. An attempt to commit malicious injury to property is thus an offence that falls within Schedule 1.

Appearances:

Plaintiff: Ms I Bands, instructed by G P van Rhyn, Minnaar and Co Inc, Uitenhage and Struwig Hattingh Attorneys, Port Elizabeth

Defendant: No appearance