

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case Nos.: **1770 &1771/12**

(Consolidated by Order of this Court dated 3 February 2015)

In the matter between:

LOYISO ANTONI

First Plaintiff

SANDISWE TWENI

Second Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT (Special Plea on Prescription)

NTSEPE AJ:

1. This is a special plea on prescription placed before me, by agreement between the parties, for separate adjudication in terms of Rule 33 (4). The separation has been duly ordered.
2. The parties prepared a stated case upon which the special plea is to be determined.
3. The Plaintiffs instituted action against the Defendant for damages arising from an alleged unlawful arrest, assault and detention. The defendant delivered its

special plea wherein it raised that the Plaintiffs' claims, in *toto*, have been extinguished by prescription in terms of section 1 (d) of the Prescription Act 68 of 1969 (the Prescription Act). In the replication delivered on 12 December 2018, the Plaintiffs denied that the claims had prescribed; a position they held until the date of the hearing being 5 December 2019.

4. Shortly before the commencement of the hearing, the Plaintiffs conceded that their claims for unlawful arrest, assault and the unlawful detention for the period 16 February 2009 up to 5 June 2009 has prescribed rendering the Defendant partly successful on the special plea. The converse, of course, is that the Plaintiffs are similarly successfully having defended a substantial portion of their claim against the defendant's special plea.
5. It is trite law that costs are ordinarily awarded to the successful party unless there are good grounds for departure. Success is defined by substance and not form. A Court may, however, order that each party pay its own cost if it is fair and just to do so. (DE v RH 2015 (5) SA 83 (CC) at 105 D-E.)
6. The Defendant contends that it is the successful party as a substantial portion of its special plea has been conceded. Similarly, Counsel for the Plaintiffs argued that the Plaintiffs have successfully opposed the special plea in respect of their claim for unlawful detention, being a period of approximately 1 year and 8 months which remains enforceable against the Defendant. It was further submitted that the Plaintiffs' claim for the remaining period of detention i.e. 6 June 2009 to 9 March 2011 is a substantial period which if quantified in

monetary terms, would entitle them, should they prove same in due course, to a substantial monetary award.

7. It seems to me that both parties have been successful. However, in the circumstances of this case it is impractical to find that either of the parties were substantially successful as against each other. This is due to the nature of the rights affected herein which relate to substantial and constitutionally guaranteed rights. To amplify this point, both parties have succeeded on issues of equal importance. The defendant having established that the claim for arrest, assault and part of the detention were extinguished and the plaintiffs having established a substantial portion of the detention claim is enforceable against the Defendant. It needs no further mention that arrest, assault and detention effect and/or deal with rights that are enshrined in the Bill of Rights.¹ In all these circumstances it is fair and just to make an order that each party carry its own costs.

8. In the result I make the following order.

(a) The Defendant's special plea is relation to Plaintiffs' claims for unlawful arrest, assault and detention for the period 16 February 2009 up to 5 June 2009 is upheld.

(b) The defendant's special plea in relation to Plaintiff's claims for further detention from 5 June 2009 is dismissed.

¹ See sections 10, 12 and 14 of The Constitution of the Republic of South Africa, Act 108 of 1996.

(c) That each party must pay its own costs.

N NTSEPE

Acting Judge of the High Court of South Africa

Appearances:

Counsel for the Plaintiffs': Adv A Beyleveld (SC), Instructed by Lulama Prince & Associates

Counsel for the Defendant: Adv NW Gqamana (SC) with Adv T Zietsman, Instructed by State Attorneys

Date heard: 5 December 2019

Judgment delivered: 6 December 2019