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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

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|------------------------------|--------|
| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case number: 4810/2022

In the matter between:

ALETTA KHANYE

Plaintiff

And

MINISTER OF POLICE

Defendant

CORAM: VAN ZYL, J

HEARD ON: 3 SEPTEMBER 2024

DELIVERED ON: 12 SEPTEMBER 2024

[1] This matter was enrolled for trial on 3, 4 and 5 September 2024. However, the morning of 3 September 2024 I was advised by Mr van Eeden, who appeared on behalf of the plaintiff, and Mr Chauke, ‘ who appeared on behalf of the defendant, that the action has been settled between the parties.

- [2] The parties, however, could not settle the scale upon which the plaintiff's fees are to be payable.

Background to the action:

- [3] In the present matter it was the plaintiff's case in terms of the pleadings that she was unlawfully arrested on 29 October 2021 and unlawfully detained until 3 November 2021. She claimed R400 000.00 for general and special damages suffered in respect of the following:

“10.1 Depriving of the Plaintiff's freedom

10.2 *Contumelia*;

10.3 Emotional stress and Psychological trauma;

10.4 Embarrassment suffered by the Plaintiff by keeping her in the holding cells and being arrested before members of the public.”

- [4] The plaintiff's second claim is on the basis that she was wrongfully and maliciously charged with malicious damage to property. In this regard she claimed general and special damages in the sum of R200 000.00 for the following:

“12.1 Depriving of the Plaintiff's freedom;

12.2 *Contumelia*;

12.3 Emotional stress and Psychological trauma;

12.4 Embarrassment suffered by the Plaintiff by keeping her in the holding cells.”

- [5] The matter has been settled on the basis that the defendant is to pay the plaintiff the capital amount of R200 000.00 in respect of

“damages suffered by the Plaintiff”, together with interest on the said amount and costs of suit.

Legal principles and application thereof to the facts:

[6] Rule 67A was inserted, and rule 69 substituted, both with effect from 12 April 2024. Both rules only address awards of costs as between party and party.

[7] Rule 67A(3)(a) determines as follows:

“(3)(a) A costs order shall indicate the scale in terms of rule 69, under which costs have been granted.

(b) In considering the factors to award an appropriate scale of costs, the court may have regard to:

- (i) the complexity of the matter; and
- (ii) the value of the claim or importance of the relief sought.

(c) If the scale in terms of paragraph (a) is not indicated in the order, scale A of Rule 69(7) shall apply to the costs that the court has awarded.”

[8] In terms of rule 69(7) the scales of fees contemplated by rule 67A(3) are scale A, scale B and scale C. The fees connected to the respective scales are as follows:

Scale A R375.00 per quarter of an hour or part thereof
(maximum allowed)

Scale B R750.00 per quarter of an hour or part thereof
(maximum allowed)

Scale C R1 125.00 per quarter of an hour or part thereof
(maximum allowed)

- [9] The costs order made by the court must only indicate the scale in terms of rule 69, under which costs have been granted. The court is not required to also indicate in its order whether the maximum amount or a lower amount than the maximum one in the particular scale is allowed. The taxing master retains a discretion to determine what the reasonable amount within the parameters of the relevant scale should be. See **Erasmus: Superior Court Practice**, DE van Loggerenberg, at RS 23, 2024, D1 Rule 69-6
- [10] Mr Chauke submitted that scale A is the appropriate scale in the present matter. He referred to the judgment of **Mashavha v Enaex Africa (Pty) Ltd** (2022/18404) [2024] ZAGPJHC 387 (22 April 2024). He submitted that only the importance, value and complexity of the case are the factors in terms of rule 67A(3)(b) which are to be taken into consideration when determining the appropriate scale. Mr Chauke submitted that none of the said factors justify costs on scale B in the present circumstances.
- [11] The judgment in **Mashavha**, *supra*, is criticized in certain respects by the learned author of **Erasmus: Superior Court Practice**, *supra*, at RS 23, 2024, D1 Rule 67A-8 to 67A-9:

The approach adopted by Wilson J is not free from difficulties, for the following reasons, amongst others:

- (a) The factors set out in rule 67A(2) are not factors to be taken into account by the court in determining an appropriate scale of fees in terms of rule 67A(3). Thus, the ‘inartful or unethical conduct’ referred to in paragraph 11 of the judgment is irrelevant as far as an appropriate scale is concerned. This is recognized in paragraph 19 of the judgment.
- (b) It is not correct, as held in paragraph 16 of the judgment, that the default position is that fees will be recovered on scale ‘A’ unless a higher scale has been justified. There is simply no indication in rules 67A and 69 to that effect. If that is the position, as Wilson J would have it, a court would not be exercising its discretion in determining that scale ‘A’ is the appropriate scale. In terms of rule 67A(3)(c) scale ‘A’ is the default scale only if the costs order does not indicate the scale of costs.
- (c) The importance of the relief claimed (i e not the ‘importance of the case’) has both a subjective and an objective element. To have applied only an objective test in paragraph 20 of the judgment appears to be incorrect under circumstances where the parties were not invited to place facts before the court in order to properly consider the subjective (or objective) position.
- (d) The value of the claim, and not whether it is recovered, is a relevant factor in terms of rule 67A(3)(b)(ii). Thus, the approach in paragraph 23 of the judgment appears to be incorrect.
- (e) Wilson J was not called upon to make a value judgment of a general nature concerning counsel’s fees. That was simply not an issue in the case before him. Paragraphs 24–27 are accordingly imprudent and inappropriate 19 or, at best, constitute *obiter dicta*.”

[12] I do not have to express myself on the applicability, or not, of the factors listed in rule 67(A)(2) for purposes of determining the appropriate scale, since those factors are not relevant in this instance where the trial has been settled.

[13] Mr van Eeden submitted that scale B is the appropriate scale of fees in the present matter. With regard to the importance of the relief claimed, he relied on the judgment in **Mjali v Minister of Police** (2223, 2226 & 2227/2016) [2020] ZAECMHC 49 (29 September 2020). (The said judgment served on appeal **Minister of Police v Mjali** 2023 JDR 4603 (ECM)), which appeal was successful, but without affecting the principles Mr Van Eeden is relying upon.) The judgment also dealt with unlawful arrest and detention and malicious prosecution. At paragraph [82] of the said judgment reference was made to the following judgment:

[82] In *RA & others v Minister of Police*, unreported judgment full bench, dated 21 April 2016, (Case Number A315/2015 available on saflii), the court stated the following:

“This case also bears a public interest element as, inter alia it relates to unlawful conduct by SAPS and the protection of the rights of citizens. An attack on the rights of the individual is an attack on the community and grinding down of individual’s rights erodes the rights of the community as a whole. Therefore, in this type of case the impact is not limited to the individuals but extends to the community of which they form part. This underscore the importance of the matter.”

The court continued as follows at paragraph [89] of the judgment:

“[89] In RA (*supra*) which was an appeal from a single judge to a Full Bench it was held that the Judge of the court *a quo* erred in awarding costs on the Magistrate’s Court scale merely because of the quantum of damages awarded to [the plaintiff. The full bench was unanimous that the Judge *a quo* ought to have awarded the costs to the plaintiff on the High Court scale. A number of considerations were taken into account in setting aside the costs award of the court *a quo* and awarding costs on High Court scale. Such considerations included the importance of the rights involved, public interest, the complexity of the matter ...”

[14] The court further found as follows at paragraph [93] of the judgment:

“[93] Consequently, the society has an interest in the High Court hearing matters that relate to State Officials violating the rights enjoyed by individuals rather than respecting and protecting such rights.”

[15] With regard to the complexity of this matter, I do not consider it as uncomplicated as submitted by Mr Chauke. This matter was due to be on trial in respect of both merits and quantum and had been certified trial-ready and allocated three days for the trial. A bundle of documents, consisting, *inter alia*, of the contents of the police dockets and some photos, were also to be used during the trial.

[16] The value of the claim was R600 000.00, which is a substantial amount which does not even fall within the jurisdiction of the Regional Court.

[17] In addition to all of the aforesaid, I agree with the judgment of **Ghubhelabm (Pty)Ltd v R.A.W. Truck Trading CC** (B3217/2023) [2024] ZAGPPHC 460 (26 April 2024), which also dealt with the

Mashavha-judgment, where the court found as follows at paragraph [27] of the judgment:

“Costs orders, including the assessment of the appropriate Rule 69 scale, remain a matter for the exercise of judicial discretion.”

[18] In the totality of the circumstances I find that scale B of fees for plaintiff’s counsel is appropriate.

Order:

[19] The following order is made:

1. By agreement between the parties, save for the scale of the fees of counsel, the following order is made:

1.1 The defendant is to pay the plaintiff the capital amount of R200 000.00 damages suffered by the plaintiff, which amount is to be deposited into the account of the plaintiff’s attorneys, being the following account:

Name: Loubser van Wyk Inc.

Type: Trust account

Bank: First National Bank (Hatfield)

Account No: 6[...]

Branch code: 252145

(under reference number W2679, with proof of payment to be sent to info@louwalt.co.za).

- 1.2 The defendant will be liable for interest on the amount of R200 000.00, calculated at the rate of 10.75% per annum from date of judgment until date of final payment, if payment of the capital amount is not received within 60 days from date of this order.
- 1.3 The defendant is to pay the plaintiff's costs of suit to date, on a scale as between party and party on the High Court tariff and counsel's fees on scale B, having regard to the provisions of Uniform Rules 67A and 69.

C. VAN ZYL, J

On behalf of Plaintiff:

Adv JC van Eeden
Instructed by:
Loubser van Wyk Inc.
c/o Jacobs Fourie Inc.
BLOEMFONTEIN
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On behalf of Defendant:

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