

SOUTH AFRICA / JUDGMENT

A.S v Member of the Executive Council for the Department of Health KwaZulu-Natal (7630/2013P) [2023] ZAKZPHC 146 (28 November 2023)

[2023] ZAKZPHC 146

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop

CASE / FILE NUMBER

7630/2013P

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FLYNOTES:

CIVIL PROCEDURE – Amendment – Particulars – Medical negligence claim – After ten days of evidence and with last witness for MEC being cross-examined – Plaintiff not planning to lead further evidence on issues identified in contentious paragraphs – Likely not impacting on final decision – MEC would be prejudiced by granting of application – Possibility that if application granted, some of the MEC's witnesses may have to be recalled so that version purposefully not put to them could be so put – Application to amend particulars refused.

IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG

Case
no: 7630/2013P
In

the matter between: A[...]
S[...]
PLAINTIFF
and
MEMBER
OF THE EXECUTIVE COUNCIL FOR THE
DEFENDANT
DEPARTMENT
OF HEALTH KWAZULU-NATAL

Coram: Mossop J

Heard: 17 November 2023

Delivered: 28 November 2023
ORDER
The

following order is granted: 1.
The plaintiff's application to amend her particulars of claim
by the insertion of paragraph 16B and paragraphs 17.3.1 to 17.3.5, as
detailed in her notice of intention to amend dated
16 January 2023,
is refused.

2.
The costs of the application are to be paid by the plaintiff
but such
costs may only be taxed after delivery of the final judgment in the
trial.

JUDGMENT

MOSSOP J:

- [1] During the early evening of 28 December 2010, the plaintiff gave birth to a profoundly disabled boy (the minor child) at the East Griqualand and Usher Memorial Hospital at Kokstad, KwaZulu-Natal (the hospital). The minor child has spastic quadriplegic cerebral palsy. The trial that I am presently hearing arises from an action instituted by the plaintiff against the defendant for damages arising out of the alleged negligent conduct of the defendant's servants at the hospital relating to the birth of the minor child. From my understanding of those pleaded grounds of negligence,[1] they relate to conduct and events leading up to, and immediately after, the birth of the minor child.
- [2] The trial of the action commenced with the particulars of claim as originally framed in place. Since the trial has commenced, it has covered some 10 days of evidence in three separate tranches of hearings,[2] and has progressed to the precipice of finality, with the last witness for the defendant in the witness box being cross examined.

[3] The plaintiff now seeks to amend her particulars of claim and consequently delivered a notice in terms of Uniform rule 28(1) (the notice of amendment). That elicited a notice of objection from the defendant. Accordingly, before me is an opposed application brought in terms of Uniform rule 28(4) to amend the plaintiff's particulars of claim. Mr Maritz SC, together with Mr Bodlani SC, were instructed to move that application for the plaintiff and Mr Mullins SC resisted that application for the defendant. I am indebted to counsel both for their helpful submissions and for the congenial way in which the application was argued.

[4] At the outset, I caution myself that while the plaintiff has closed her case, the defendant has not yet done so and the trial proceeds. In determining this application, I should therefore refrain from expressing an opinion on the credibility of any of the witnesses who have thus far testified. This, as Willis J noted in *Randa v Radopile Projects*,^[3] does complicate the process of explaining why a particular decision has been arrived at.

[5] The law on the issue of amendments is well settled. Uniform rule 28(10) grants a court the power:

'... at any stage before judgment [to] grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.'

[6] In *Robinson v Randfontein Estates GM Co Ltd*,^[4] Innes CJ stated that:

'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings.'

The court thus has a wide discretion to permit amendments but this discretion must be exercised judicially.^[5] This simply means that the decision should not be arrived at 'capriciously but for substantial reasons'^[6] and that 'there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial'.^[7]

[7] When exercising such discretion, the well-followed approach postulated in *Moolman v Estate Moolman*^[8] is of assistance:

'[The] practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

[8] Thus, prejudice to the opposing party is 'the touchstone for the grant or refusal of the application'.^[9]

[9] The primary goal of an amendment, frequently mentioned by the party seeking it, is to ensure a proper ventilation of the true dispute

between the parties in order to permit the court to determine that issue.[10] Notwithstanding this laudable goal, the seeking of an amendment, nonetheless, remains an indulgence, particularly once the trial has commenced.[11] In this regard, Willis J in Randa[12] expressed the view that:

‘It has long been my conviction that the commencement of a trial is the fulcrum upon which the courts’ stance in respect of applications for amendments to pleadings should be balanced. The further away the parties are from the commencement of the trial, the easier it should be for a litigant to obtain an amendment and, conversely, the deeper the parties are into trial and the nearer they may be to obtaining judgment, the more difficult it ought to be.’

[10] In paragraph 9 of the affidavit used in support of her application to amend her particulars of claim, the plaintiff, through the voice of her attorney, explains the basis of her amendment:

‘9.1 save in the minor respect alluded to below:

9.1.1 the amendment is founded upon the evidence already adduced by the plaintiff and her witnesses at trial;

9.1.2 the plaintiff does not propose to adduce any further evidence in support of the proposed amendment.

9.2 the plaintiff proposes, through the proposed amendment, to align her pleadings to the evidence adduced at the trial;

9.3 evidence relating to the post-natal care of [the minor child] relied upon by the plaintiff is documented in the hospital records and was addressed in the report and evidence of Dr Yatish Kara at the trial.’

I shall henceforth refer to this paragraph as ‘paragraph 9’.

[11] The plaintiff’s notice of amendment is a formidable document, comprising some 10 pages which contain 10 paragraphs crowded with proposed amendments. This is best demonstrated by reference to the new proposed paragraph 17.4, which alone has 31 sub-paragraphs, some of which also have their own sub-paragraphs.

[12] But during argument, it appeared to me that some of the proposed amendments within the notice of amendment were not opposed by the defendant and some were no longer persisted with by the plaintiff. Given the convivial way in which counsel presented their arguments and interacted with each other, the court inquired of them whether they could not sit down together and identify which of the amendments remained contentious and required a decision by the court, which were not opposed by the defendant, and which were no longer persisted with by the plaintiff. Counsel very kindly agreed to do so and the court therefore stood down to allow this exercise to occur. On resumption, counsel informed me that only the following paragraphs in the notice of amendment remained contentious and therefore necessitated a decision by the court:

(a) Paragraph 16B of the notice; and

(b) Paragraphs 17.3.1 to 17.3.5 of the notice.

I shall refer to these paragraphs as ‘the contentious paragraphs’.

[13] I will consequently not make further mention of the other amendments mentioned in the notice of amendment, as they will resolve themselves by either not being pursued by the plaintiff or by being consented to by the defendant without further objection. The sole issue that this judgment will now focus on will thus be whether the amendments outlined in the contentious paragraphs should be granted.

[14] The contentious paragraphs respectively read as follows:

‘16B. Following the delivery of [the minor child] by caesarian (sic) section [in] a severely compromised state in consequence of what is set out in paragraph 16A above [,] [the minor child] was provided with sub-optimal resuscitation which fell short of the proper and reasonable standards for such resuscitation.’[13]

‘17.3. They failed to:

17.3.1 manage the resuscitation of [the minor child] immediately following his birth in a proper and reasonable manner;

17.3.2 implement appropriate and correct resuscitation methods on respect of [the minor child] immediately after his birth;

17.3.3 ameliorate or limit the damaging effects of the brain injury and/or the complication;

17.3.4 take any or any reasonable steps to prevent the brain injury or damage occasioned by the brain injury from becoming permanent;

17.3.5 manage the immediate post-natal period appropriately or in accordance with proper standards.’

[15] The basis of the defendant’s objection to the amendment as a whole, prior to it being whittled down to the contentious paragraphs, was twofold:

(a) firstly, it contended that many of the amendments sought were simply not necessary and, if granted, would result in evidence being

incorporated into the pleading, something that is neither desirable nor permitted;[14] and

(b) secondly, notwithstanding what the plaintiff stated in paragraph 9, no evidence had actually been led on the issues identified in the contentious paragraphs during the plaintiff’s case. The delivery of the notice of amendment was therefore not an attempt to synchronise the pleadings with the evidence that had already been led. In this regard, the defendant contends that it was never the plaintiff’s case that events after the birth of the minor child

caused, or contributed, to his present condition. The defendant goes further and suggests that the plaintiff consciously chose not to lead this evidence when she notionally had the opportunity to do so.

[16] By virtue of the allegation that no evidence was led as contended for in the contentious paragraphs, it follows that the first ground of objection cannot apply to the contentious paragraphs, but the second ground of objection may well apply. That ground of objection must therefore be carefully considered.

[17] During her case, the plaintiff, inter alia, presented the evidence of an expert witness, Dr Yatish Kara (Dr Kara). He is the witness referred to by the plaintiff in paragraph 9.[15] While he was being led by the plaintiff's erstwhile counsel, Mr Gajoo SC, and was holding forth on the topic of the perfusion of fluids and glucose and nutrition immediately after an injury, Mr Mullins rose and objected to that line of questioning for the

following reason:

'MR MULLINS: M'Lord, I do not want to interrupt this too much but there is nothing pleaded about any damage sustained after the birth, or glucose issues.'

Plaintiff's erstwhile counsel responded, in part, as follows:

'MR GAJOO: ... All the witness is doing is commenting about the likelihood of further damage. It has not been pleaded specifically as I recall but it is encompassed within his report, he deals with it as part of his report. He is simply explaining what he has said in his report as far as that is concerned.'

The court asked Mr Gajoo whether he intended amending the plaintiff's particulars of claim to allow this evidence to be led. Counsel was initially uncertain and the court stood down and granted him an opportunity to take instructions and to consider his options. Upon returning, the court was advised as follows:

'MR GAJOO: M'Lord, thank you, we are not going to persist in the amendment.'

[18] That, however, was not the end of the matter. Dr Kara later went on in his evidence in chief to again testify about hypoglycaemia, which prompted the following objection from Mr Mullins:

'MR MULLINS: M'Lord, I just want it noted that my silence is not some indication that I am going to accept the amendment in due course. This evidence is not – if there is going to be an amendment in due course to suggest that postnatal care may have caused the injury.'

Counsel for the plaintiff responded by saying that:

'MR GAJOO: M'Lord we have accepted that. We are simply dealing with the joint minute and he is explaining what was agreed on ... '

[19] In the face of Mr Mullins's implacable objection to this evidence being led, the plaintiff did not lead it, whether through Dr Kara or through any other witness. In my view, the position adopted by Mr Mullins was correct. The particulars of claim made no allegation about any injury sustained by the minor child after his birth, nor did they allege any issues arising out of hypoglycaemia or any complication arising from a want of glucose.

[20] In fact, the possibility of a postnatal injury causing, or contributing, to the minor child's condition was, in effect, ruled out by the evidence of another witness called by the plaintiff, namely Dr Ebrahim. He expressed himself as follows when cross examined by Mr Mullins:

'DR EBRAHIM: Well, we know that in my opinion the baby entered labour without hypoxic injury. There may have been a trace that was of doubt that was category 2, which in my opinion was not an indication of damage. It was an indication that damage might occur,

and we know that the baby was born with severe hypoxic ischemic encephalopathy, which means that the baby suffered hypoxia. Now, the hypoxia could have happened before labour, during labour or after labour. Now, since the baby was born hypoxic, it removes the postnatal period as the time when the hypoxia occurred. We are left with the labour and before labour and we have no reason to suspect why a healthy mother with a 4kg baby would enter labour with a baby that has got brain damage from hypoxia. The baby might have had some evidence of compromise but there was no injury as yet. There was no damage as yet. There was no irreversible factor at that point. So the conclusion is that it happened from the time of the onset of labour until the time baby was born.'

[21] The content of the contentious paragraphs is at odds with the evidence of Dr Ebrahim.

[22] A consequence of the election made by the plaintiff not to effect the amendment and lead the evidence was that when Dr Hofmann, a medical practitioner who attended at the birth of the minor child, gave his evidence for the defendant, no questions were put to him on the issues raised in the contentious paragraphs.

[23] It is therefore difficult to understand how the proposed amendment, as contained in the contentious paragraphs, could constitute an attempt by the plaintiff to align her pleadings with the evidence led. Certainly, no attempt was made in argument to identify when that evidence had been led.

[24] The proposed amendment could, perhaps, if generously viewed, be considered as an attempt to amend to enable that evidence to be led. But that is not the plaintiff's expressed intent. She has unequivocally stated in her affidavit, in her heads of argument, and in argument, that she intends leading no further evidence on the issues identified in the contentious paragraphs. Why the amendment is sought therefore is not clear nor is it apparent how it will contribute to the resolution of the true issues between the parties.

In Benjamin,[16] the court held that:

‘Where a proposed amendment will not contribute to the real issues between the parties being settled by the Court, it is, I think, clear that an amendment ought not to be granted. To grant such an amendment will simply prolong and complicate the proceedings for all concerned and must, in particular, cause prejudice to the opposing party who will have to devote his energy and expend both time and money in dealing with an issue, the resolution of which may satisfy the needs (or curiosity) of the party promoting it but which will not contribute towards the adjudication of the genuine dispute between the parties.’

[25] The trial is long outstanding, and it has been two years since the first witness testified in the matter. I am aware that the plaintiff intends to apply to re-open her case, which may prolong proceedings. However, this is intended to allow her to lead evidence on a very discrete issue, namely whether she felt her baby moving in the run up to her going into labour. Mr Mullins, very fairly, indicated during argument that he would have no objection to this occurring. And it

appears also to be agreed that the plaintiff’s expert witness, Dr Kara, will have to be re-called to give evidence on a document

that came to hand at the eleventh hour relating to blood tests performed upon the minor child shortly after his birth. But these are very limited issues upon which evidence will be led and should not unduly prolong the trial.

[26] I have considered the fact that there has been a considerable delay in seeking the proposed amendment. This delay is acknowledged by the plaintiff, who states in her heads of argument that some explanation is required for the delay.[17] I have carefully read the founding affidavit in support of the amendment. I regret that I have found no such explanation therein. I, nonetheless, caution myself that a delay in seeking an amendment is itself not a reason to refuse it.[18]

[27] The fact that no evidence was led on the issues contained in the contentious paragraphs did not occur through happenstance, but occurred because of a decision that was consciously taken regarding the presentation of that evidence. Even if the application to amend was to be granted, there is every possibility that it will have no impact on the final decision in the light of the plaintiff’s decision not to lead any further evidence on the issues identified in the contentious paragraphs.

[28] I accept that the decision not to lead this evidence was a decision that may have been taken by the plaintiff’s erstwhile counsel and that her new counsel may not regard himself as being bound by a decision that he believes may not be in her best interests. But her new counsel, Mr Maritz, repeatedly assured me in argument that no evidence would be led on the issues covered by the amendment. As no evidence was ever led on those aspects, the amendment becomes an exercise in futility, in my view.

[29] I also take the further view that the defendant would be prejudiced by the granting of the application. The type of prejudice identified in Benjamin applies with equal force to the facts of this matter. Coupled to this is the possibility that if the application is granted, some of the defendant's witnesses may have to be recalled so that the version, which was purposefully not put to them, could be so put. The inconvenience and prejudice would be heightened. Sight, finally, must also not be lost of the fact that the plaintiff is indigent and the litigation is being conducted on her behalf on a contingency basis. She is in no position at this stage to meet any costs order that may be granted in terms of Uniform rule 28(9),[19] and the defendant cannot therefore at this stage be compensated with the granting of a costs order. The costs order that I intend granting has been crafted to cater for the plaintiff's impecuniosity.

[30] In the exercise of my discretion, it seems to me that it would not be in the interests of justice to permit the amendment.

[31] In the circumstances, I grant the following order:

1. The plaintiff's application to amend her particulars of claim by the insertion of paragraph 16B and paragraphs 17.3.1 to 17.3.5, as detailed in her notice of intention to amend dated 16 January 2023, is refused.

MOSSOP J

APPEARANCES

Counsel for the applicant : Mr NGD Maritz SC with Mr AM Bodlani SC Instructed by:

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Date of argument:

: 17 November 2023

Date of judgment

: 28 November 2023

[1] Twenty grounds of negligence are pleaded in the particulars of claim, divided into two tranches of allegations. The first tranche,

paragraph 17.1 of the particulars of claim, details five grounds of general allegations of negligence. The second tranche, paragraph

17.2, itemizes 15 more specific allegations of negligence.

[2] Three days of evidence over the period 22 to 24 November 2021; five days of evidence over the period 25 to 29 July 2022; and two days of evidence over the period 11 to 12 August 2022.

[3] Randa v Radopile Projects CC 2012

(6) SA 128 (GSJ) para 17.

[4] Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198.

[5] Embling v Two Oceans Aquarium CC 2000

(3) SA 691 (C) 694G-H.

[6] R v Zackey 1945 AD 505 at 513, quoting with approval from In re Taylor (4 Ch. D. 157).

[7] Merber v Merber 1948

(1) SA 446 (A) at 452-453, quoting with approval from Ritter v Godfrey

[1920] 2 KB 47.

[8] Moolman v Estate Moolman and another 1927 CPD 27 at 29.

[9] Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C) at 957I-J.

[10] Media 24 (Pty) Ltd v Nhleko and another

[2023] ZASCA 77 para 16.

[11] Minister van die Suid-Afrikaanse Polisie en 'n ander v Kraatz en 'n ander 1973

(3) SA 490 (A) at 512E-H; Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and others 1978

(1) SA 914 (A) and 928D.

[12] Randa v Radopile Projects CC 2012

(6) SA 128 (GSJ) para 4.

[13] The reference to the minor child in square brackets has been inserted into the contentious paragraphs to anonymize his identity. The further word and punctuation mark appearing in square brackets are missing from the proposed amendment but need to be inserted to allow the proposed amendment its proper meaning. This appears to be common cause.

[14] Media 24 (Pty) Ltd v Nhleko and Another [2023] ZASCA 77 para 18.

[15] At sub-paragraph 9.3 thereof.

[16] Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C) at 958A-E.

[17] Krogman v Van Reenen 1926 OPD 191 at 194-195.

[18] Bankorp Limited v Anderson-Morshead 1997

(1) SA 251 (W) 253E-F.

[19] That portion of Rule 28 reads: '(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.'

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