IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 8810/2008

In the matter between:

SIZWE AGRIPPA WANDA Plaintiff

and

MINISTER OF SAFETY & SECURITY Defendant

ORDER

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1. The plaintiff's amendment of 3 July 2014 to insert the word "maliciously" and claim the increased sum of R 30 000 for malicious prosecution in paragraph 4(c) in his amended particulars of claim is a nullity and is accordingly set aside.

2. The plaintiff's amendment to replace the words "to date" and substitute same with the words "to the end of October 2014" and the consequent increase of the plaintiff's claim for loss of earnings is also declared a nullity and is set aside.

3. The plaintiff's amendment to replace the word "assault" with the words "arrest and detention" in paragraph 5 is granted.

4. The plaintiff's amendment to increase his general damages from R 250 000 to R 1 200 000 is granted subject to the plaintiff proving the general damages he has suffered.

5. The costs of the application are reserved for determination by the trial court hearing the issue of the quantum of the plaintiff's damages.

JUDGMENT

HENRIQUES J

Introduction

[1] The opposed application before me is in respect of amendments sought by the plaintiff to his particulars of claim.

[2] The parties did not file affidavits.

Factual Matrix

[3] On 7 July 2008, the plaintiff instituted action against the defendant for damages arising from his wrongful and unlawful arrest on 12 July 2007 and his

wrongful and unlawful detention from 12 July 2007 to 18 October 2007.

[4] In terms of the particulars of claim dated 7 July 2008 (original particulars of claim) the plaintiff sought damages as follows:

> '4 (e) General damages in the amount of R 150 000-00.
>
> 7 (a) Disability in respect:
>
> (i) Loss of earnings up to July 2007 @ R 1 500-00 p.m. x 17 months to date: R 18 500-00;
>
> (d) General damages for past pain and shock, depriving of his liberty, suffering impairment of his dignity and self-esteem and contumelia:
> R 150 000-00;
>
> (e) General damages for malicious prosecution: R 20 000-00.
>
> Total amount of damages in the amount of R 188 000-00.'

[5] The matter was enrolled for trial on two occasions for the determination of the issue of liability. On 16 May 2012, Swain J granted the following order:

> 'That in terms of Rule 33(4) separating the issues of liability and quantum. The trial will proceed initially solely on the issue of liability.
>
> It is declared that the Defendant is liable to compensate the Plaintiff for any damages that the Plaintiff may prove to have suffered.
>
> That the Defendant is ordered to pay the Plaintiff's costs to date.'

[6] I was informed by counsel for the plaintiff and defendant that the issue of liability was conceded *in toto*, as incorporated in the above order granted by Swain J.

[7] The plaintiff thereafter by notice of amendment in terms of rule 28(1) dated 3 July 2014 (first amendment), sought to amend the original particulars of claim by *inter alia* inserting the word "maliciously" and by increasing the quantum of its damages as set out in the notice.

[8] Such amendment was not opposed by the defendant and the amended pages were filed on 30 July 2014, thereby effecting the amendment.

[9] On 8 October 2014, the plaintiff sought further amendments in terms of a notice in terms of rule 28(1) of the Uniform Rules of Court (second amendment) in *inter alia*, the following respects:

[9.1] replacing the amount of R 250 000 in paragraph 4(e) in respect of general damages with an amount of R 1 200 000;

[9.2] replacing the word "assault" with the words "arrest and detention" in claim B of its amended particulars of claim;

[9.3] extending the date of the plaintiff's unemployment until the end of October 2014;

[9.4] extending the period for loss of earnings to end of October 2014;

[9.5] amending the total quantum of its claim to R 1 342 500;

[9.6] the aforesaid amendments are set out in detail in the plaintiff's notice dated and served on 8 October 2014.

[10] The defendant objected to the proposed amendments by notice of objection dated 10 October 2014.

[11] The grounds as stated in the notice are the following:

'1.

1.1 The initial amount of damages was in the sum of R 250 000,00 and preceeding the trial the Defendant was taking instructions and trying to resolve the matter based on the said amount;

1.2 The intended amendment amount is R 1 200 000,00, the Defendant is now facing a much more higher risk, if it were to loose at trial;

1.3 the Defendant needs more time to take instructions and deliberate over the new amended sum claimed;

2.

2.1 The initial loss of earnings claimed is in the amount of R 18 500,00.

2.2 The intended amended amount is now R 112 500,00;

2.3 Defendant advances the same argument as above.'

Analysis

[12] Amendments to pleadings and documents, other than a sworn statement are governed by the provisions of rule 28 of the Uniform Rules of Court.

[13] Of significant relevance are the provisions of rule 28(10) which read as follows:

> 'The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.'

[14] It is clear from the aforesaid sub-rule that such amendments must be requested before judgment, as once a court has pronounced a final judgment, it is *functus officio* and has no authority to grant any amendment of the pleadings (see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G).

[15] The order of Swain J referred to above was dispositive and constituted a final judgment in respect of the issue of liability, which in any event was confirmed by counsel for both the plaintiff and defendant.

[16] The first amendment sought by the plaintiff was to introduce a claim for malicious prosecution after the grant of the order by Swain J, which claim was clearly not pleaded in its original particulars of claim, notwithstanding reference to damages for malicious prosecution.

[17] Notwithstanding the fact that the defendant did not object to such amendment, the amendment is clearly a nullity, alternatively void *ab origine*. In seeking such amendment after the grant of a final judgment referred to above, such amendment violates the unambiguous provisions of rule 28(10) of the Uniform Rules of Court.

[18] The general damages for such malicious prosecution concomitantly must also fall away.

[19] The purport of the second amendments sought by the plaintiff, as reflected below, is in my view related to both issues of liability and quantum for the reasons that appear hereunder.

[20] The substitution of the word “assault” with the words “arrest and detention” in paragraph 5, being claim B of the first amended particulars of claim, was nothing more than a correction of a misnomer, as the plaintiff’s original particulars of claim was never premised on an action for assault, but rather an action for the wrongful and unlawful arrest and detention of the plaintiff. Such correction of the obvious misnomer can hardly occasion any prejudice to the defendant (see *Moolman v Estate Moolman* 1927 CPD 27).

[21] The amendment relating to the loss of earnings by extending the period from seventeen (17) months to date with the words ‘loss of earnings from the date of arrest and detention being 12 July 2007 @ R 1 500-00 p.m. to the end of October 2014’, goes to the root of the defendant’s liability to the plaintiff’s damages in that the defendant conceded liability premised on the plaintiff’s original particulars of claim as recorded in the order of Swain J referred to *supra*.

[22] In considering the arguments before me, I am alive to the fact that the court has wide powers to effect a change in the pleadings at any stage of the action (*Morgan & Ramsay v Cornelius & Hollis* (1910) 31 NPD 262 at 265), however, such

amendment should not be granted unless the parties could be put back in the position as they were when the pleading which was sought to be amended was filed (see *Simmons, NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N)).

[23] In any event, such amendment falls foul of the provisions of rule 28(10) as referred to *supra* and is accordingly unsustainable.

[24] The consequential proposed increase in the quantum of the plaintiff's claim in respect of loss of earnings in the circumstances must also fall away.

[25] The amendment sought in respect of the plaintiff's general damages from R 250 000 to R 1 200 000 is related only to the issue of quantum and not the predisposed issue of liability.

[26] Whilst the plaintiff has not submitted a reasonable explanation as to the delay in seeking such amendment, such failure in itself does not preclude a court in the exercise of its judicial discretion from granting such amendment (see *Ekurhuleni Metropolitan Municipality v Waverley Court CC* 2015 JDR 1496 (GJ) para 14).

[27] In any event, the defendant cannot be prejudiced by the grant of such amendment as the plaintiff is still obliged to prove its general damages at a trial to determine the issue of the plaintiff's quantum of damages.

Costs

[28] Both parties have been partially successful and in the exercise of my discretion, I deem it appropriate that the costs of the application should be reserved for determination by the trial court hearing the issue of the plaintiff's quantum of damages.

[29] For the reasons referred to above, I grant the following orders:

[29.1] The plaintiff's amendment of 3 July 2014 to insert the word "maliciously" and claim the increased sum of R 30 000 for malicious prosecution in paragraph 4(c) in his amended particulars of claim, is a nullity and is accordingly set aside.

[29.2] The plaintiff's amendment to replace the words "to date" and substitute same with the words "to the end of October 2014" and the consequent increase of the Plaintiff's claim for loss of earnings is a nullity and is accordingly set aside.

[29.3] The plaintiff's amendment to replace the word "assault" with the words "arrest and detention" in paragraph 5 is granted.

[29.4] The plaintiff's amendment to increase his general damages from R 250 000 to R 1 200 000 is granted subject to the plaintiff proving the general damages he has suffered.

[29.5] The costs of the application are reserved for determination by the trial

court hearing the issue of the quantum of the plaintiff's damages.

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HENRIQUES J

Case Information

Date of argument	:	13 & 21 October 2014
Date of judgment	:	3 March 2017

Appearances

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Counsel for Defendant	:	Adv. T. Khuzwayo
Instructed by	:	State Attorney: KwaZulu-Natal 6th Floor, Metlife Building 391 Anton Lembede Street (Smith Street) Durban Ref: 123/002257/08/W/P26 (T) 031-365 2500 (F) 031-306 2448