IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MTHATHA

NOT REPORTABLE

Case no: 4307/2018

In the matter between:

MAPHELO ANELISIWE Plaintiff/Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE Defendant/Respondent

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JUDGMENT

Zilwa AJ

[1] The Plaintiff seeks leave to further amend her particulars of claim in terms of her notice of amendment dated 28 June 2023. This involves the insertion of the following paragraph:

"*Further the Plaintiff in her personal capacity has suffered loss of income due to the delay in finishing her schooling and her tertiary qualifications, such delay having been consequent (inter alia) of the need for the Plaintiff to care for her severely impaired child for the remainder of the child's life, as well as the effect of the aforementioned delay on her employment prospects and future career progression, given the need (inter alia) for the Plaintiff to care for a severely impaired child for the remainder of the child's life. The total loss of income is R900 000 000."*

[2] The Defendant objected to the Plaintiff's notice of amendment. The following grounds of objection have been raised:

2.1 The Applicant's claim has prescribed;

2.2 The amendment introduces a new cause of action;

2.3 The amendment sought will render the particulars of claim excipiable;

2.4 The Applicant waived alternatively abandoned her claim for loss of earnings or earning capacity;

2.5 The notice to amend was delayed and no explanation was proffered for the delay;

2.6 The application for leave to amend is *mala fides;*

2.7 If the amendment is granted will cause prejudice to the Respondent; and

2.8 The Applicant is estopped from proceeding with her claim.

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[3] At the commencement of the argument I directed the parties to address me on point 2.3 which was amplified to rely on non-compliance with Rules 18(4) and 18(10) of the Uniform rules. The high watermark of the objection was couched as follows:

> "*If the amendment is effected, the pleadings will be excipiable in that the pleadings will not comply with the Rule 18(4) and Rule 18(10) in that the pleadings will not contain a clear and concise statement of the material facts upon which the Applicant relies for her claim for loss or earnings or earning capacity and will not be in compliance with the Rule 18 (10)(c)(i) in that, inter alia, she failed to state the earnings lost to date and how the amount is made-up."*

[4] Uniform Rule 18(10) provides as follows:

> '*A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for-*

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of- (i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do); (ii) the enjoyment of amenities of life (giving particulars); and stating whether the disability concerned is temporary or permanent; and

*(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.' (*underlining for emphasis)

[5] When adjudicating the dispute between the parties, the Court should be guided by the following legal principles, set out in the ancient *Moolman v Estate Moolman*[1]:

5.1 it is trite that a litigant may amend his or her pleadings at any stage of the proceedings before judgment;

5.2 a court hearing an application for an amendment has a discretion to grant it. Such discretion must be exercised judiciously.

[1] 1927 CPD 27 at 29;

5.3 the general approach to amendments is that they should be allowed, unless the amendment application is made in bad faith and would cause an injustice which cannot be compensated with a costs order;

5.4 an amendment that would render the particulars of claim excipiable is impermissible.[2] (*underlining for emphasis*)

[6] Over the years there has been a considerable wealth of judicial authority in relation to which factors must, in principle, result in the refusal of the amendment. It has been held, for instance, that where a pleading sought to be amended will become excipiable, such amendment must be refused. Even though this principle originates before our current constitutional dispensation, it still remains good law in my view.[3] It is also my view that there is no prudence in allowing an amendment that would place the pleadings in a worse situation than they were before the amendment. Put it differently, to allow the amendment in the sure knowledge that the Defendant will

[2] Also see : Krischke v Road Accident Fund 2004 (4) SA 358 (W) at 363B; Bowring Barclays & Genote (Edms) Bpk v De Kock [1991] 3 All SA 42 (SWA)

[3] In Phanto (*infra*) at pages 5 – 6 the following useful background is given for a proper understanding of the rule:

"*Rule 18(10) in its current form was part of the overhaul of Rule 18 introduced by way of amendments to the rules made as long ago as 1987. Historical investigation will show that prior to those amendments any deficiency in particularity in a declaration or particulars of claim could be addressed by the defendant requesting further particulars for the purposes of pleading. Those historical provisions were taken away and replaced by rule 18(10) in respect of damages claims. In my view, it clearly follows therefrom that a pleading in a damages claim now has to contain far greater particularity in respect of the calculation or making up of that claim than had previously been the case.*"

immediately note an exception makes little sense.[4] The role of the pleadings is to properly outline issues, not only for the parties, but also for the Court. Pleadings that render it difficult to understand the cause on which the claim or defence is based stand in the way of justice, and therefore an amendment that carries a possibility of such an eventuality must be discouraged early on, even before the other party confronts it with an exception.

[7] The view I hold in this regard was once echoed in the case of *Phanto Props (Pty) Ltd v La Concorde Holdings (Pty) Ltd*[5] where Binns – Ward J remarked as follows:

> "By allowing an amended pleading non- compliant with rule 18, a court would necessarily thereby be permitting a pleading to be brought into being that would be deemed, in terms of rule 18(12), to be an irregular step. It seems to me undesirable for a court to make itself party to any such process or procedure."

[8] Claims for personal injury such as the present need to be particularised to the extent that the parties, and the Court, know why there is a case and to where it is going. For the Defendant, this latter aspect embodies the reasonable expectation of what it can be called upon to pay. For the Plaintiff, it creates a reasonable expectation of financial recovery. Figures which are not

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[4] De Klerk v Du Plessis 1995 (2) SA 40 BCLR 124 (T); Manyatshe v South African Post Office Ltd [2008] 4 All SA 458 (T)

[5] 2021 JDR 3266 (WCC) at page 7

justified in the way postulated by the Rules do a disservice to the interests of both.

[9] Plaintiff is therefore required to plead a summary of the material facts on which he or she will rely with sufficient clarity to enable the defendant to plead thereto. These primary factual allegations, which are also referred to the *facta probanda*, are those which the Plaintiff will be required to prove at the trial in order to succeed with his or her claim. They must be distinguished from the secondary allegations, or *facta probantia*, which are usually matters for evidence.[6]

[10] *Facta probantia* which prove the essential and material facts and it is those which have to be clearly and concisely set out. The Defendant is entitled to not be taken by surprise at the trial as she is further entitled to conduct her own enquiries about the case she is called upon to meet and prepare evidence accordingly. To do this, it must know what the case is.

[11] The book of Harms Civil Procedure in the Supreme Court[7], the author had the following to say:

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[6] Jowel v Bramwell Jones 1998 (1) SA 836 (WLD) at 903 A-B)

[7] At pages 263 - 264

> *"Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made."*

[12] At page 264 the learned author suggests further that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.

[13] Clearly and logically in my view, the ultimate test must still be whether the pleading complies with the general rule enunciated in Rule 18 of the Uniform rules and the principles laid down in our existing case law.

[14] In the case of *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen*[8] the following articulation was made:

> "In my view, if a pleading does not comply with the subrules of Rule 18 requiring specific particulars to be set out, prejudice has, *prima facie*, been established. Cases may well arise where a party would not be prejudiced by

[8] 1992 (4) SA 466 (W) at 470H

> the failure to comply with these subrules, or where a pleader would be excused from providing the prescribed particularity because he is unable to do so. But in such cases the onus would in my view be on him to establish the facts excusing his non-compliance. The law reports abound with cases which lay down this principle in respect of other Rules of Courts, and the same principle applies in my view in relation to non-compliance with Rule 18." (My underlining)

[15] The above authority is on point if regard is had to the fact that there has been no averment in the notice to amend that seeks to explain as to why particularity required in Rule 18(10) cannot be available. It is common practice that the particulars of claim get filed lacking in particularity envisaged but there is normally a rider giving an undertaking that more particularity will be provided once the relevant experts' reports, with proper quantification as to how the amount claimed has been arrived at, have been obtained.

[16] On the other hand *Mr Mtshabe SC,* who appeared for the Applicant, argued that the particulars of claim would not be excipiable after the amendment has been granted moreso that the relevant experts' reports were delivered in terms of Rule 36(9) shortly after the notice to amend was delivered. With respect I did not follow this line of argument if regard is had to the basic principle that the notice to amend upon which the application for leave to amend is premised should be considered in isolation.

[17] Eloquently stressing this point, Davis J had the following to say in the case of *Ngobeni v Eskom Holdings Soc Limited*[9]:

> "The same lack of particularity is also glaringly absent in respect of the quantum formulation. There is a non-compliance with Rule 18(10) and this has been debated with counsel during argument. The argument that, subsequent to the service of the summons the two reports referred to in the introduction of this judgment had been forwarded to the defendant, provides no answer. Should the plaintiff wish to rely on the findings, conclusions or even descriptions contained in those reports as part of its case, they needed to be pleaded or her reports need to be incorporated in the particulars of claim." (My underlining)

[18] On the issue of prejudice, it was submitted on behalf of the Applicant that the Respondent cannot be prejudiced if the proposed amendment can be allowed in its current. I disagree. My view is that the prejudice for non-compliance with Rule 18 is *prima facie* prejudicial. In the case of *Sasol Industies (Pty) Ltd t/a Sasol 1 (supra),* Cloete J agreed with this view when he remarked as follows:

> "In my view, if a pleading does not comply with the subrules of Rule 18 requiring specified particulars to be set out, prejudice has, *prima facie*, been established. Cases may well arise where a party would not be prejudiced by

[9] 2022 JDR 0857 (GP) at page 11

> the failure to comply with these subrules, or where a pleader would be excused from providing the prescribed particularity because he is unable to do so. But in such cases the onus would in my view be on him to establish the facts excusing his non-compliance. The law reports abound with cases which lay down this principle in respect of other Rules of Court, and the same principle applies in my view in relation to non-compliance with Rule 18."

[19] The fact that the Respondent will be embarrassed to plead is a clear prejudice which cannot be compensated by an order of costs, in my considered view.

[20] I will not be doing justice in granting an amendment that will militate towards further unnecessary litigation in this matter. That could be avoided if the proposed amendment were improved to bring it into compliance with Rule 18(10). Now that I am inclined to refuse the application for amendment, it would be well within the Plaintiff's power to take such ameliorating steps.

[21] On the issue of costs - considering that the Applicant is championing her constitutional right and that the Defendant's negligence has been established, I am inclined to depart from the normal rule of costs following the outcome. In the exercise of my discretion, I am not persuaded to mulct the Applicant with costs. The justifiable order is for each party to pay its own costs.

[22] In the result, the following order shall issue:

1. The application for amendment is refused.
2. That each party shall pay its own costs.

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H ZILWA
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	Adv NR Mtshabe SC
Instructed by:	Mjulelwa Inc. Attorneys, Mthatha
For Respondent:	Adv RK Ramdass
Instructed by:	Norton Rose Fulbright SA Inc., Johannesburg c/o Smith Tabata Attorneys, Mthatha
Date Heard:	29 February 2024
Date Delivered:	05 March 2024