

SOUTH AFRICA / JUDGMENT

Shabangu v Road Accident Fund (21503/2013) [2024] ZAGPPHC 1265 (2 December 2024)

[2024] ZAGPPHC 1265

COURT

North Gauteng High Court, Pretoria

BEFORE

KM Mmuoe

CASE / FILE NUMBER

21503/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 21503/2013

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 2/12/2024

SIGNATURE

In the matter between:

NOMFANELO MINENHLE SHABANGU

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

REASONS FOR ORDER MADE

MMUOE AJ:

Background

- [1] The matter came before me on the civil trial roll of 21 October 2024. I subsequently made an order postponing the matter sine dies and affording the defendant 15 days from the date of service of the order on the Defendant, to make any consequential adjustments, to the Plaintiff's amended particulars of claim dated 14 October 2024.
- [2] The summons was issued on 12 April 2014 and the plaintiff claimed a total amount of R503 000 from the defendant. The total claim amount was made up of R1000 for past hospital expenses, R2000 for past medical expenses, R120 000 for future medical expenses, R80 000 for estimated future loss of earnings and R300 000 for general damages.
- [3] The action was defended and a plea was subsequently filed. The issue of liability and future medical expenses was dealt with in terms of an order dated 11 October 2016 by Ledwaba DJP. On 16 February 2022, the state attorney came on record on behalf of the defendant. The plaintiff reached the age of majority and was substituted in her personal capacity on 14 June 2022. There were several pre-trial conferences held between the parties. These took place on 15 September 2015, 5 October 2016, 22 September 2022 and 2 February 2023 respectively.
- [4] The plaintiff's attorney applied for a trial date on 13 February 2023. On 21 February 2023 the plaintiff's attorney served the defendant with a notice of set down for trial. The trial action was set down for 21 October 2024.
- [5] On 14 August 2024, 20 August 2024, 4 September 2024, 12 September 2024 and 20 September 2024, the plaintiff served various notices in terms of Rule 36(9) of the Uniform Rules of Court, containing the expert reports of Mr D De Vlamingh, Mr Johan Potgieter and Ms L Taylor respectively. There were rule 36(9)(b) notices that had been previously filed prior to the October 2016 trial and again in 2022.
- [6] On 16 September 2024 the plaintiff's attorney served a notice of intention to amend the particulars of claim by increasing the total claim amount to an amount of R4 720 000. According to plaintiff's notice, the past hospital expenses claim would amount to R50 000, past medical expenses of R250 000, estimated future medical expenses of R120 000, past loss of earnings amounting to R2 000 000, future loss of earnings(estimated) in the amount of R2 000 000 and general damages amounting to R300 000.
- [7] The 10 day period to object to the proposed amendment expired on 1 October 2024 in terms of rule 28(3). The 10 day period for the plaintiff to effect the amendment in terms of rule 28(5) would expire on 15 October 2024. The plaintiff served and filed the amended pages on 14 October 2024 increasing the claim to a total of R4 720 000.

- [8] On 18 October 2024(a court day before trial) at approximately 09:49, an application in terms of rule 38(2) was served on the defendant via email to: p[...] and K[...]. In the rule 38(2) application, the plaintiff sought the admission of all evidence by way of affidavit. The application was supported by a founding affidavit deposed to by the plaintiff's attorney. The founding affidavit states amongst others that "the applicant and/or factual witnesses has or will depose to affidavits which the applicant intends to rely on in proving her case."

The founding affidavit also states that reliance will be placed on the section 19(f) affidavit of the plaintiff's mother, which was deposed to at the time when the plaintiff was a minor. In respect of the plaintiff's experts, it states that "all the experts employed by the applicant, to quantify the claim against the Road Accident Fund, have or will prepare affidavits, placing their expert medico-legal and expert reports in evidence." The experts' names are not mentioned in the application and their affidavits are not annexed. The expert affidavits were uploaded onto Caselines on 2 and 18 October 2024 respectively. There is no indication of formal service of the expert affidavits on the defendants.

- [9] At the commencement of the trial on 21 October 2024, Counsel for the plaintiff indicated that the state attorney responsible for the matter, Ms Brenda Rangata was allocated another matter and that for all intents and purposes there would be no appearance for the defendant.
- [10] Counsel for the plaintiff was asked amongst others to address the court on the late amendment and issues relating to compliance with all procedural requirements prior to the matter proceeding. Counsel for the plaintiff argued that the amendment made on 14 October 2024 was to bring the plaintiff's claim in line with the calculations and that there was no prejudice to the defendant. Counsel was also afforded an opportunity to submit argument in respect of other aspects pertaining to the matter. I reserved the judgment in in order to consider the matter and the documents filed.

Discussion

- [11] The plaintiff's amendment played a significant role with respect of the procedural issues in the matter. The late stage amendment and its effect on the other litigant cannot be simply ignored.
- [12] When the matter reached trial stage in 2016, the original particulars of claim claiming an amount of R503 000 were operative. If regard is to be had to the period between the date when the matter was set down for trial and the trial date itself, a period of no less than eighteen months had passed. In order for a party to obtain a trial date, the matter must be trial ready. Whilst amendments may be allowed by the court at any time before judgment, in instances where a rule provides a litigant with right to act after such amendment, it is important that such rights of a litigant ought to be considered.

- [13] The amended pages were filed a mere five court days before the trial date. The amendment itself is made at a late stage and is significant. It increases the total claim by R4 217 000. That constitutes an 838% increase in the claim. I find that five days before the trial the plaintiff deemed it important and necessary to increase the claim by such a substantial amount. The amendment did not exist in a vacuum.
- [14] I disagree with plaintiff's Counsel's submission that the amendment on 14 October 2024 was made to bring the claim in line with the calculations. The amendment was proposed via a notice of intention to amend on 16 September 2024. The actuary, Mr Potgieter, was then instructed on 18 September 2024 to prepare a report. Mr Potgieter proceeded to prepare the actuarial report which is dated 19 September 2024 and where he calculated the total loss of income as R1 278 727. He also deposed to an affidavit on 25 September 2024 confirming the contents of his report. Despite the knowledge of the new calculation, the plaintiff nonetheless proceeded to effect its amendment on 14 October 2024 for an amount of R4 720 000. There is no expert calculation that seeks to bring the claim anywhere in the region of R4 720 000. Counsel for the plaintiff attempted to justify that there was no prejudice on the basis that the actuarial report was provided to the defendant on 26 September 2024. The problem I have with that submission is that the actuarial calculation does not tie up with the amendment that was effected later. If the plaintiff knew as at 26 September 2024 when the actuarial report and the affidavit of Mr Potgieter that the amount of the claim would no longer be R4 720 000, then it brings into question the need to effect the amendment.
- [15] The same can be said with regards to the general damages. An amendment was effected that left general damages at an amount of R300 000. Counsel for the plaintiff conceded during her address that the injuries were not serious. Surely the plaintiff knew this fact as at 14 October 2024. If there was no intention to proceed with a claim for R300 000 in respect of general damages, then there was no reason to effect such amendment.
- [16] The effect of the amendment plays an important role in determining the stage at which the plaintiff's claim becomes fixed. Prior to effecting the amendment, the plaintiff's claim was fixed in the amount of R503 000. The amendment, which raises the claim by an additional R4 217 000 changes the plaintiff's claim significantly. But what does this mean for the other party to the proceedings? Will this amendment have the effect of re-opening the pleadings? What effect does this have on the other party to the proceedings?
- [17] Regard should be had to rule 28(8), which reads: "Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30." This means that the amendment having been effected on 14 October 2024, the fifteen-day period in which the defendant would be entitled to make any consequential adjustment to documents (including the plea) would expire on 4 November 2024. This would be after the trial date.

- [18] In Natal Joint Municipal Pension Fund, the Supreme Court of Appeal confirmed that restoration of *litis contestatio* can only be take place “...once the issues have once more been defined in the pleadings or in some other less formal manner.[1]” At the earliest, this would have been on 4 November 2024 in this case.
- [19] In Olivier, Mantame J said: “It may be so that this increase in quantum did not alter the cause of action, the identity of the parties and the scope of the issues in dispute as it was stated by the plaintiff. Notwithstanding, the scope of damages has been increased significantly and it would without a doubt require a pleading.[2]”
- [20] In Rantelle, Davis J expressed: “Although doubt had been expressed whether an immaterial or minor amendment would have the same result of a ‘fresh *litis constestatio*’, it must be beyond doubt that any substantial amendment would have the result that pleadings are reopened. That the Supreme Court of appeal confirmed in *Endumeni*.”
- [21] I find that the plaintiff’s amendment had the effect of re-opening the pleadings and that *litis contestatio* fell away. That meant that on the trial date of 21 October 2024, the pleadings were still open. There is no explanation provided in respect of the reasons that the amendment was not brought at an earlier stage. Counsel for the plaintiff attempted to argue to justify the amendment despite moving for an order for lesser amount (which was still substantially higher than the original amount pre-amendment).
- [22] Ultimately, the plaintiff had over eighteen months to address any amendments and instead decided to propose the amendment a little over a month before the trial date. This resulted in the amendment being effected five days before the trial. As a result of *litis contestatio* having fallen away, the defendant still had the right to make consequential adjustments to its documents as at the date of trial.
- [23] I must consider the other party’s rights in respect of the amendment. I have concluded that the amendment is material and significant. The amendment has an effect on the defendant. The matter is set on the trial roll, and for all intends and purposes is a defended matter. The fact that Counsel for the plaintiff indicated that Ms Rangata was allocated another matter and could not appear does not mean that any rights of the defendant should be ignored. This is even more important given the fact that the defendant would not in any way have known of the new submissions that plaintiff’s counsel was making in respect of the calculations. The matter remains a defended matter and the defendant’s defence has not been struck out. It also does not mean that due consideration should not be afforded to the defendant’s rights to act in terms of any consequential adjustments to its documents.
- [24] Lastly, in the plaintiff’s Counsel’s heads of argument which were filed on the trial date and despite arguing the need for the amendment for the R4 720 000, Counsel moved for judgment in the amount of R1 280 476.55. This amount was made up of R200 316.05 for past loss of income and an amount of R1 080 160.50 for future loss of income. The fact

that these amounts are lower than the amendment does not assist the plaintiff. The amounts remain substantially higher than those appearing on the original particulars of claim. In the original particulars of claim, the plaintiff had claimed an amount of R80 000 for estimated future loss of earnings only. Given the contradiction between the amended claim and the amount sought at trial, it is even more important that the defendant ought to be given its rights in terms of Rule 28(8).

Conclusion

[25] Accordingly, the plaintiff's late stage amendment had the consequence of the pleadings being reopened. Given that these amendments are material and substantial it would have been only fair that the defendant be afforded an opportunity to deal with them in accordance with rule 28(8). Therefore, the defendant should be allowed to act in terms of rule 28(8) as a result of the amendment.

[26] In my view, the late stage amendment led to a situation where *litis contestatio* fell away as a result of the amendment to the particulars of claim on 14 October 2024. The defendant should be afforded a fair opportunity to adjust its documents in light of the claim that was increased by an amount of R4 217 000 five days before trial.

[27] As the defendant was not present at court on the day of trial, I find that it would be fair to provide the defendant fifteen days from the date of service of the order to make any consequential adjustments to its documents.

Order

[28] I made an order that:

- a) The matter is postponed sine dies.
- b) The Defendant is afforded 15 days from the date of service of this order on the Defendant, to make any consequential adjustments to the Plaintiff's amended particulars of claim dated 14 October 2024.
- c) No order as to costs.

Hand-down and date of reasons

[29] These reasons are handed down electronically by circulation to the parties or their legal representatives by email and by uploading the reasons onto Caselines. The date for hand down for the reasons is deemed to be 2 December 2024.

KM MMUOE

ACTING JUDGE OF THE HIGH COURT

PRETORIA

For the Plaintiff: Adv. S. Maritz Instructed by: Frans Schutte & Matthews Phosa Attorneys For the Defendant: No appearance Instructed by: STATE ATTORNEY, PRETORIA

[1] Natal Joint Municipal Pension Fund v Emdumeni Municipality 2012 (4) SA 593 (SCA) at para [13]

[2] Olivier v MEC Health, Western Cape 2023 (2) SA 551 (WCC) at [21] (Olivier)

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Prepared on 9 October 2026 · Esheria