



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

Case No: 2248/2012

In the matter between:

SIWAPHIWE MAGWENTSHU

APPLICANT

And

MINISTER OF SAFETY & SECURITY

RESPONDENT

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....
SIGNATURE

.....
DATE

JUDGMENT

SMITH J:

[1] On 22 October 2012, the plaintiff issued summons against the defendant for damages he suffered as a result of an alleged assault by members of the South African Police Services on 3 March 2012. In paragraph 5 of the particulars of claim, the plaintiff

alleges that the assault took place at Chatam Street, Mthatha, and that the police officers 'were accompanied/commanded by the ringleader Mr Michael Pama'.

[2] On 11 November 2021, he gave notice of his intention to amend his particulars of claim by averring that the alleged assault took place at Sprigg Street, Mthatha, and that the police officers were 'accompanied/commanded by the ringleader Mr Woods of the NIU (National Investigation Unit)'.

[3] The defendant filed a notice of objection in terms of Rule 28 (3) of the Uniform Rules, stating that he opposes the proposed amendment on the following grounds:

- (a) The proposed amendment has not been sought timeously, but only 9 years after the incident occurred, without any explanation for the inordinate delay.
- (b) The amendment will render the pleading excipiable since it is contrary to the facts set out in the statutory notice given in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002.
- (c) The defendant stands to be prejudiced by the amendment as he has prepared for trial and pleaded to the cause of action as pleaded in the original particulars of claim.
- (d) The amendment introduces a new cause of action to the extent that the averments in respect of the place where the alleged incident took place as well as the alleged perpetrators, introduce a new claim all together. That claim has since become prescribed.

[4] The plaintiff thereafter brought an application for leave to amend his particulars of claim in terms of Rule 28(4) of the Uniform Rules. In the supporting affidavit filed by his attorney of record, the attorney states that he had only become aware of the

discrepancies in the plaintiff's particulars of claim when he consulted with the latter during October 2021. He then immediately took steps to ensure that the pleadings are brought in line with the plaintiff's instructions.

[5] I do not believe that there is any merit in the defendant's contention that he will be prejudiced by the delay in effecting the amendment. It is trite that the defendant's own investigations confirmed that the alleged incident occurred at Sprigg Street and that Mr Woods was the commanding officer at the time. The matter has not yet been set down for trial and it is inconceivable that the defendant's preparation for trial will be impacted by the amendment.

[6] There is also no merit in the defendant's contention that the proposed amendment will introduce a new cause of action. The essential facts pleaded by the plaintiff in order to sustain his cause of action are that members of the police force assaulted him on 3 March 2012, at Mthatha. The averments regarding the street where the assault allegedly took place and who commanded the police are not part of the *facta probanda* required to sustain the plaintiff's cause of action. The amendment of those particulars do therefore not introduce a new cause of action.

[7] I am accordingly of the view that the defendant has not been able to show that he will be prejudiced in any manner by the proposed amendment.

[8] It is trite that amendments to pleadings will always be allowed unless they are *mala fide* or their introduction will cause prejudice to the other party that cannot be remedied by a costs order. In this case, the defendant has not been able to show such prejudice and the amendment must accordingly be allowed. The plaintiff has not asked for costs in his notice of motion, nor has he given notice to the defendant that he will ask for costs in the event of the latter opposing the application.

[9] In the result the plaintiff is given leave to amend his particulars of claim in accordance with the notice to amend dated 5 November 2021.

J.E. SMITH

Judge of the High Court

APPEARANCES

Date of hearing : 18 August 2022

Date of delivery : 1 September 2022

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