



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. 139/2015

In the matter between:

MPATHI ENOCH QWABE

Plaintiff

And

MINISTER OF POLICE

Defendant

**BRIEF REASONS AND ORDER
IN RESPECT OF SPECIAL PLEAS**

HARTLE J

[1] The defendant raised certain special pleas of prescription after the plaintiff amended his particulars of claim. The import of them all is that the plaintiff for the first time when he delivered his amended particulars of claim (on 23 February 2023) introduced new causes of action or new debts which are claimed more than three years after 1 July 2023, the date on which his claim arose.

[2] The plaintiff abandoned his amendment as introduced by paragraphs 5.2 of his last amended particulars of claim regarding the defendant having exceeded the outer limits of the 48-hour rule, hence the defendant's first special plea has fallen away.¹

[3] The plaintiff did not replicate to the special pleas. However in a stated case and a pre-trial minute that served before the court for purposes of arguing the special pleas, it was submitted on his behalf with regard to the remaining two pleas, firstly in paragraph A2, that the recent amendment implicated thereby does not introduce new allegations nor a separate head of damages, but that the plaintiff merely sought thereby to perfect, clarify and particularise paragraphs 6.2 to 6.4 of his original particulars of claim and, secondly in respect of paragraph A3, that these additional paragraphs (as *facta probantia*) were also merely intended to perfect, clarify and particularize his already existing claim for unlawful arrest and detention presently under scrutiny, the bare basis for such claim having been pleaded in paragraphs 5.1 to 5.5 of his original particulars of claim.

¹ The amended particulars of claim should henceforth read as if paragraph 5.2 has been deleted in its entirety. Ms. Mqobi submitted that the preamble that "(t)he Plaintiff was unlawfully arrested and detained at Peddie Police Station" should still remain, but Mr. Sishuba argued to the contrary. It matters not though in my view because the sentiment that both the arrest and detention (as a necessary corollary to the arrest) were unlawful have been stated elsewhere in the particulars of claim.

[4] Indeed, the success of the special pleas raised by the defendant presupposes the premise that the impugned paragraphs introduce new causes of action or heads of damage.

[5] Briefly regarding the plea referred to in paragraph A2 of the defendant's special plea, the plaintiff's amended allegation that he suffered "great humiliation as he is a person of good reputation", although perhaps unfortunate, is in my view nothing more than saying he suffered *contumelia* in the traditional sense.

[6] With reference to the special plea raised under paragraph A3, there is evidently no reference whatsoever to a claim for malicious prosecution. The averments of fact in my view go to issue of the defendant's liability for the plaintiff's detention after his arrest (the continued detention) and the element of causality in relation to this claim.²

[7] To my mind it was necessary for the plaintiff to plead an evidentiary basis and specific facts against which the court is expected to adjudge the unlawfulness of his continued detention and its connection with the harm contended for by him exactly because the onus on the defendant to justify it generally should not be invoked in a vacuum.³ The plaintiff has however from the outset at least maintained that his arrest, *and continued detention at the hands of the police*, was unlawful. The amendments merely sought to give that averment flesh.

[8] The special pleas are accordingly bad in law and must fail with costs to follow such result.

² See in this regard *De Klerk v Minister of Police* 2019 (12) BCLR 1425 (CC) at [62] – [63]. See also the requirements for the delict which the court re-stated in para [14] of the judgment.

³ *Minister of Safety and Security v Slabbert* (2010) 2 All SA 474 (SCA).

[9] In the result I issue the following order:

1. The defendant's special plea of prescription premised on the argument in support of paragraph A2 of his special plea that paragraph 5.11 of his amended particulars of claim constitutes a new cause of action, namely defamation, or introduces a new head of damages that was not pleaded before the amendment was delivered, is dismissed.
2. The defendant's special plea of prescription premised on the argument in support of paragraph A3 of his special plea that paragraphs 5.12 to 5.16 of his amended particulars of claim constitute a new cause of action, namely malicious prosecution, or seek to introduce a new head of damages that was not pleaded before the amendment was delivered, is dismissed
3. The defendant is liable for the costs of the determination of the special pleas.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 3 May 2023
DATE OF JUDGMENT : 9 May 2023

Appearances:

For the plaintiff : Ms. T Mqobi instructed by Mdlangazi, Attorneys, East London (ref. Mr. Mdlangazi).

For the defendant : Mr. M H Sishuba SC instructed by the State Attorney, East London (ref. Mrs Dlanjwa).