IN THE NORTH WEST HIGH COURT
MAHIKENG

CASE NO.: 1293/14

In the matter between:

THE MINISTER OF SAFETY AND SECURITY **Applicant**

and

JIM GOITSEMODIMO MORUBANE **Respondent**

DATE OF HEARING	**:**	**17 NOVEMBER 2016**
DATE OF JUDGMENT	**:**	**17 NOVEMBER 2016**
DATE REASONS REQUESTED	**:**	**05 DECEMBER 2016**
DATE REASONS HANDED	**:**	**17 FEBRUARY 2017**
FOR THE PLAINTIFF	**:**	**Adv. D. Smith**
FOR THE DEFENDANT	**:**	**Adv. Moagi**

REASONS FOR JUDGMENT

KGOELE J:

[1] On the 23rd September 2014, the respondent who is the plaintiff in the main action instituted an action against the applicant (the defendant in the main action) for unlawful arrest and detention. The applicant filed notice of intention to defend the action and plea wherein the arrest and detention of the respondent were admitted. Subsequently, the applicant discovered that the respondent was not arrested and detained. Based on the above, the applicant served a notice to amend their plea in terms of Rule 28(1) of the Uniform Rules of Court (**the Rules**), hence this interlocutory application. On 26th September 2016, the respondent filed a notice of objection in terms of Rule 28(3) to the proposed plea.

[2] In its application the applicant sought leave to amend its plea to read as follows:-

"2.1 on 10th October 2011 at around 11h00 Warrant Officer Nkgodi who is attached to the detective branch in Mahikeng Police Station invited the Plaintiff to an interview regarding a case of intimidation reported by his colleague, Warrant Officer Alfred Ramokgolo.

2.2 the object of the interview was to afford the Plaintiff with an opportunity to respond to the allegations levelled against him by Warrant Officer Alfred Ramokgolo and to put his version on record.

2.3 the Plaintiff was interviewed by Warrant Officer Nkgodi in the detective office situated at Mahikeng Police Station. He left the detective office immediately after signing his statement.

2.4 it is specifically denied that the Plaintiff was arrested and detained by warrant officer Nkgodi and Detective Mathe."

[3] The interlocutory application served before me on the 17th November 2016 whereupon the following order was made:-

"Application to grant leave to amend the particulars of claim as set out in the Notice of Intention to amend in terms of Rule 28 is hereby dismissed with costs".

[4] On the 5th December 2016 the applicant filed a notice in terms of Rule 49 (1) (c) of the Rules and the reason of the abovementioned order follows hereunder.

[5] The explanation proffered by the applicant's attorney of record in the affidavit she deposed to is to the effect that during November 2016, in one of the consultations, the investigating officer Warrant Officer Lekoae, who inherited the file from warrant officer Mathe who was no longer employed at their station, erroneously confirmed that the respondent was arrested. Warrant officer Nkgodi whom it is alleged arrested the respondent in this matter did not attend the abovementioned consultation due to family commitments. The same applies to Warrant Officer Bathobotlhe who charged the respondent, but due to official commitments. The explanation

continued to the effect that at the time of the said consultation, Lekoae was apparently not having the original case docket with him. The complainant's statement and the statement regarding interview with the suspect availed to him convinced him to labour under the impression that the respondent was arrested and detained.

[6] The explanation by the applicant's attorney of record further reveals that the above was influenced by the fact that during the said consultation he only had in his possession, copy of the complainant and witness statements including the investigation diary. Based on the above and the documentation availed to Counsel, it was pleaded on behalf of the applicant that the respondent was arrested and detained at Mahikeng Police Station.

[7] According to the applicant's attorney of record, during March 2015, Colonel Sebusho informed the applicant's attorney of record that whilst he was discussing this matter with warrant officer Nkgodi he was informed that the respondent was not arrested and detained. He further indicated that he was not able to trace the original docket in order to verify what really occurred.

[8] The applicant's explanation continued to the effect that the applicant' attorney of record attempted to amend the applicant's plea which was subsequently withdrawn as the original case docket was not provided to her. It then became evident to the attorney of record during August 2016 whilst Counsel was consulting with warrant officer Nkgodi that, the respondent was not arrested. The

original police docket availed to Counsel at that time also confirmed that the respondent was not detained in the police cell.

[9] Advocate Moagi submitted on behalf of the applicant that although the applicant accepts the fact that there was an unreasonable delay, this is not the only factor that need to be taken into consideration by the Court. Reasons given are not malicious. She urged the Court to take into consideration that the applicant cannot be blamed for the whole five years before the matter came before this Court. The respondent will also not be prejudiced because they now have the docket which had been discovered and he is an employee of SAPS, he can be able to access the other documents he requires to prepare for the trial.

[10] She further submitted that, the amendment should be allowed for the proper ventilation of the issues before Court and if not allowed, it will lead to absurdity as applicant will lead evidence which will be against its pleadings. She relied heavily on the following authorities:-

Erasmus **RS 1, 2016, D1-333;**

In **Imperial Bank Ltd v Barnard and Others NNO 2013 (5) SA 612 (SCA) para 8** where the Court emphasised that:-

> "an application for amendment will always be allowed unless it is made mala fide or will cause prejudice to the other party which cannot be compensated for by an order of costs or some other suitable order such as a postponement"

See also:- **Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) at 638A.** where it was said:-

> "An amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done".

[11] Advocate Moagi emphasized the fact that the general approach to be adopted in applications for amendment has been set out in numerous cases. An important consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.

[12] Advocate Moagi reiterated that it should be noted that warrant officer Lokoae inherited the file from warrant officer Mathe. The matter was withdrawn provisionally on number of occasion. On the 16th May 2014, the criminal matter opened against the respondent was *"informally moderated and the matter was withdrawn"*. At the time of consultation he had not consulted with Nkgodi and was not in possession of the original case docket. Based on the above and the documentation availed to Counsel, he was convinced that the respondent was indeed arrested, and it was erroneously pleaded on behalf of the applicant that the respondent was arrested and detained at Mahikeng Police Station.

[13] She added the following as far as the absence of prejudice is concerned:-

- The respondent does not provide reasons why he cannot utilise the provisions of Rule 35 to inspect the original case docket and/or request further and better discovery if necessary.
- The respondent may request further particulars in preparation for trial in terms of Rule 21 of the Rules of court.
- It is not known whom the respondent wished to call as witnesses and why they cannot be *subpoenaed* to corroborate his allegations.
- The respondent has already been awarded costs for postponement occasioned by the proposed amendment.

[14] Advocate Smit in response heavily relied on the following quote from an unreported judgment in the Eastern Cape Division (Grahamstown), **case number 847/2010**, in the matter between S**tandard Bank Limited v Ashbury George Davenport N.O. and others (saflii link: www.saflii.org/za/cases/.../2014/27.pdf*):-***

"The principles applicable to applications to amend were summarised thus by Henochsberg J in *Zarug v Parvathee NO 1962 (3) SA 872 (D) at 875H-876E:*

'A large number of decisions were quoted to me but I do not think it necessary to refer to all of them, suffice it to say that it seems that the general tendency of the decisions of our Courts, following in this respect the

> trend of English judicial opinion, has been in the direction of allowing amendments where this can be done without prejudice to the other party, and, I think that the following legal principles can be gathered from the decisions quoted to me:…….....
>
> 1. That the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.
>
> 2. With its large powers of allowing amendments, the Court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.
>
> 3. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a bona fide mistake."
>
> An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is *mala fide* or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted.'

An amendment that involves the withdrawal of an admission is treated somewhat differently, in the sense that it is usually 'more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the Court of the bona fides thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence'.

President-Versekeringsmaatskappy Bpk v Moodley 1964 (4) SA 109 (T) at 110H-111A

The position was summed up thus by Ogilvie Thompson AJ in Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd:-

Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd 1946 CPD 735 at 749

> "Before granting an amendment to a pleading which has the effect of withdrawing an admission therein I consider that the Court should require a satisfactory explanation of both the circumstances whereunder the admission was made and of the reasons why it is now sought to withdraw it: and, as in the case of all amendments to pleadings, the question of possible prejudice to the opposing party must of course also be considered."

-A rider must be added: the enquiry into whether or not the application to amend is bona fide – in other words, whether a satisfactory explanation has been given – is the first enquiry and, if it is found that the applicant for the amendment does not clear this hurdle, there is no need to consider the second leg of prejudice".

[15] She further on behalf of the respondent submitted that:-

- the application to amend is not *bona fide*;
- no real explanation exists with regard to the delay in giving notice of the amendment of almost 1 year;
- no real explanation was given as to the "fault" in the making of the admission;
- if the amendment were to be granted the respondent will suffer severe prejudice which cannot be compensated by a postponement and/or order as to costs;
- the amendment, if granted, will therefore afford the applicant an unfair tactical advantage to the detriment of the respondent;

- the prejudice the respondent will suffer will result therein that he in all probability cannot successfully continue with this action.

[16] The computation of time in this matter is important. The action was instituted during the end of 2014. The summons was served respectively on 15th and 23rd September 2014. The applicant filed a plea on 24th November 2014. In the said plea the applicant admitted that the respondent was arrested. On 29th July 2016 the applicant gave notice of its intention to amend its plea by withdrawing the admission of the arrest of the respondent. This intended amendment is made almost two years from date of the plea. The effect of the intended amendment is the withdrawal of an admission.

[17] I fully agree with Advocate Smit that the reasons for the withdrawal of the admission is not fully explained and not shown to be *bona-fide*. According to explanation proffered by the applicant, much emphasis is placed on the fact that the police officer Lekoae including the State attorney who deposed to an affidavit did not have the complete docket to verify the information as to what occurred on the day in question. This is borne by paragraphs 9-15 of the explanation proferred. A question that remains unanswered is, why could they not at that early stage as a safety valve simply deny the arrest as they were according to them not having sufficient information to form an informed plea?

[18] What compounds this issue further is that it appears that from the time their legal representative consulted with these police officers

about this matter on the 23 November 2014 inclusive of March 2015 and up to August 2016, they could not trace the docket. This is a period of almost two years. The applicant does not explain what steps they took to locate the docket and more importantly, what were the impediments in finding same.

[19] As stated by the applicant and from the papers in the possession of Warrant Officer Lokoae, he confirmed that the applicant was arrested. No substantial facts are put before this Court from where it can even be inferred as to why this admission was a mistake especially with reference to the papers in his possession and the fact that he was the investigating officer. We are just told that one of the papers that made Warrant Officer Lokoae to labour under the mistaken impression that the respondent was arrested was an investigation diary. Unfortunately the copy of this diary was not even attached to the papers.

[20] Furthermore, no explanation is given as to why Warrant Officer Nkgodi and/or Warrant Officer Bathobotlhe could not be contacted telephonically during the consultation which apparently took place in their absence to ascertain their version of the events prior to completing the plea. No explanation was furthermore furnished what attempts did they resort to even try to contact those two Warrant Officers even days after this consultation.

[21] The deponent to the affidavit supporting this application alleges that the allegation that the respondent was not arrested came to her attention during March 2015. On 22 April 2015 a pre-trial was

held between the legal representatives of the parties. During this pre-trial the applicant still admitted that the respondent was arrested on the 10th October 2010. This pre-trial conference was held approximately one month after which the new version of "*no arrest*" allegedly came to the attention of the deponent. All this information is borne by their version. This was a perfect time and opportunity for the applicant to have started amending their plea.

[22] Subsequent to the pre-trial conference, the applicant attempted to amend the plea which amendment was withdrawn. The said notice of intention to amend was served on the 11th May 2015 and subsequently thereto withdrawn on 23 June 2015. As to why the applicant decided to withdraw this attempt to amend the plea, we are not told. This happened despite the fact that from their own version they had a complete docket in their hands at that time.

[23] On 8 February 2016 a second pre-trial conference was held before Gura J. The State Attorney, who is the deponent to the founding affidavit supporting this application, attended the pre-trial conference. No indication was given on the said date of any intended amendments to the plea nor was any information given as to the possibility of such an amendment. If this was not the perfect time for the applicant to have made an indication that they want to bring an amendment of the plea, then the time will never be ripe for them.

[24] The action was set down for trial to commence on 15 August 2016 to 17 August 2016. The notice of intention to amend was

served on 29 July 2016. The applicant, on its version, states that it was aware of the allegation of "no-arrest" since March 2015. Notwithstanding this, the applicant only attempt to retract its admission to an arrest 10 days before the commencement of the trial.

[25] The applicant does not fully explained why it waited more than a year before it filed its notice of intention to amend which in effect is a withdrawal of an admission. The applicant furthermore does not explain why it did not take any steps to inform the respondent or his attorney of record of such intended amendment when it became aware of this new version during March 2015. Had the applicant taken pro-active steps when it became aware of this new version during March 2015, and had the applicant adequately informed the respondent thereof, the respondent and his legal representative could have at that stage already attempted to secure the necessary evidence in order to prove otherwise.

[26] It is however evident that the applicant chose not to disclose this information and/or predicament they were facing if any to the applicant and/or his legal representative and only did so more than one year later.

[27] It is important to emphasize that their subsequent withdrawal on the 23rd June 2015 of the amended notice served on respondent on the 11th May 2015 is also disturbing. It gives this Court an impression that the applicant did not from the onset know what

their story is. This withdrawal also occurred during the time they were still not having a complete docket. This withdrawal unfortunately gave the respondent in all probabilities the impression that the applicants are sticking to their previous guns.

[28] The length of time that has passed as indicated above also affect the prejudice the respondent may suffer. Firstly, if it took the defendant who is the custodian of the dockets and diaries including the information required in this matter from November 2014 to August 2016 to search and locate the docket, how is it going to be possible for the respondent to get the information he may require to now rebuild the allegation that he was not arrested. Although it is not disputed that respondent is a police official, it is obvious that he is not the custodian of these documents eg. diaries that were used 2 years ago. This is not public information either. Secondly, we are told in paragraph 5 of the founding affidavit of the applicant that Warrant Officer Mathe the former investigating officer is no longer stationed at Mafikeng Police Station. It will definitely not be easy and it may be time consuming for the respondent to locate him, especially taking into consideration that the applicant themselves who are his employer, failed and did not manage to talk to him to verify the arrest, which signifies that it was difficult for them to locate him as well.

[29] Another important consideration is that the applicant admitted the arrest. As a result thereof the applicant had the *onus* of proving that the arrest was lawful. This admission in the plea by the applicant caused the respondent to dispense with the procurement and / or to consider taking such steps necessary to procure the

necessary evidence in order to prove the arrest. In my view, the granting of the amendment will severely prejudice the respondent in that if granted the respondent must now attempt to procure evidence in respect of an arrest that took place almost 5 years ago on 10 October 2011. Due to the time delay this in itself will prove to be quite challenging.

[30] Securing of witnesses for an arrest that took place almost 5 years ago will be very difficult. In all probabilities if the amendment were to be granted the applicant would have to incur substantial resources and time in order to try and obtain the necessary evidence to prove the arrest.

[31] In the case quoted by the respondent above, it has been held that a withdrawal of an admission involves a change of front which requires full explanation to convince the Court of the *bona-fides* thereof. In my view the applicant did not give out a full explanation to convince this Court of their *bona-fides* as demonstrated above. The last nail to the coffin of the applicant can be seen from what appears to be a copy of the part of the docket that contain particulars of the accused that forms part of the discovered documents which is found on page "PD37" thereof. There is an inscription with the figures "10/10/2011" filled on a space provided for "*date and time of arrest*". As to how the applicant will climb this insurmountable aspect of their case will be of interest to know. Above all, these fly against their explanation and unfortunately signify an element of *mala fides* on their part as it casts doubt on their *bona fides*.

[32] I am also of the view that the amendment sought for will prejudice the respondent, who had by the admission been led to believe that he need not prove the relevant fact and might, for this reason, have omitted to gather the necessary evidence timeously. This is the case where I cannot do more than to agree with the respondent's Counsel that the probabilities points heavily to the fact that the proposed amendment sought was done to obtain an unfair advantage to the detriment of the respondent.

[33] All of the above are the reasons why an order of the 17 November 2016 was granted.

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A M KGOELE
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE PLAINTIFF	:	W J Coetzer Attorneys 23 Victoria Street MAFIKENG 2745
FOR THE DEFENDANT	:	State Attorney Justice Chambers 44 Shippard Street MAFIKENG 2745