CASE NO.: I 2677/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PIETER PETRUS VISAGE	**PLAINTIFF**
And	
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**FIRST DEFENDANT**
MRS E. H. NANDANGO	**SECOND DEFENDANT**
THE MAGISTRATES' COMMISSION	**THIRD DEFENDANT**
ATTORNEY GENERAL OF NAMIBIA	**FOURTH DEFENDANT**

Coram: SILUNGWE, A. J.

Heard on: 27th July 2009

Delivered on: 6TH July 2011

JUDGMENT

SILUNGWE, A.J,

[1] This is an application wherein the plaintiff seeks to amend his particulars of claim in an action for damages against the defendants. The action flows from the plaintiff's alleged deprivation of liberty by the second defendant who was at all material times the presiding magistrate in a criminal matter involving the plaintiff. The period of the said deprivation ranged from March 20, 2003, to June 15, 2005, when the plaintiff was released from prison in consequence of this Court's intervention on appeal.

[2] The particulars of claim that the plaintiff requires to amend shows, *inter alia,* that –

> "At all material times second Defendant was employed and appointed by First Defendant alternatively Third Defendant as Magistrate of Windhoek"

The Defendants responded by filing an exception indicating that the plaintiff's particulars of claim disclose no cause of action in that the first defendant and/or the third defendant are not vicariously liable for acts committed by judicial officers in the exercise of their judicial functions. This turn of events spurred the plaintiff to file a notice of intention to amend his particulars of claim. The defendants opposed the intended amendment by way of a notice in terms of Rule 28(4) of the Rules of the Court.

Thereafter, the plaintiff filed a substantive application to amend his particulars of claim.

[3] In his notice of amendment, the plaintiff shows that –

> "At all material times second defendant was appointed by first defendant, alternatively third defendant, as a Magistrate of Windhoek to exercise the judicial power of the State of the Republic of Namibia and the second defendant acted in that capacity at all times relevant hereto".

Further, it is sought to add to the original particulars of claim that "at all relevant times the plaintiff enjoyed the fundamental right not to be deprived of his personal liberty except according to the procedures established by law". Besides, it is intended to amend the particulars of claim by a substitution of paragraph 9 and renumbering it as follows:

> *"11. Second defendant, in her aforesaid capacity, acted inter alia and/or fraudulently and or maliciously and/or without proper motive and/or in error was guilty of the gross est carelessness by doing the following;*
>
> *11.1 She attempted to intervene to prevent the State from closing its case;*
>
> *11.2 She did not inform the plaintiff, his legal representatives or the prosecutor that the State's case had been closed on a previous occasion;*
>
> *11.3 She was determined to get a conviction against the plaintiff;*
>
> *11.4 She unduly interfered with the State's case;*

11.5 She denied the plaintiff a fair trial".

On top of all that, the plaintiff seeks an amendment to insert the following paragraphs"

"13. *Acting as aforesaid, the second defendant deprived the plaintiff of his personal liberty otherwise than by the due process of law and accordingly in conflict with the constitution of the Republic of Namibia", and*

"15. In the premises, the first, second and third defendants jointly and severally, the one paying the other to be observed, are liable to the plaintiff in the amounts of N$2 million and N$100,000.00.

Not surprisingly, the defendants objected to the proposed amendments.

[4] In deciding applications for amendments to pleadings, the Court enjoys discretionary powers to grant or refuse such applications. The object of the Court is do justice between the parties by deciding real issues. This is illustrated by *Whittaker v Roos and Another: Morant V Roos & Another* 1911 TPD 1102-3 in which the following observations were made:

> *"This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we*

know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the court will not look to technicalities, but will see what the real position is between the parties".

[5] An application for amendment will, however, be refused if to allow it would cause prejudice to the other party which would not be curable by an order for costs. This is exemplified by the observations that were made in *Trans-Drakensburg Bank Ltd (under judicial management) v combined Engineering (Pty) Ltd)* 1967 (3) Sa 632 (N), namely:

> "… I consider that the aim should be to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing issues on record is not to stand in the way of this; his punishment is in his being mulcted in the wasted costs. The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and where appropriate, a postponement".

[6] It is submitted on behalf of the plaintiff that the defendants will suffer no prejudice which cannot be addressed by an appropriate order for costs. This submission remains unchallenged and is thus upheld.

[7] The defendants resist the plaintiff's application for amendments of his particulars of claim on certain enumerated grounds. I deem it convenient to start with the ground that relates to prescription. Mr

Oosthuizen, learned counsel for the defendants, submits that if the application were to be allowed, the first and third defendants would be precluded from successfully raising prescription as a special defence. However, the response by Mr Smuts, learned counsel for the plaintiff, is quite the opposite.

[8] In considering the issue of prescription, the Supreme Court of Appeal remarked as follows in *Associated Paint Chemicals Industries (Pty) t/a Albestra Paint and Lacquers v Snit 2000 (2) SA 789 SCA) at 794C:*

> "As a general rule a plaintiff is not precluded by prescription from amending his claim provided the debt which is claimed in the amendment is the same debt as originally claimed, and provided of course that prescription of the debt originally claimed has been duly interrupted".

Another case of interest in this regard is *FirstRand Bank Ltd v Nedbank (Swaziland) Ltd 2004 (6) SA 317 (SCA)* where the court expressed itself in these terms at 320-321, para 4:

> "[4] section 15(1) of the Prescription Act 68 of 1969 provides:
> 'The running of prescription shall, subject to the provisions of ss (2), be interrupted by the service on the debtor of any process whereby the creator claims payment of the debt'.
>
> *As observed by Gorbett J A in Evins v Shield Insurance Co. Ltd 1980 (2) SA 814 (A) at 842E-F, it is clear that the "debt" is necessarily the correlative of a right of action vested in the creditor, which likewise become's extinguished simultaneously with the debt'. The distinction between 'right of action' and 'cause*

> *of action' has been repeatedly emphasized by this court. More recently in CGU Insurance Ltd V Rumdel Construction (Pty)Ltd [2003] 2 AU SA 597 (SCA) para [6] at 601c-d 'debt' (and hence its correlative 'right of action') was noted to bear 'a wide and general meaning: and not the technical meaning given to 'cause of action', being the phrase ordinarily used to describe the set of material facts relied upon to establish the right of action. Even a summons which fails to disclose a cause of action for want of other averment may therefore interrupt the running of prescription provided only that the right of action sought to be enforced in the summons subsequent to its amendment is recognizable as the same or substantially the same right of action as that disclosed in the original summons. (see Sentrachem v Prinsloo 1957 (2) SA 1 (A) at 15H – 16B; Churchchill v Standard General Insurance Co. Ltd 1977 (D SA 506 (A) AT 517b – C). If it is, the running of prescription will have been interrupted and it will not matter that the effect of the amendment is to clarify or even expand the claim".*

See also *Mtambo v Road Accident Fund* 2008 (1) SA 313 (W) at 317-318, para [14]; *Basfour 2482 (pty) Ltd v Atlantic Meat Market (pty) Ltd and Another* Case No.: (T) 1833/2004 (unreported).

[9] As it has repeatedly been observed, it is clear that the 'debt' is necessarily the correlative of a "right of action" vested in the creditor. Furthermore, it is noteworthy that the expression "right of action" bears a wide and general meaning, which is in stark contrast to the technical meaning accorded to the term "cause of action". It is clear that the debt set out in the original statement of claim is the "deprivation" of the plaintiff's freedom which Mr Smuts contends is recognized as having substantially the same right of action as the right of action pursued in the proposed amendment, namely, an

"actionable infringement of the plaintiff's fundamental rights protected by chapter 3 of the Constitution". I find merit in Mr Smuts' contention. In any event, it is settled law that even a summons which "initially failed to disclose a cause of action for want of or other averment" may nevertheless interrupt the running of prescription provided that the right of action sought to be enforced in the summons subsequent to its amendment is recognizable as the same or substantially the same right of action as that disclosed in the originally summons. See: *Mutambo V Road Accident Fund,* Supra*,* at 317-318 para[14]. In consequence, the argument espoused on behalf of the defendants regarding prescription, let alone the alleged plaintiff's failure in the original summons to the disclose the cause of action against the first and third defendants, fails.

[10] Another objection raised on behalf of the defendants is that the proposed amendments, if allowed, would materially change the plaintiff's claim by introducing a different (new) cause of action against the first and third defendants. In amplification, it is argued that the first and third defendants are not liable for defective judicial acts (or omissions) which result in loss to the subject. Mr Oothuizen continues that, in view of the common law position, to wit, that the first defendant is not vicariously liable for the wrongdoings of judicial officers, which, in his submission, was not altered by the Namibian Constitution, there existed and there still exists no claim against the first and third defendants since the inception of the proceedings.

[11] In countering the aforegoing argument, Mr Smuts states that the proposed amendments simply expand and improve upon the right of

action contained in the original particulars of claim. He continue that the right which the plaintiff seeks to enforce is a right arising out of a wrongful act perpetrated by the second defendant, done in the exercise of the judicial power of the State. It is affirmed that all this flows directly from the second defendant's prior appointment by the first defendant to carry out such duties on behalf of the State. It is further argued that the amendment would not render the particulars of claim excipiable given the development of the law by reason of the superimposition of the Constitution with particular reference being had to the rights protected under Article 25 of the Constitution. The argument is premised on *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 811-812 where reference was made to the case of *Maharaj v Attorney General of Trinidad and Tobago* (No.2) [1979] A C 385 (PC) and [1978] 2 All ER 670 at 629J and 680C-D which was said to be;

> "--- more explicit in its categorization of the remedy of a constitutional right as a public-law remedy which goes beyond that available in the common law.
>
> *The appellant, a member of the Bar of Trinidad and Tobago, had been wrongly committed for contempt of court in breach of his constitutional right not to be deprived of liberty without due process of law, 107 for which breach a plaintiff was entitled 'without prejudice to any other action with respect to the same matter which is lawfully available' to 'apply to the High Court for redress'. 108 in rejecting an argument that the granting of a remedy of such a breach would 'subvert the long established rule of public policy that a Judge cannot be made personally liable in court proceedings for anything done by him in the exercise or purported exercise of his judicial functions. 109 Lord Duplock, delivering the*

judgment of the majority of the Privy Council stressed the public law nature of the remedy as follows:

> 'The claim for redress under s 6(1) for what has been done by a Judge is a claim against the State for what has been done in the exercise of the judicial power of the State. This is not vicarious liability; It is a liability of the state itself. It is a liability in the public law of the State not of the Judge himself, which has been newly created by s 6(1) and (2) of the Constitution'.
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> ---
>
> 'The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would included damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone".

[12] In the light of the previous discussion regarding the terms "right of action" and "cause of action", the question whether the right of action relied upon in the original particulars of claim is recognizable as the same or substantially the same as that relied upon in the particulars of claim as amended, has already been answered in the affirmative. Hence, the argument that the proposed amendments do introduce a new right of action does not hold water as it is misconceived. The decisive issue is that the plaintiff's right of action is present in the original particulars of claim as it is in the proposed amendments of the particulars of claim, namely, the plaintiff's deprivation of the fundamental right to freedom which is in the teeth of Article 7 of the Constitution as read with Article 12 (1)(a). It follows that the

argument on behalf of the defendants concerning the common law position that the State is not liable for wrongful judicial acts (or) omissions is misplaced in the context of this case.

[13] A further objection is that, after the withdrawal of the original legal practitioners, current legal practitioners for the plaintiff, namely, the Legal Assistance Centre, neither submitted any mandate to amend the particulars of claim nor filed any substitute power of attorney. In response, it is contended that the defendants' objection is inept or, in any event, no longer relevant for the following reasons: (1) a party does not require a power of attorney to amend nor must a power of attorney contains an expressed mandate to amend; (2) lack of substitution is not a basis to defeat an amendment: and (3) in any event, the plaintiff's current legal practitioners have filed a fresh power of attorney.

[14] While an unrepresented party does not need a power of attorney in order to amend a summons, a legal practitioner representing a party needs to have a power of attorney which confers upon such legal practitioner the right of representation. In the present case, the plaintiff's current legal practitioners subsequently filed a notice of representation and an update power of attorney. In the circumstances, I am inclined to condone the legal practitioner's laps in the matter which has, in any event, been made good.

[15] In the end, I am satisfied, for the reasons given, that the plaintiff's application for amendments of his particulars of claim should be upheld. Accordingly, the following order is made:

1. The plaintiff's application to amend his original particulars of claim is granted with costs, including those of two instructed counsel.

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SILUNGWE, A. J

On behalf of Plaintiff	**:**	**D. F. Smuts, SC assisted by G. Dicks**
Instructed by	**:**	**Legal Assistance Centre**

On behalf of Defendants	**:**	**G. H. Oosthuizen**
Instructed by	**:**	**Government Attorney**