IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**~~YES~~/NO**
Of Interest to other Judges:	**~~YES~~/NO**
Circulate to Magistrates:	**~~YES~~/NO**

Case number: 4485/2016
4486/2016
4487/2016
4488/2016
4489/2016

In the matter between:

TSHEPO PETRUS MOKHOBO **Plaintiff/Respondent**

and

MINISTER OF POLICE **Defendant/Excipient**

AND FOUR OTHER MATTERS

CORAM: NAIDOO, J

HEARD ON: 21 APRIL 2017

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 17 AUGUST 2017

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[1] This is an exception to the summons issued by the plaintiff/respondent against the defendant/excipient. The issues raised in this matter are identical to those in four other matters, where summons was issued against the same defendant as in this matter. and which were enrolled to be heard together with this matter. These latter mentioned cases are:

1.1 Case number 4486/2016 – Nkejane Petrus Monyepha v Minister of Police

1.2 Case number 4487/2016 – Dimakatso Paulina Sebofi N.O. v Minister of Police

1.3 Case number 4488/2016 - Teboho Paulus Letsepa v Minister of Police

1.4 Case number 4489/2016 – Tshidiso Daniel Maqala v Minister of Police

I shall refer to the parties as they are cited in the summons. Ms GJM Wright represented the defendant/excipient and Mr W Groenewald represented the plaintiff/respondent in this court.

[2] Each plaintiff alleges in his Particulars of Claim that he was unlawfully and/or maliciously arrested, without a warrant of arrest, by a Captain Mbele who was, at the time of the arrest of each plaintiff, in the employ of the South African Police Service (SAPS). The dates of arrest range from 3 March 2012 to 4 December 2012. Each plaintiff, save one, alleged that he was detained until 27 September 2013. The plaintiff in case number 4487/2016 (the Sebofi case), acting as executrix in the deceased estate of Andries Hendry Sebofi, alleged that the deceased was detained until 8 February 2013. They also alleged that Captain Mbele misled the court during the hearing of their bail applications, by wrongfully

and/or falsely claiming that there were eye witnesses who implicated the plaintiffs. All the plaintiffs were acquitted on 25 November 2013. Each plaintiff claimed, inter alia, damages for loss of income and two of them also claimed the legal costs incurred in defending the criminal charges against them.

[3] The defendant's exception to the summons in each case is based on the following grounds:

3.1 The plaintiff's claim for loss of income is a claim for pure economic loss. As such it can only be brought by way of the *actio legis Aquilia,* which requires that all elements of the Aquilian action must be pleaded, including wrongfulness, causation and fault.

3.2 The same considerations apply if special damages are claimed in respect of unlawful arrest and subsequent detention (as in this case).

3.3 The plaintiff's summons is fatally defective in that it fails to make the necessary allegations, specifically with regard to the elements of wrongfulness, causation and fault in respect of the claim for loss of income. The plaintiff has therefore failed to disclose a cause of action in respect of the claim for loss of income, rendering his Particulars of Claim excipiable.

[4] The plaintiff, for his part, alleges that the necessary allegations to establish a cause of action have been made in the summons.

4.1 Firstly, that Captain Mbele wrongfully misled the court during the bail application by falsely alleging that there were eye witnesses implicating the plaintiff.

4.2 With regard to the arrest, the plaintiff alleges that the plaintiff was arrested without probable cause and that arrest or detention is

prima facie wrongful, making it unnecessary to allege or prove wrongfulness. The defendant bears the duty to allege and prove the lawfulness of the arrest or detention.

4.3 The plaintiff cites, in respect of fault (as well as paragraph 20 in connection with wrongfulness), the case of **Goodyear SA (Pty) LTD v Wietz (3919/2012) [2103] ZAECPEHC 49,** a judgment of Eksteen J, handed down on 17 October 2013 in the Port Elizabeth High Court, where the court said, in essence, at paragraph 27 that the reference to "malice" in the context of *actio iniuriarum* is to be understood as a synonym for *animus injuriandi,* which encompasses *dolus directus* or *dolus indirectus.*

4.4 The plaintiff alleges that the use of the words *"As a result of the aforegoing"* in paragraph 5 of the Particulars of Claim, was sufficient to establish causation. Mr Groenewald also argued that paragraphs 3, 4 and 5 of the Particulars of Claim must be read together in order to see that a cause of action has been established.

4.5 The plaintiff, in each matter mentioned above, has alleged patrimonial loss as a result of the actions of the defendant, as represented by Captain Mbele. Details of such patrimonial loss are set out in the Particulars of Claim.

[5] Rule 23(1) provides as follows:

"23 (1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms or paragraph *(f)* of subrule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided

further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception."

A long line of decisions in our courts has emphasised that the remedy of an exception is available when the objection goes to the root of the opponent's claim or defence. The true object of an exception is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion. [**See Glaser v Heller 1940 (2) PH F119 (C); Kahn v Stuart 1942 CPD 386 at 391; Santos v Standard General Insurance Co Ltd 1971 (3) SA 434 (O)]**

The excipient also has the duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed, failing which the exception must fail.

[6] The defendant seeks to assail only the plaintiff's claim for patrimonial loss (which is a claim under the *actio legis Aquiliae*) as set out in his Particulars of Claim, alleging that it is self-contained and can be struck out without affecting the rest of his claim. Ms Wright argued that the mere use, by the plaintiff, of the words "wrongful" or "unlawful" is not sufficient to satisfy the requirements of the Lex Aquilia. She argued further that insufficient facts have been pleaded in respect of the arrest and the subsequent proceedings to sustain a cause of action. With regard to the use of the word "malicious", Ms Wright argued that while Mr Groenewald asserted that the word included intent, there was no reference to negligence, dolus or fault in respect of the proceedings instituted against the defendant. The word could also have other meanings. With regard to the word "falsely" it could also mean that wrong facts were unintentionally put before the court.

[7] Ms Wright placed reliance on the matters of **Minister of Safety and Security v Scott 2014(6) SA 1 (SCA)at 14 D-G,** and

Media 24 v SA Taxi Securitisation 2011(5) SA 329 (SCA) at 335 A-B. It was argued on behalf of the defendant that the reference to wrongfulness for purposes of a claim for unlawful arrest is not adequate for purposes of liability for pure economic loss. The Media 24 case dealt with wrongfulness in the context of a defamation action and expressed the view that what was wrongful for the defamation action may not be adequate for a claim for pure economic loss. The court went on to say at page 335 C "Whether it is adequate or not will depend on judicial determination as to what is wrongful in the context of a claim for actual loss resulting from a defamatory publication".

[8] The question therefore, is the stage at which the judicial determination of the adequacy of the allegation of wrongfulness can be made. In my view, a proper assessment of wrongfulness for the purposes of pure economic loss is best determined at the trial stage upon consideration of all the evidence in this regard. An aspect in the Scott case relied upon by the defendant relates to the question of legal causation, where the court held on page 14 D that "This court has expressed a preference for the 'flexible approach' in determining legal causation". Ms Wright pointed out that these two matters were Supreme Court of Appeal (SCA) decisions, while the Goodyear case relied upon by the plaintiff was a decision of the Port Elizabeth High Court, suggesting presumably that they were binding, whereas the Goodyear case was of persuasive value only. Neither of the SCA cases dealt with an exception, while the Goodyear case pertinently did so. In my view, the Goodyear case is not at odds with the dicta in the SCA decisions and this court is free to allow itself to be persuaded by the views of the court in Goodyear.

[9] In any event, with regard to the question of legal causation, the court in the Goodyear case, at paragraph 36, cited with approval the dictum of Corbett CJ in the case of **International Shipping Company (Pty) Ltd v Bentley 1990(1) SA 680 (A) at 700 H,** where the court said, in essence, that demonstrating that the wrongful act was the cause of the loss does not necessarily result in legal liability. The determination of whether such wrongful act is sufficiently closely or directly linked to the loss is a juridical problem where policy considerations may play a part in the solution thereof. The court in Gooodyear reiterated the decisions in a number of SCA decisions where it was held that the test for determining remoteness of damage (legal causation) is a flexible one, but which does not supercede other tests such as "foreseeability, proximity or direct consequences". The court referred to the case of **Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009(2) SA 150 (SCA)**, a case followed on this aspect in the Scott case referred to by Ms Wright. The court's conclusion in Goodyear was that the foreseeability of harm cannot be determined at the exception stage and would depend, in part, on the evidence presented at the trial. At that stage factors such as the relationship between the parties will be considered and the applicability of policy considerations will be determined. I align myself with this approach.

[10] I agree with Ms Wright that there should have been more details provided in the Particulars of Claim in this matter regarding the cause of action, but it is my view that the arguments put forward by Mr Groenewald in respect of meeting the requirements of the Aquilian action, at this stage, are persuasive. Ms Wright appeared to concede that interpretations other than the one put forward by

the plaintiff in respect of, at least, the words “malicious” and “falsely” are possible. At paragraph 28 of Goodyear, the court held that the allegation of malice embraces intention in the sense of *dolus* and constitutes an averment of fault. With regard to the element of wrongfulness, the onus is on the defendant to prove that the arrest and detention of each plaintiff was lawful. To my mind, the plaintiff’s interpretation of the Particulars of Claim is not unreasonable or improbable, and it cannot therefore be said that on every possible interpretation that the pleading can bear, it does not sustain a cause of action.

[11] The dismissal of an exception, where it is presented and argued as such, does not finally dispose of the issue raised by the exception and is not appealable. The point could be re-argued at the trial. **(Erasmus Superior Court Practice B1-152).** In my view, an undue harshness will be brought to bear upon the plaintiff if the exception were upheld in the light of what I have said above. I find that the issues raised by the exception cannot be sustained at this stage.

ORDER

[12] In the circumstances, I make the following order:

12.1 The exception is dismissed with costs.

S. NAIDOO J

On behalf of Plaintiff/Respondent: Adv W Groenewald

Instructed by:	Symington & De Kok Attorneys 169B Nelson Mandela Drive Bloemfontein (Ref: T O'Reilly MXM2956)
On behalf of Defendant/Excipient:	Adv GJM Wright
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