

SOUTH AFRICA / JUDGMENT

Strydom v Sol Plaate Municipality (825/2019) [2024] ZANCHC 121 (8 November 2024) [2024] ZANCHC 121

COURT

Northern Cape High Court, Kimberley

BEFORE

MC Mamosebo

CASE / FILE NUMBER

825/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE

DIVISION, KIMBERLEY

Case No: 825/2019

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between:

VANESSA

STRYDOM

Applicant/Plaintiff

and

SOL

PLAATE MUNICIPALITY

Respondent/Defendant

Heard:

19/09/2024

Delivered

08/11/2024

Summary: Interlocutory application.
Leave to amend Particulars of Claim. Objection,
changing location would lead to new cause of action. Prescription
does not arise.
No mala fide or injustice. Amendment granted.
ORDER
In the result, the

following order is made: (1)
The applicant/plaintiff is granted leave to amend her Particulars of
Claim
as set out in her Notice of Intention to Amend, which bears the
Registrar's date stamp of 27 May 2024.
(2)
The said amendment shall be effected within ten (10) days of this
order.
(3)
The costs occasioned by such amendment must follow the result, with
costs
of counsel on scale B.

JUDGMENT

Mamosebo ADJP

- [1] In this interlocutory application the plaintiff, Ms Vanesa Strydom, is seeking leave to amend her Particulars of Claim. The application is opposed by the respondent, Sol Plaatje Municipality. For convenience I will refer to the parties as the plaintiff and the defendant.
- [2] On 31 May 2017 the plaintiff slipped, fell and got injured in Kimberley. She now sues the defendant for the incident due to its alleged negligence in failing to maintain the road/pavement area. She maintains that she made a bona fide mistake when describing the names of the streets where the cause of action arose.
- [3] These are the plaintiff's original paragraphs 3.1 and 3.2 of the Particulars of Claim:
- '3.1 The defendant was in control and/or responsible for the construction, maintenance and safety of the area, including but not limited to the roads, pavement, drains and storm water drains situated at the intersection of Bultfontein Road and Lennox Street, Kimberley, Northern Cape Province.
- 3.2 The defendant was in control of the area situated at the intersection of Bultfontein Road and Lennox Street, Kimberley, Northern Cape Province, particularly the pavement and storm water drain.'
- [4] The plaintiff now seeks to amend the affected paragraphs to read as follows:

‘3.1 The defendant was in control and/or responsible for the construction, maintenance and safety of the area, including but not limited to the roads, pavement, drains and water drains situated at the intersection between Lennox Street and Sydney Street, Kimberley, Northern Cape Province.

3.2 The defendant was in control of the area situated at the intersection of Lennox Street and Sydney Street, Kimberley, Northern Cape Province, particularly the pavement and storm water drain.’

[5] The defendant objects to the proposed amendment. Its basis for doing so is that the granting of the amendment would change the location and lead to a new cause of action over an incident that occurred on 31 May 2017 which claim would have prescribed. The defendant argues that the court lacks the discretion to override the prescribed

extinctive three-year period. The summons interrupting the onset of prescription was served on the defendant on 25 April 2019.

[6] What is immediately discernible from the preceding paragraphs is the different name of the intersection where the second street name is Sydney instead of Bultfontein. According to the applicant, the two streets are one block apart.

[7] The question to be answered is whether the plaintiff’s proposed cause of action would introduce a new cause of action as contended for by the defendant.

[8] A good starting point are the remarks by the Constitutional Court in *Affordable Medicine Trust and Others v Minister of Health*[1] where Ngcobo J, then, said:

‘[9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. [1995 (2) SA 73 (Tk) at 76D -76I. See also *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* [1990] ZASCA 47; 1990

(3) SA 547 (A) at 565G – 566A]. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or ‘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’. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?’ (emphasis added)

[9] The plaintiff’s claim is one of delict. In *MTO Forestry (Pty) Ltd v Swart NO*[2] Leach JA made these remarks:

‘...I turn to the question of the respondent’s liability. As the appellant’s claim is founded in delict, it had to establish, first,

the conduct of the respondent of which it complained; second, the wrongfulness of that conduct; third, fault on the part of the

respondent (in this case in the form of negligence); fourth, that it had suffered harm; and fifth, a causal connection between such harm and the respondent's conduct that is the subject of its complaint.'

[10] The address of where the cause of action arose does not form part of the essential elements of the delict but as correctly contended on behalf of the plaintiff, is peripheral to the facts. The claim remains the same. The effect of allowing the proposed amendment would not affect the essential elements (*facta probanda*) necessary to be proved to establish the pleaded claim. Its effect would only probably alter the pleaded detail concerning the correct intersection where the incident occurred (the *facta probantia*) and to which the plaintiff intends to establish those facts. It follows that the defendant's contention that the proposed amendment that the plaintiff wishes to make will introduce a new cause of action, is misconceived. Amending the pleading by correcting the intersection would not alter the originally pleaded cause of action; but would, in my view, merely correct what seems to be a *bona fide* error. See Erasmus[3] and Wholesale Housing Supplies (Pty) Ltd v Rich Rewards Trading 556 (Pty) Ltd[4]

[11] The objection to the amendment is based on extinctive prescription. The defendant maintains that the originally pleaded claim occurred on 31 May 2017 and would have prescribed. Regard being had to the sentiments expressed by Eksteen JA in *Sentrachem Ltd v Prinsloo*[5] where the SCA considered the issue whether the defectively pleaded particulars of claim had interrupted the running of prescription, the Court held:

'Artikel 15(1) van die Verjaringswet 68 van 1969 bepaal dat verjaring gestuit word 'deur die betekening aan die skuldenaar van 'n prosesstuk waarin die skuldeiser betaling van die skuld vorder'. Dit dien daarop gelet te word dat daar nie van 'n skuldoorsaak of 'n grond van aksie gepraat word nie, maar slegs van die vordering van 'n skuld.

In die meerderheidsuitspraak in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) op 836C-E sê Corbett AR:

"Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages."

In *Mazibuko v Singer* (supra op 265D – E) wys Colman R daarop dat dit misleidend kan wees om in dié verband van 'n skuldoorsaak

('cause of action') te praat, maar eerder van 'n vorderingsreg ('right of action'). Die verskil tussen hierdie twee begrippe word

verder deur Trollip AR in 'n minderheidsuitspraak in Evins se saak 825F – H toegelig. Hy wys daarop dat 'skuldoorsaak' gewoonlik op die wesenlike feite slaan, wat in pleitstukke uiteengesit word, om die vorderingsreg uit te maak waarop die skuld verhaal kan word. Die geleerde Regter vervolg dan:

“...I am not sure that it necessarily follows that, because one factual basis differs from another in some respect or respects, separate or different rights of action arise; on the contrary, both cases may nevertheless beget only one right of action or debt, eg one for the plaintiff's entire patrimonial loss. The cases of Green v Coetzer 1958 (2) SA 697 (W) and Schnellen v Rondalia Assurance Corporation of SA Ltd 1969 (1) SA 517 (W)... are apposite illustrations of that.”

Hierdie opmerking is myns insiens geensins strydig met die beginsels in die meerderheidsuitspraak neergelê nie. Die vorderingsreg en die skuld is dus slegs teenpole van 'n verbintenis, en waar die skuld verval, verval die vorderingsreg ook (Erasmus v Grunow en 'n Ander 1978 (4) SA 233 (O) op 245E en Evins se saak supra op 842E – F).’

[12] The claim that the plaintiff is seeking to enforce remains substantially the same but for the substitution of the street Sydney for Bultfontein. Counsel for the defendant relied on Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd[6] urging me to find that the plaintiff was negligent and her attempt to want to raise the incorrect address as a bona fide mistake having been inert for seven years, should be penalised. She was responsible to take reasonable precautions when issuing summons.

I am not persuaded that the granting of such an amendment would result in the plaintiff introducing a new cause of action. Unlike in the Blaauwberg matter where the issue before the appeal court was whether an action mistakenly instituted in the name of Anglo-Dutch Meats (UK) Limited as creditor served to interrupt prescription where it appeared, after the prescriptive period, that Anglo-Dutch Meats (Exports) Limited was the true creditor and the summons was duly amended.

[13] Of significance are Heher JA's remarks in Blaauwberg[7] where he meted out caution regarding the fundamental differences when dealing with amendments regulated by a wide and generous discretion

which leans towards a proper ventilation of issues and are granted according to developed rules and the position where prescription was interrupted in terms of s 15(1) of the Prescription Act and discretion does not apply or has not run. I am satisfied that prescription does not arise.

[14] Further aspects for consideration pertain to whether the applicant was mala fide in bringing the application and whether granting the application would result in prejudice or an injustice to the other party which could not be compensated for by an order of costs. Nienaber JA, writing for the majority in Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere[8] said:

‘that the mere application of a particular Court procedure for a purpose other than that for which it was primarily intended was typical, but not complete proof, of mala fides; in order to prove mala fides a further inference that an improper result was needed. Such an application of a Court procedure (for a purpose other than what for it was primarily intended) was thus a characteristic, rather than a definition, of mala fides’

[15] Counsel for the defendant submitted that swapping of the street names was done mala fide. There is no basis for such a submission in the defendant’s case. To what end would plaintiff harm her own case. Would the defendant be prejudiced by the proposed amendment? In *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)*[9] Rose Innes J said the following:

‘The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless the application to amend is mala fide or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for 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 notice of motion which it is sought to amend was filed. *Moolman v Estate Moolman and Another* 1927 CPD 27 at

29. A material amendment such as the alteration or correction of the name of the applicant, or the substitution of a new applicant, should in my view usually be granted subject to the considerations mentioned of prejudice to the respondent. Compare *Trustees African Explosives Pension Fund v New Hotel Properties (Pty) Ltd*; *Trustees African Explosives Pension Fund v Nestel* 1961 (3) SA 245 (W) at 247A – E. The risk of prejudice will usually be less in the case where the correct applicant has been incorrectly named and the amendment is sought to correct the misnomer than in the case where it is sought to substitute a different applicant. The criterion in both cases, however, is prejudice which cannot be remedied by an order as to costs and there is no difference in principle between the two cases.’

The defendant in casu is clutching at straws. To argue malice or prejudice is woefully misconceived.

[16] I now remain with the question of costs. It was submitted on behalf of the plaintiff that although costs lie within the discretion of the court, I should find that the opposition by the defendant was unreasonable and thoughtless; a process followed to avoid or delay or derail the main action. The plaintiff argued that the defendant be ordered to pay the costs of this application on a punitive scale as between attorney and client, alternatively, on a party and party scale with costs of counsel on Scale B. The defendant persisted with its claim that the plaintiff lacked a valid reason to bring the application for an amendment, seeking to introduce a new cause of action on a prescribed claim. The defendant prayed that the application be dismissed with costs.

[17] Costs remain in the discretion of the court which is to be exercised judiciously. The opposition to this application is unwarranted because it is in my view not part of the essential elements that the plaintiff still has to meet. This application qualifies to be regulated by a wide and generous discretion which leans towards the proper ventilation of disputes. The defendant is being unnecessarily technical in its defence. The fact that the only correction relates

to a street name in a particular intersection within close proximity to where the incident occurred, eliminates any form of prejudice or injustice. The contention pertaining to prescription should not even have featured. The facts and issues in this case are plain and straightforward. There is no need to burden the trial court to determine the issue of costs where we are in the best position to do so. The outcome of the merits in due course cannot alter the situation. It would be unfair to leave the complainant out of pocket until then. The costs must follow the result.

[18] In the result, the following order is made:

- (1) The applicant/plaintiff is granted leave to amend her Particulars of Claim as set out in her Notice of Intention to Amend, which bears the Registrar's date stamp of 27 May 2024.
- (2) The said amendment shall be effected within ten (10) days of this order being made.
- (3) The costs occasioned by such amendment must follow the result, with costs of counsel on scale B.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the applicant/ plaintiff: Adv. AR van Staden

Instructed by:

Stefan Greyling Inc

For respondent/defendant: Adv. RC Mathevula

Instructed by:

Mjila & Partners Inc

[1] Affordable Medicine Trust and Others v Minister of Health [2005] ZACC 3; 2006 (3) SA 247 (CC) para 9

[2] MTO Forestry (Pty) Ltd v Swart NO 2017 (5) SA 76 (SCA) para 12

[3] Erasmus, Superior Court Practice, Vol 2, D1-338A

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- [4] Wholesale Housing Supplies (Pty) Ltd v Rich Rewards Trading 556 (Pty) Ltd, unreported, WCC Case No 22189/2016 (29 October 2021) at paras 7 – 17.
- [5] Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A) at 15B – H
- [6] Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd [2004] 1 All SA 129 (SCA) paras 15 and 16
- [7] Ibid para 12 and 13
- [8] 1999
- (3) SA 389 (SCA) at the headnote (at 414I – J)
- [9] Devonian Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) 1994 (2) SA 363 (C) at 369F – I
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