

SOUTH AFRICA / JUDGMENT

E D v Middelhoven (3013/15) [2017] ZAGPPHC 1189; 2018 (3) SA 180 (GP) (12 October 2017) [2017] ZAGPPHC 1189

COURT

North Gauteng High Court, Pretoria

BEFORE

P M Mabuse

CASE / FILE NUMBER

3013/15

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 3013/15

DATE: 12 October 2017

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED.

12/10/2017

E D Plaintiff

V

DR J MIDDELHOVEN Defendant

Practice

- Applications and motions- Interlocutory application- Form of-Whether under Rule 28(4) of Uniform Rules application for

amendment to be made on notice and notice of motion procedure supported by affidavit as contemplated in Rule 6.

Practice- Pleadings-Amendment of- Application for amendment in terms of Rule 28(4) as amended in 1994- Form of- Whether application to be made to be made on notice and notice of motion procedure supported by affidavit as contemplated by Rule 6 to be used

Prescription- Extinctive prescription- "Debt" ss 10 and 15(1) of Act 68 of 1969- Meaning of. Action for damages-Right of a claimant to damages arising from contract distinct from right to claim damages arising from delict. Claim for damages based on contract and claim for damages based on delict arising from the same source- Whether such claims constitute a single cause of action or two separate causes of action.

MABUSE J:

- [1] This is an application by the plaintiff for the amendment of the particulars of claim dated 29 September 2015. This application is opposed by the defendant.
- [2] The plaintiff's cause of action has its provenance in the following circumstances. The defendant did a reconstruction of the plaintiff's breasts in the year 2011. There were however complications. Based on such complications, on 16 January 2014 the plaintiff issued summons against the defendant and claimed, inter alia, payment of the sum of R3,725,325.00. Through the unopposed application for amendment dated 3 August 2015, the amount of R3,725,325.00 was altered to R1,948,318.20. The plaintiff's cause of action was at this stage, as evidenced by her particulars of claim, based on contract. That was pleaded as follows:

"3.

Gedurende of ongeveer November 2011 he! die partye 'n mondelingse ooreenkoms gesluit ingevolge waarvan die Verweerder onderneem het om die Eiseres behoorlik te assesser, om sekere chirurgie op die Eiseres uit te voer en meer spesifiek om beide die Eiseres se borste te rekonstrueer, en om die Eiseres post-operatief te behandel.

4.

Dit was 'n bepaling van die ooreenkoms dat die Verweerder die chirurgie met sodanige professionele vaardigheid as wat redelikerwys van 'n spesialis plastiese chirurg verwag word, sou uitvoer.

5.

Ondanks die ooreenkoms het die Verweerder die chirurgie en die behandeling op 'n na/atige wyse in een of meer van die volgende opsigte uitgevoer:

5.1 Versuim het om die Eiseres behoor/ik en vo/ledig te assesser, beide voor en na die operasie.

5.2 Deurdat hyprosteses ingeplant het wat te groot is.

5.3 Dat hy versuim het om die Eiseres se toestand post-operatief behoor/ik te diagnoseer en te behandel.

8.

As 'n verdere gevolg van die voormelde borsing en beserings deur die Eiser opgedoen het die Eiser skade gely ensal skade ly in die bedrag van R3,725,325.00, welke bedrag as volg saamgestel word.

A. Betaling van die bedrag van R3,725,325.00.”

[3] The foregoing particulars of claim were amended on 25 September

2015. That application for amendment was unopposed. The new

particulars of claim, according to the amended pages, were served on the defendant on 27 October 2015 and filed with the registrar of this Court on 28 October 2015. They read as follows:

Gedurende of ongeveer November 2011 het die partye 'n mondelingse ooreenkoms gesluit ingevolge waarvan die Verweerder onderneem het om die Eiseres behorlik te assesser met die oog op toekomstige chirurgie, om sekere chirurgie op die Eiseres uit te voer en meer spesifiek om beide die Eiseres se borste te rekonstrueer en die Eiseres post-operatief te behandel. Die ooreenkoms is gesluit te Boksburg en die partye het in persoon opgetree.

Dit was 'n bepaling van die ooreenkoms dat die Verweerder die chirurgie met sodanige professionele vaardigheid as wat redelikerwys van 'n spesialis plastiese chirurg verwag word, en sonder nalatigheid.

Ondanks die ooreenkoms het die Verweerder die assessering, die chirurgie en die behandeling, teenstrydig met die ooreenkoms, op 'n nalatige wyse in een of meer van die volgende opsigte uitgevoer:

5.1 Die Verweerder versuim het om die Eiseres behoorlik en voldoende te assesser en te behandel, beide voor en na die operasies wat die Verweerder op die Eiseres uitgevoer het:

5.1.1 Op 30 November 2011, toe die Verweerder sogenaamde "expanders" op die Eiseres se bors ingeplant het, deurdat hy versuim het om in ag te neem dat die Eiseres voorheen borskanker onder lede gehad het, voordat hy met die operasie voortgegaan het

5.1.2 Op 22 Februarie 2012, toe die Verweerder prostese op die Eiseres se borskas ingeplant het en om in ag te neem dat die Eiseres voorheen borskanker onder lede gehad het en dat hy voortgegaan het om die prostese in te plant wat te groot was, voordat hy met die operasie voortgegaan het.

5.1.3 Op 15 Maart 2012, toe die Verweerder die voormelde prosthesis vertwysder het, deurdat hy versuim het om in ag te neem dat die Eiseres alreeds sepsis in haar borste gehad het en om haar vir daardie sepsis te behandel.

5.1.4 Deurdat hy op 15 Maart 2012 haar voortydig ontslaan het terwyl die sepsis nog nie behandel was nie en sodanig ontslag te vroeg was nadat die Eiseres onder narkose behandel was.

6.

As gevolg van die Verweerder se voormelde nalatigheid het die Eiseres pyn en lyding ondervind, en moes sy verdere mediese behandeling met daardie gepaardgaande mediese koste ondergaan en sal sy toekomstige mediese behandeling moet ondergaan om beide haar borste te rekonstrueer.

[4] Later the plaintiff's attorneys reconsidered her cause of action and decided to bring an action based on medical negligence. That this was the case was confirmed by Mr Wessels. For this purpose, the plaintiff delivered a Notice of Intention to Amend in terms of Rule 28(1) of the Uniform Rules of Court. The intended amendment involved:

4.1 the complete deletion of paragraph 3 of the original Particulars of Claim;

4.2 the insertion of paragraph 4Bis;

4.3 the complete deletion of paragraph 5 of the original Particulars of Claim and the replacement thereof with a new paragraph 5;

4.4 the deletion of paragraphs 7.1 to 7.3 of the original Particulars of Claim and replacing them with the new paragraphs 7.1, 7.2 and 7.3;

4.5 the deletion of the entire paragraph 8 of the original Particulars of Claim and replacing it with a new paragraph 8;

4.6 the deletion of prayer 'A' of the original Particulars of Claim and replacing it with a new paragraph 'A'.

[5] Accordingly the proposed amendment would read thus:

"3.

Gedurende of ongeveer November 2011 het die partye 'n monde/inge ooreenkoms gesluit ingevolge waarvan die Verweerder onderneem he! om die Eiseres behoorlik te assessee met die oog op toekomstige chirurgie, om sekere chirurgie op die Eieseres uit te voer en meer spesifiek om beide die Eiseres se borste te rekonstrueer en die Eiseres post-operatief te behandel. Die ooreenkoms is gesluit te Boksburg en die partye het in persoon opgetree.

Dit was 'n bepaling van die ooreenkoms dat die Verweerder die chirurgie met sodanige professionele vaardigheid as wat redel!kerwys van 'n spesialis plastiese chirurg verwag word, sou uitvoer. Altematiewelik tot paragrafe 3 en 4 uit hoofde van die pasient dokter verhouding wat daar ontstaan het tussen Eiseres en Verweerder het daar 'n regsplig op die

Verweerder gerus om die Eiseres te adviseer, behandel en chirurgie toe te pas en om a/le stappe te neem om te verhoed dat die Eiseres komplikasies opdoen volgens die rede/ike standarde van 'n dokter en veral 'nplastiese chirurg in sy posisie en sander nalatigheid

Ondanks die ooreenkoms en regsplig wat op die Verweerder gerus het, het die Verweerder die assessering, die chirurgie en die behandeling,

teenstydig met die ooreenkoms en sy regsplig op 'n nalatige wyse in een of meer van die volgende opsigte uitgevoer:

5.1 Versuim het om die Eiseres behoorlik en volledig te assesseer, beide voor en na die operasie.

5.1.1 Op 30 November 2011, toe die Verweerder sogenaamde "expanders" op die Eiseres se bors ingeplant het, deurdat hy versuim het om in ag te neem dat die Eiseres voorheen borskanker onder lede gehad het, voordat hy met di eoperasie voortgegaan het.

5.1.2 Op 22 Februarie 2012, toe die Verweerder prostese op die Eiseres se borskas ingeplant het en om in ag te neem dat die Eiseres voorheen borskanker onder lede gehad het en dat hy voorgegaan het om die prostese in te plant wat tegroot was, voordat hy met di eoperasie voortgegaan het.

5.1.3 Op 15 Maart 2012, toe die Verweerder die vorme/de prosthesis verwyder het, deurdat hy versuim het om in ag te neem dat die Eiseres a/reeds sepsis in haar borste gehad het en om haar vir daardie sepsis te behandel.

5.1.4 Deurdat hy op 15 Maart 2012 haar voortydig ontslaan he! terwyl die sepsis nog nie behandel was nie en sodanig ontslag te vroeg was nadat die Eiseres onder narkose behandel was.

5.2 Deurdat hy prostheses ingeplant het wat te groot is.

5.3 Dat hy versuim het om die Eiseres se toestand post-operatief behoorlik te diagnoseer en te behandel.

7.

As gevolg van die voormelde:

7.1 Is die Eiseres gehospitaliseer en he! mediese behandeling ontvang en het kostes as gevolg daarvan aangegaan, sat ook in die toekoms gehospitaliseer word en sal verdere mediese behandeling ontvang en sal verdere uitgawes met betrekking daartoe aangaan,

7.2 Het die Eiseres pyn en lyding ervaar en sat in die toekoms verdere pyn en lyding ervaar,

7.3 Het die Eiseres 'n verlies aan lewens genietinge gely en sat in die toekoms 'n verdere verlies aan lewensgenietinge ly.

As 'n gevolg van die voormelde kontrakbreuk weens die nalatige nie nakoming van die Verweerder se sorgsaamheidsplig, kumulatief en/of alternatiewelik die verbreking van die algemene sorgsaamheidsplig wat aan die Eiseres verskuldig was, het die Eiseres skade gely en sal sy skade ly in die bedrag van R2,313,956.30 welke bedrag as volg saamgestel word:

A. Betaling van die bedrag van R2, 131,956.30 . 11

[6] The relevant Notice of Intention to Amend was served by the plaintiff's attorneys on the defendant's attorneys on 17 January 2017 and filed the following day with the registrar of this Court. The purpose of the amendment was to introduce paragraph 4Bis and other paragraphs. This paragraph 4Bis introduces another cause of action, medical negligence.

[7] On 31 January 2017 the defendant's attorneys delivered to the plaintiff's attorneys an objection in terms of Rule 28(3) of the

Uniform Rules of Court to the contemplated amendment. Rule 28(3) provides that:

"An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded."

The defendant had complied with the provisions of Rule 28(3) inasmuch as he had fully set out in his Notice of Objection the grounds upon which his objection against the proposed amendment was based.

[8] At a pre-trial conference held by the parties on 31 January 2017 the defendant expressly indicated its objection to the plaintiff's

contemplated amendment on the ground that such an amendment amounted to the introduction of this alternative claim and that the said alternative claim constituted a new cause of action which had become prescribed.

[9] Mr Wessels (SC), counsel for the plaintiff, argued that the defendant's objection was purely technical. Relying on the case of *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ) he urged this Court not to entertain the defendant's objection for the foregoing reason. He submitted that the objection

to the amendment lacked merits and was contrary to the convention held over a long period of time.

[10] Mr Botha, counsel for the defendant informed the Court that the defendant has raised five grounds of objection against the proposed amendment. These grounds of objection were that:

10.1 there was no application for an amendment before the Court;

10.2 the plaintiff has not complied with the Rules of this Court;

10.3 there were no amendments before the Court;

10.4 the plaintiff created an impression that she did not need time to bring the amendment;

10.5 the amendment sought to introduce a new cause of action that has become prescribed.

10.6 THERE IS NO APPLICATION FOR THE AMENDMENT BEFORE COURT

10.7.1 According to Mr Botha, the question is whether there is any amendment before the Court. According to the rules of Court, a party that wants to make an amendment of its pleadings or any document in terms of Rule 28(1) must give notice to the other party or parties. The notice in terms of Rule 28(1) shall furnish complete particulars of the proposed amendment. In terms of Rule 28(2) the notice referred to in Rule 28(1) shall state that unless a written objection to the proposed amendment is delivered within 10 ays of the notice, the amendment will be effected. The plaintiff has so far complied with both Rules 28(1) and 28(2).

10.7.2 The date of hearing of the main trial was 15 February 2017. It was the defendant's complaint that the plaintiff was trying to squeeze in the amendment of the particulars of claim in terms of Rule 28(10) which reads as follows:

"A 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. " He submitted that there was no application for leave to amend before Court on the basis of which the Court could make any ruling. In casu, the plaintiff only delivered her Notice of Intention to Amend. The plaintiff has not delivered any application for leave to amend hence the defendant's approach that there was no application before the Court on the basis of which the Court could make an order.

With regard to this objection the crucial question, which will be answered in the subsequent paragraphs, is whether the plaintiff,

having been served with a Rule 28(3) objection was obliged to lodge an application for leave to amend as enjoined by Rule 28(4) or whether the delivery of the Notice of Intention to Amend was, for the purposes of Rule 28(4), sufficient?

10.7

10.7.1 THE PLAINTIFF HAS NOT COMPLIED WITH THE RULES OF COURT OR PROCEDURE SET OUT FOR AMENDMENT

On 31 January 2017, the defendant delivered to the plaintiff a Notice of Objection to the proposed amendment. I have already referred to the said Rule 28(3) supra. The defendant's case was that the plaintiff has not complained about the said Notice of Objection. If there was anything wrong with the Notice of Objection, so counsel for the defendant developed his argument, the plaintiff was entitled to attack it in terms of Rule 30 of the Uniform Rules of Court. The plaintiff has not taken any steps in terms of the said Rule. Accordingly, so concluded the defendant's counse,l the said Notice of Objection was valid.

10.7.2 In terms of the Rules, once the defendant has complied with the provisions of Rule 28(3), the plaintiff may follow the steps set out in Rule 28(4), in other words, the plaintiff 'may' lodge an application for leave to amend. As the plaintiff has not followed the steps set out in the said Rule 28(4) of the Uniform Rules of Court, there is no application for leave to amend, so it was argued by the defendant's counsel. The plaintiff has simply disregarded the Rules of this Court, he concluded.

10.7.3 He went further and argued that the plaintiff's attorney simply proceeded to file the amended pages of the plaintiff's particulars of claim contrary to the provisions of Rule 28(4). To exacerbate the situation, the plaintiff's attorneys delivered the plaintiff's Rule 28(1) notice on 6 February 2017, a mere six days after the defendant had served them with a Notice of Objection.

10.7.4 The plaintiff tried to push through the amendment and in doing so completely disregarded the Rules of Court so Mr Botha argued. An amendment in terms of Rule 28 has to be authorised by the Court.

10.8 WHY ARE THE AMENDMENTS NOT BEFORE THE COURT

On 8 February 2012, the defendant delivered on the plaintiff a notice in terms of Rule 30(2)(b) in terms of which he objected to the filing of the amended pages on the basis that the plaintiff was procedurally not authorised by the Court to file any such pages. The filing of such pages without having obtained leave of the Court as enjoined by Rule 28(4) was, according to Mr Botha, an irregular step. That application in terms of Rule 30(2)(5) still has to be decided. It was not before the Court at the hearing of the matter.

10.9 NO OTHER OPTION

10.9.1 It was argued by Mr. Botha that the plaintiff has no option but to follow the procedure set out in Rule 28(4). According to him, the plaintiff created an impression that she did not have enough time to bring the application in terms of Rule 28(4). For that reason, she truncated the period set out in Rule 28(1) by her attempt to squeeze in the amendment in terms of Rule 28(2).

10.9.2 There is, in this Division, a special Interlocutory Court that sits on Tuesdays and Thursdays of each week for such matters. The plaintiff has failed to bring her application to amend before such Court but has chosen to deal with this matter haphazardly. Counsel for the defendant argued that the plaintiff's conduct amounts to an abuse of the Court processes. In support of this point, that the plaintiff's conduct amounted to an abuse of the court processes, Mr. Botha referred the Court to the following dates and events:

- (a) on 20 January 2015 a copy of the summons was served on the defendant
- (b) on 31 August 2015 the plaintiff amended her particulars of claim;
- (c) on 12 November 2015 the defendant served his plea. In paragraph 4.3.3 of the said plea, the defendant warned the plaintiff that she could not claim general damages if her claim was based on a contract;

- (d) on 28 January 2016 the parties heard a first pre-trial conference. At this pre-trial conference, the defendant again warned the plaintiff about the flaws in the claim;
- (e) on 20 June 2016 the defendant wrote a letter to the plaintiff and pointed out the same problem in the plaintiff's claim;
- (f) on 25 August 2016 the defendant sent a reminder to the plaintiff. Still there was no response from the plaintiff;
- (g) on 17 January 2017 the plaintiff delivered her Notice of Intention to Amend .

10.9.3 It was argued by Mr. Botha that the manner in which the plaintiff dealt with this matter constituted an abuse of the Court processes and that such conduct was prejudicial to the defendant. On the other hand, counsel for the plaintiff argued that there will be no prejudice to the defendant if the amendments are allowed. It is trite that in terms of our law the duty lies on the plaintiff, being the party seeking an indulgence, to prove the absence of prejudice. Mr. Botha argued that the following circumstances were, inter alia, clearly indicative of the presence of prejudice:

- (1) up to the point when and where the Court allow the amendment, the defendant does not know the case he has to meet;
- (2) the defendant does not know whether to file a consequential amended plea of its own.

[11] The provisions of s 28(1), 28(2), 28(3), 28(4) and 28(10) have been set out above in the judgment. Rule 28(1) provides that:

"Any party desiring to amend a pleading or document other than a statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment. 11

The plaintiff's notice was titled:

"Kennisgewing van wysiging in terme van Reël 28. 11

In terms of Rule 28(2):

"The said notice in terms of Rule 28(1) shall state that unless written objection to the proposed amendment is delivered within ten days of the notice, the amendment will be effected."

- [12] The plaintiff had without doubt complied with the provisions of both Rules 28(1) and 28(2) but that is not enough to bring about an amendment of the pleading. Quite clearly the purpose of Rule 28(1) is to inform the other parties of the intention of the amending party to amend its pleading or document. More importantly it is to notify the other party or parties of the nature and extent of the contemplated changes to a pleading. Once the other party knows about the nature and scope of an amendment, such a party is afforded an opportunity to study the amendment and to assess the extent to which such an amendment will affect its own case.

[13] Once it has concluded its assessment of the proposed amendment, the party receiving the Notice to Amend must decide whether to object to the proposed amendment or not. This is done by delivering a Notice of Objection as set out in Rule 28(3). Such a party is given a period of ten days from the date on which the Notice of Intention to Amend was served on him or her or it to deliver his or her or its objection. The defendant as pointed out, has complied fully with the provisions of this Rules 28(1) and 28(2). Rule 28(4) provides that:

"If an objection which complies with (3) is delivered within the period referred to in (2), the party wishing to amend may, within ten days, lodge an application for leave to amend."

The old Rule 28(4) which was amended on 28 January 1994 by the new Rule read as follows:

"If an objection is made within the said period, which objection shall clearly and concisely state the grounds upon which it is founded, the party wishing to pursue the amendment shall within ten days after receipt of such objection, apply to Court on notice for leave to amend and set the matter down for hearing. The Court may make such order thereon as to it seems meet."

In terms of the old Rule a party that "wished to pursue an amendment" had to make a substantive application for leave to amend. The case of *Nel v Mathews* 1973(1) SA 184 [T.P.A] was decided in terms of the old Rule. In this case the Court, Hiemstra J, as he then was, had the following to say at page 1850-E:

"In my oordeel is die aansoek om tersydestelling ongegrond Die feit dat die verweerder se kennisgewing van wysiging gelei het dat die aansoek op die dag van die verhoor gedoen sou word, verhinder die eiser nie om binne veertien dae na ontvangs van die kennisgewing beswaar daarteen te maak soos bedoel in (4) nie. As hy beswaar aangeteken het, sou die verweerder binne tien dae by die Hof aansoek moes gedoen het om wysiging toegelaat te kry. (my underlining)."

[14] Quite clearly, the provisions of the new Rule 28(4) are quite distinct from the provisions of the old Rule. While the old Rule

28(4) put it expressly that a party pursuing an amendment "shall ... apply to Court for leave to amend"; the new Rule 28(4) states that:

"The party wishing to amend may ... lodge an application for leave to appeal."

The questions facing this Court are as follows:

14.1 do the provisions of both Rules have the same meaning and intention? Logic dictates that the meaning and the intention conveyed by the new Rule cannot be the same as the meaning and intention conveyed by the old Rule, otherwise "why fix it if it ain't broken?" Accordingly, and on the basis of the foregoing, in my view, the application of the new Rule 28(4) is far different from the application of its predecessor. The provisions of the new Rule 28(4) may therefore not be applied in the same manner as the provisions of the old Rule 28(4).

14.2 Does the word "may" in the new Rule 28(4) suggest that a party that wishes to pursue an amendment does not have to apply on notice and in the same way as

was prescribed by the old Rule 28(4) for leave to amend? May a party approach the Court for leave to amend without 'lodging an application' in writing for leave to amend? Can the party that wishes to pursue an amendment, having delivered its Rule 28(1) notice and having been served with a proper Notice of Objection, without filing any further papers, simply approach the Court for leave to amend?

[15] My sister, Kubushi J, was seized with a matter that was on all fours with the current matter in case number 14239/2014. In a written judgment that she handed down on 4 February 2015 she reasoned in paragraph 8 of the said judgment that:

“[8] It is my view that this Court is not competent to grant the applicant leave to amend its particulars of claim when the applicant has failed to comply with the requirements of (4). Compliance with sub-rule (4) should as a general rule be insisted upon, unless there are circumstances which justify departure from the sub-rule. In this instance there are no such circumstances. The application can, therefore, not be heard.

[9] On that basis the application ought to be struck off the roll. This does not preclude the making of a subsequent application, in proper form, for the relief sought by the applicant.”

In that case the applicant had approached the court for leave to amend without having filed a written application for leave to amend. The court was strongly of the view that the applicant was obliged to have delivered its application for leave to amend. The Court was not inclined to grant the application as pointed in paragraphs (8) and

[9] above.

[16] In *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (WLD) the Court had to deal with precisely the same issue. The question that the Court had to decide in that case was whether or not the words 'lodge an application' in the new Rule 28(4) denoted the use of the formal notice of motion procedure laid down in Rule 6(1) and whether or not "a particular form of application" had been laid down in the new Rule 28(4) requiring that specific provisions in the Rule be allowed and not more general provisions. In that matter the plaintiff had applied in terms of Rule 28(4) of the Uniform Rules of Court in the Local Division for leave to amend its declaration after an objection had been raised to the proposed amendment by the defendant. The application was not lodged by way of notice of motion procedure supported by an affidavit, just like in the instant matter. The defendant objected in limine to the application, raising the question whether the form of application used was admissible in view of the new Rule 28(4). On behalf of the defendant it was contended that the new wording 'lodge an application for leave to amend' denoted a change in the intention of the legislature and that all applications for leave to amend had now to be noticed on notice of motion supported by an affidavit. This is the approach that was argued by Mr. Botha. The Court held that the new Rule 28(4) simply provided that an application may be lodged for leave to amend the pleadings and that the wording used was anonymous to that found in Rule 6(15), which stated that:

"The Court may on application order to be struck out from any affidavit any matter which is scandalous vexatious or irrelevant "

The procedure to be adopted under Rule 6(15) was an application on notice of motion which was not to be used. At page 56 1-J the court stated that:

"In my view, the words used in Rule 28(4), i.e. 'lodge an application: cannot in the context of an amendment, which by nature is an interlocutory application, denote an intention on the part of the legislator that the formal notice of motion procedure supported by an affidavit contemplated in Rule 6 should be adopted "

The Court continued at page 57 A-C and stated that:

"1. Amendments to pleadings can be of a wide variety. Some are simple and purely formal in nature, i.e to amend arithmetical and clerical errors in pleadings. Other amendments may be more substantial, for example amendments seeking to withdraw an admission made on the pleadings. It is trite law that amendments constituting the withdrawal of an admission have to be done on affidavit. However, it would, in my view, be absurd to interpret the new Rule 28(4) as prescribing the use of the Rule 6 procedure in all cases of applications for leave to amend pleadings. In cases where a mere word or figure requires amendment, it would be totally absurd to file a notice of motion supported by an affidavit to secure such amendments. Affidavits would only be necessary in more substantial amendments, such as the withdrawal of admissions."

[17] I would, with the greatest of respect to my Sister Kubushi J, take a different approach and follow the approach set out in the Swartz matter. In my view, the new Rule 28(4) postulates two procedures by which a party seeking an amendment may approach the Court for leave to amend. It is of capital importance to point out in the first place that the choice of the procedure to seek such leave is, by using the word " may', left entirely to the discretion of such a party. The first procedure that a party pursuing an amendment may use is oral. By this method, all that such a party has to do after receiving the Notice of Objection in terms of Rule 28(3) is to set such a matter down for hearing and on the date of hearing, simply walk into Court and orally apply for leave to amend. The second procedure of applying for leave to amend is to "lodge an application for leave to amend" as enjoined by the provisions of Rule 28(4). What the new Rule 28(4) has done was to abolish the regimented procedure of the old Rule 28(4) which compelled a party seeking an amendment to bring a substantive application for leave to amend. The new Rule 28(4) does not compel a party seeking an amendment to deliver an application for leave to amend. As I pointed earlier it is entirely the decision of the party pursuing leave to amend whether to apply for leave to amend orally or to lodge an application for leave to amend.

[18] Accordingly, the first four objections raised by the defendant against the plaintiffs proposed amendment do not have any merit and are accordingly dismissed.

[19] THE AMENDMENT SEEKS TO INTRODUCE A NEW CAUSE OF ACTION

I now turn my attention to the fifth and last ground of objection to the proposed amendment. That ground of objection is that the proposed amendment, medical negligence, amounts to an introduction of a new cause of action. Again, while Mr Wessels labelled the objection to the proposed amendment as a mere technicality, Mr Botha on the other hand, was satisfied that it was meritorious. The starting point is:

19.1 to set out the history of the matter;

19.2 to refer to the proposed amendment;

19.3 to define with reference to authorities what a cause of action is;

19.4 to decide whether it is a new cause of action; and

19.5 to rule whether it should be allowed.

[20] In order to bring to prominence the defendant's objection to the proposed amendment that it introduces a new cause of action, it is only apposite if I stipulate the essential facts in their chronological order. The following facts are not in dispute:

20.1 during November 2011, the defendant reconstructed the plaintiff's breasts;

20.2 on 16 January 2014 the plaintiff issues summons against the defendant. The cause of action is a contract. A contract is, as we know it, basically an agreement between two or more persons which gives rise to personal rights and corresponding obligations. It is an agreement that is legally binding on the parties. An agreement is a contract only if it comprises a number of essential elements. The all-important one of these essential elements bring that the agreement is one for performance or non- performance in the future by one or more of the parties to it. In terms of such an agreement one or more of them undertake to give or to do something or not to do something. The other essentials are that the parties must have legal capacity to contract. In this regard see *Conradie v Rossouw* 1919 AD 279; that they must seriously intend to bind themselves; that, in a few exceptional cases, the agreement must comply with certain formalities. Finally, that the agreement must not be unlawful or contrary to the statutory law, public policy or the good morals of the society in its formation or performance or purpose. The allegations contained in paragraph 2 supra have reference.

20.3 On 17 May 2017 the plaintiff's attorneys served a notice of intention to amend her particulars of claim in terms of Rule 28(1). The objection under discussion relates to this amendment.

[21] It is of supreme importance to point out that the plaintiff's initial cause of action was a contract. The purpose of the amendment, whether the plaintiff chooses to call it "alternative claim" indicates that the plaintiff now chooses to lodge an alternative

claim based on medical negligence in other words on a delict. A delict, on the other hand, is defined as "the breach of a duty imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty is owed and who has suffered harm in consequence of the breach." See in this regard *The Law of Delict*, 7th

Edition, by R.G. McKerron page 5. Although this definition may not be universally applicable without qualification, it will, nonetheless serve to distinguish a delict from a contract for purposes of the current subject.

[22] Irrespective of how she puts it, the manner in which the plaintiff's alternative claim has been phrased, presupposes two separate and identifiable causes of action, or as Jansen JA prefers to call them in *Evans v Shields Insurance Co Ltd* 1980 (2) SA 814 (AD) at page 825 F, the "right of action". The first such claim for compensation is based on contract and the second one on medical negligence. Both these claims have their origin in one and the same source. They are importantly different. Dealing with the legal nature of a delict and a contract McKerron had the following to say about the distinction between the two:

"Although a delict must be distinguished from a breach of contract, it is to be observed that the same act or omission may be both a breach of contract and a delict." In this regard he referred to the case of *Van Wyk v Lewis* 1924 AD 438 at page 443. "This is the case where the act or omission constitutes both the breach of a duty arising out of a contract and the breach of a duty imposed by law independently of the contract. Thus, if a surgeon causes harm to a patient upon whom he operates by negligently leaving a surgical swab in his body, the patient has a cause of action against him both in contract and in delict: in contract, because the surgeon impliedly promised to use due care in performing the operation, in delict because every person is under a duty to use care not to cause physical injury to others."

[23] WHAT IS A CAUSE OF ACTION?

In order to establish whether at common law the claim for damages arising from a contract as explained supra and a claim arising from medical negligence are the same or separate causes of action or simply facts of a single cause of action it is of supreme importance that I determine, firstly, the essential characteristics of "cause of action": In *Mckenzie v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16, the court held, in relation to a statutory provision that defined the geographical limits of the jurisdiction of a magistrate's court, that "cause of action" meant:

"... every fact which d would be necessary for the plaintiff to prove, if traversed, in order to support his right to Judgment of the court. It does not comprise every piece of evidence which is necessary to prove its fact, but every fact which is necessary to be proved "

In *Abrahamse and Sons v SA Railways and Others* 1933 CPD 626 at page Watermeyer J, defined the expression "cause of action" in the following terms:

"The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to being proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such a cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. "

[24] Now, in casu, in order to constitute a cause of action in respect of her claim based on a contract, the plaintiff would have to allege, as she has done in the particulars of claim, and prove that:

24.1 there was an agreement or consensus between her and the defendant;

24.2 that she and the defendant have the capacity to contract;

24.3 the performance on which they have agreed was possible and lawful;

24.4 that the prescribed formalities, where applicable, have been complied with. Generally these are the essentials that constitute a "cause of action" called a contract. The cause of action that lacks those essentials is not a contract. Accordingly, whether or not something is a cause of action is determined by the essential ingredients of such a cause of action or to put it simply by the material characteristics.

[25] According to *Government of RSA v Ngubane* 1972 (2) SA 601 A at 606 E-H, in the case of an Aquilian Action for damages for bodily injuries, the basic ingredients of the plaintiff's cause of action are:

- (a) a wrongful act by the defendant causing bodily injury;
- (b) accompanied by fault, in the case of culpa or do/us on the part of the defendant; and
- (c) damnum in other words loss to the plaintiff's patrimony, caused by the bodily injury.

In *Evans v Shields Insurance Co Ltd* 1980 (2) SA 814 (AD) at page 839 A, the court, referring to the abovementioned ingredients of an Aquilian Action, stated that:

"The material facts which must be proved in order to enable the plaintiff to sue (or facta probanda) would relate to those three basic ingredients and upon the occurrence of these facts a cause of action arises. "

[26] Therefore, in order to establish whether the causes of action are similar or different, one merely has to look at the facts that a litigant has to prove in order to succeed with his or her claim. Once the facta probanda are different, then the causes of action can never be the same. This simply means that the causes of action are different. The conclusion

that I have now reached, based on the definition of 'cause of action' is that there are two causes of action in this matter, one contained in the original particulars of claim and the other in the proposed amendment and as confirmed by Mr Wessels. The proposed amendment does not stem from the original cause of action, in other words, from the contract. It can therefore not be an amendment of the plaintiff's original cause of action because it does not constitute part of the original cause of action. It is on its own a separate cause of action.

[27] The right which the plaintiff wishes to enforce by the amendment, is a different right from the one claimed in the summons, even if it has its origin from the same source. It does not matter that the right that the plaintiff wishes to enforce in the summons and the right that

she wishes to enforce in the amendment have their origin from the same source. What is of paramount importance though is that they are different. In conclusion the right of the plaintiff to claim damages from the defendant based upon breach of contract is a right quite distinct from the right to claim damages arising from medical negligence where both are caused by the same act. Accordingly, I am in agreement with Mr Botha that the amendment introduces a new cause of action.

[28] HAS THIS NEW CAUSE OF ACTION BECOME PRESCRIBED?

According to s 10 of the Prescription Act 68 of 1969 ("the Prescription Act"), a debt is extinguished by prescription after the lapse of the period which, in terms of the relevant law, is applicable in respect of prescription of such debts. In terms of s 12(3) of the Prescription Act, a debt which does not arise from a contract is due when the creditor has knowledge of the identity of the debtor and the facts from which such debt originates. Accordingly the debt that arises from a delict, in other words, the kind of the debt that the plaintiff seeks to introduce by way of the proposed amendment, becomes prescribed after the lapse of a period of three years from the date on which it became due in terms of the provisions of s 11(d) of the Prescription Act.

[30] I have consequently arrived at the conclusion that the plaintiffs proposed amendment introduces a cause of action that has been extinguished by prescription. Accordingly the following order is made:

1. The plaintiffs application for amendment of her particulars of claim is hereby dismissed, with costs.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

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Adv. RJ de Beer

Instructed by:

Surita Marais Attorneys

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Instructed by:

MacRobert Inc

(H Hamman)

Date Heard:

15 February 2017

Date of Judgment

12 October 2017

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