

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO. 2394/09

In the matter between:

FATIMA SHERENISA	1st PLAINTIFF
NELISWE SENGANE	2nd PLAINTIFF
ISAK TENKI MARITI	3rd PLAINTIFF

And

MINISTER OF SAFETY AND SECURITY	1st DEFENDANT
THE MINISTER OF JUSTICE	2nd DEFENDANT

CORAM:	NAIDOO, AJ
---------------	------------

HEARD ON:	15 FEBRUARY 2012
------------------	------------------

DELIVERED ON:	1 MARCH 2012
----------------------	--------------

RULING ON ADMISSIONS and NON-JOINDER IN PLEADINGS

NAIDOO AJ

[1] This matter was set down on the trial roll for hearing

before me on 14, 15 and 17 February 2012. As a result of points being raised *in limine* I reserved judgement. These are my rulings.

[2] The plaintiffs sued the defendants for damages arising out of their unlawful arrest and detention by servants of the first defendant, as well as damages arising out of their prosecution by employees of the second defendant, which prosecution the plaintiffs allege was malicious.

[3] It is common cause that the plaintiffs were detained in custody from 6 September 2005 to 4 September 2008. A criminal trial ensued and concluded on 4 September 2008. It is not in dispute that the plaintiffs were found not guilty and discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977 (the CPA)

[4] The matter came before this court for the hearing of the trial, but before the trial commenced, Mr Mphaga who represents the defendants in this matter, indicated that he wished to raise a point of law and argued that the National Director of Public Prosecutions (NDPP) is a

necessary party to this action, as a result of the decision to prosecute the plaintiffs in the criminal trial, which prosecution is a subject matter of this action. He argued further that the Minister of Justice, the second defendant in this matter, is not responsible for any decision to prosecute any person. Thus he is not liable for the prosecution in this matter and should not be a party to these proceedings. The NDPP is responsible for taking decisions to prosecute, and he is accountable to Parliament for the policies, decisions and activities of the National Prosecuting Authority (NPA). The latter also has its own budget and is an entity different from the second defendant. Mr Mphaga also argued that the admissions in paragraphs 5 and 10 of the plea are not to be taken into account by the court as they are not sound in law. I therefore, understand Mr Mphaga's argument to be that, firstly there was misjoinder of the second defendant and a non-joinder of the NDPP, and secondly that the second defendant is not bound by the admissions which I have mentioned and which were made in the plea.

[5] The plaintiffs, in paragraph 5 of the particulars of claim, allege that the second defendant, the Minister of Justice, is cited as such because of his responsibility for the Department of Justice and the National Prosecuting Authority (NPA). In paragraph 10, of the particulars of claim, the plaintiffs allege that at all relevant times to this matter, the members of the NPA who were responsible for the prosecution of the plaintiffs in court, acted within the scope of their duties as officials of the Department of Justice and that second defendant is vicariously liable for their actions. The defendants, in paragraphs 5 and 10 of their plea, admit paragraphs 5 and 10 of the particulars of claim.

[6] I pause at this point to mention that the plaintiffs did attempt to amend their particulars of claim, by way of a notice in terms of Rule 28 of the Uniform Rules of Court dated 18 January 2012, by substituting the NDPP for the second defendant. The defendants then filed a notice in terms of Rule 30 of the Uniform Rules dated 2 February 2012, complaining that this was an irregular step in that Rule 10 and not Rule 28 of the Uniform Rules set out the

only procedure for the amendment envisaged by the plaintiffs. The plaintiffs' notice of intention to amend was withdrawn shortly before the proceedings commenced on 13 February 2012. Mr Benade, who is representing the plaintiffs, pointed out, during his address to court, that the defendants filed a notice to amend their plea in respect of the admissions regarding the liability of the second defendant. In effect the amendment sought to retract the admissions that were made. The plaintiff objected to this, and it appears the proposed amendment was not pursued by the defendants. The defendants did not dispute Mr Benade's assertions. The relevant documents do not appear to have been filed in the court file.

- [7] Mr Benade argued that the second defendant was indeed bound by the admissions made in the plea, and could not amend the plea or retract the admissions without an application being made to court, on notice to all affected parties. He further offered the explanation that the plaintiffs withdrew their notice of intention to amend because it was not necessary to join the NDPP

in the light of the admission of vicarious liability made by the second defendant

[8] An amendment to pleadings is usually done on notice to the opposing party and in the case of an opposition to the amendment, a substantive application for such amendment is brought before the court. The usual procedure by which to raise the issue of joinder, whether it is non-joinder or a misjoinder, is by way of a plea in abatement, although it has been held that an objection in terms of Rule 30 of the Uniform Rules may also be permissible. **(See Erasmus: Superior Court Practice page B1-96)**. In the present matter these procedures were not followed as Mr Mphaga raised the issues from the Bar, without any objection from the plaintiffs.

[9] In their plea, the defendants raised two special pleas, one of prescription and the other of non-compliance with Act 40 of 2002. The plea was filed on 7 September 2009. It is not clear when the issue of joinder began to occupy the attention of the defendants' legal representatives, but a cryptic recording in paragraph 9.1

in the minute of the Rule 37 Conference, which was held on 28 October 2010, alludes to an intended amendment by the defendants. No details are given as to what was intended to be amended, what information was given to the plaintiffs to consider or what special plea the defendants intended to introduce. The very brief reference by Mr Benade during his address to court that the defendants intended to amend their plea may well be a reference to what was referred to in paragraph 9.1 of the Rule 37 minute. It appears, therefore, that it was the intention of the defendants to raise the issue of non joinder for a considerable period prior to the matter coming before this court for hearing.

- [10] The reality of the present situation is that the issues of the amendment to the plea and of non-joinder of the NDPP and misjoinder of the second defendant are before this court in the manner I have indicated, albeit that there was ample time for the legal representatives of the defendants to have followed the correct procedure, as stipulated in the Rules, to bring these matters before the court. While this court is entitled to

direct that the defendants take the necessary steps to ensure that the matters are properly enrolled in compliance with the Rules before they are heard, I am of the view that this would have the effect of causing a considerable delay in the hearing thereof, with resultant prejudice to the parties, especially the plaintiffs. As I have indicated, the plaintiffs do not appear to have any objection to these issues being heard. In the interests of allowing a proper ventilation of issues and, more importantly, ensuring that justice is done, I propose to deal with the issues raised.

[11] I shall deal first with the issue of the admissions made by the second defendant in the plea. In this regard it is useful to refer to the provisions of section 15 of the Civil Proceedings Evidence Act 25 of 1965 which stipulates that;

“It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of proceedings”

As matters stand, there is no affidavit before this court to explain that the admissions were made in error and explaining how such admissions came to be made.

It is expected of the defendants to have placed the affidavit before this court by way of a substantive application for the amendment of the plea accordingly. It is somewhat surprising therefore that Mr Mphaga asks this court, from the Bar, to disregard the admissions made by the second defendant. In this regard, see the matter of **Secprop 30 Investments (Pty) Ltd v South Coast Furnishers CC [2010] JOL 25526 (KZD)**, where the learned judge **Mnguni J** cited with approval the case of **Sliom v Couzyn 1927 TPD 438 at 441**. In the latter case, the learned judge **Tindall J** said

“...If a similar admission had occurred in a pleading in a trial case, it is clear that leave would not have been given to withdraw the admission, in the absence of evidence explaining the circumstance under which the admission was made.”

This is exactly what pertains in the present case. The second defendant seeks to withdraw admissions made in the plea without any explanation of the circumstances under which such admissions came to be made. In the circumstances, such a withdrawal is not permissible.

[12] The defence of non-joinder or misjoinder, being merely dilatory, must be taken *initio litis*, before issue is joined. It cannot be raised for the first time at the trial. See **Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another 1980(3) 415 (WLD) at p419 E-F.**

No finding of misjoinder or non-joinder can be made at this stage.

[13] **RULING**

1. The defendants are bound by the admissions, made in their plea, of the allegations in paragraphs 5 and 10 of the particulars of claim;
2. No finding of non-joinder or misjoinder is made;
3. The defendants are ordered, jointly and severally, to pay the costs of the hearing on 14 and 15 February 2012;
4. The plaintiffs are given leave to apply to the

Registrar for a new trial date;

5. This case is not partly- heard before me, and can be set down before any judge of this Division.

NAIDOO, AJ

Counsel for Plaintiff:

Mr HJ Benade

Instructed by

Symington & De Kock

169 Nelson Mandela Drive

Bloemfontein

Counsel for the Defendant:

Mr M Mphaga

Instructed by:

State Attorney

11th floor Fedsure Building

49 Maitland Street

Bloemfontein