

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

REPORTABLE

Case No.: 1421/2011

Date Heard: 15 February 2019

Date Delivered: 12 March 2019

In the matter between

**ELMAN NAIDOO N O**

Plaintiff

and

**THE MINISTER OF SAFETY AND SECURITY**

First Defendant

**INSPECTOR PATRICK GROOTMAN**

Second Defendant

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**JUDGMENT**

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***Litis contestatio – Rule 29(1)(b) read with a Rule 25(1) - claim for non-patrimonial damages – transmissibility of claim to estate of the deceased plaintiff – effect of further amendment after the death of the plaintiff on transmissibility of claim***

**GAJJAR AJ:**

Introduction

[1] “What’s done cannot be undone.”<sup>1</sup> The import of these words find application in the issue which I have to decide upon, namely whether or not a claim for non-patrimonial (general) damages arising from an alleged unlawful detention, is

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<sup>1</sup> These are the words uttered by Lady Macbeth in Shakespeare’s *Macbeth*, Act 5 Scene 1, 63-4, following the murder of King Duncan

transmissible on the death of a plaintiff to his/her estate. In considering this question, the legal concept *litis contestatio*<sup>2</sup> plays a determinative role.

[2] The plaintiff is Elman Naidoo NO, who sues in his capacity as executor of the late Mahlubitus Naidoo, the deceased. The plaintiff's claim is in respect of general damages and contemelia for the alleged unlawful detention of the deceased from 4 July 2008 to 23 February 2009.

[3] The claim is against the Minister of Police, as the first defendant, and Inspector Patrick Grootboom, as the second defendant. Prior to the commencement of the trial, I *mero motu* raised whether or not the deceased's claim against the defendants, which is premised on the *actio iniuriarum*, was transmitted upon his death to his estate. Upon raising this issue, the parties agreed to separate the determination of the plaintiff's *locus standi* from all the remaining pleaded issues. I accordingly issued an order, by agreement, in terms of Rule 33(4), ordering such separation in the following terms:

- "1. That the issues rising from paragraph 1 of the plaintiff's Amended Particulars of Claim, read with paragraph 1 of the Defendant's Amended Plea dated 14 February 2019 is separated from all remaining issues;
2. That such remaining issues, being those arising from paragraph 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the plaintiff's Amended Particulars of Claim, read with paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 the Defendant's Amended Plea, be stayed for later determination, if required."

[4] The parties also agreed to a statement of facts in the form of a special case pursuant to Rule 33(1) for adjudication. The agreed facts between the parties are as follows:

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<sup>2</sup> The stage in action proceedings when pleadings are said to be closed and when the issue is crystallised and joined: *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 358C; *Government of the RSA v Ngubane* 1972 (2) SA 601 (A) at 608D

- 4.1 The plaintiff is ELMAN NAIDOO N.O. an adult male currently residing at 71 Mdledle Street, Uitenhage in his capacity as executor of the deceased.
- 4.2 The defendants are as cited in the plaintiff's Amended Particulars of Claim dated 14 February 2019.
- 4.3 The deceased instituted action on 24 May 2011 by way of summons under case number 1421/2011.
- 4.4 The defendants filed their plea on 5 December 2011 in respect of the plaintiff's particulars of claim dated 16 May 2011.<sup>3</sup>
- 4.5 On 8 February 2012, the deceased filed amended particulars of claim.
- 4.6 On 10 July 2017, the plaintiff filed further amended particulars of claim.
- 4.7 The defendants filed their amended plea on 1 February 2019 to the plaintiff's further amended particulars of claim.
- 4.8 The deceased passed away on 8 July 2015.
- 4.9 The plaintiff was appointed as the duly appointed representative of the Master in the deceased's estate on 13 October 2016.
- 4.10 The deceased was substituted by the plaintiff by way of a Notice in terms of Rule 28 dated 19 June 2017.
- 4.11 The parties required adjudication on two questions. Firstly, on whether the deceased's claim for general damages was abated when he passed away, or was his claim transmitted to his estate or heirs. Secondly,

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<sup>3</sup> The period for filing a replication in terms of Rule 25(1) would have been 28 December 2011

whether the pleadings had closed at the time of the deceased's death, or alternatively, that the plaintiff reopened the pleadings by filing the amended particulars of claim on 10 July 2017.

4.12 The deceased's only claim against the defendants was for general damages suffered as a result of the deprivation of his liberty while detained from 4 July 2008 to 23 February 2009, the cause of action is the *actio iniuriarum* / non-patrimonial claim.

4.13 The plaintiff contended that the deceased's claim for general damages had passed to his estate upon his demise. As a result, it was submitted that is competent for the plaintiff to pursue this claim on behalf of the estate.

4.14 The defendants argued that the deceased's claim for general damages was abated upon his demise and is not transmissible to his heirs or estate. In the alternative it was submitted that at the time of the deceased's death on 8 July 2015 the pleadings had not closed or alternatively the pleadings were re-opened by the plaintiff when he filed the amended particulars of claim on 10 July 2017. The defendants only pleaded to the aforesaid amended particulars of claim on 1 February 2019.

#### *Litis contestatio* and its effect on the plaintiff's claim

[5] *Litis contestatio* is synonymous with the close of pleadings when the issue is crystallised and joined<sup>4</sup>. The effect of *litis contestatio* is to freeze the plaintiff's rights as at that moment.<sup>5</sup>

[6] Rule 29 deals with, *inter alia*, with close of pleadings. In terms of Rule 29(1) pleadings are considered closed if, respectively:

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<sup>4</sup> See *Milner NO*, supra at 385C

<sup>5</sup> See *Potgieter v Rondalia Assurance Co Ltd* 1970 (1) SA 705 (N) at 710A; *Ngubane*, supra at 608D-E

- 6.1 Either party has joined issue without alleging any other new matter, and without adding any further pleading;
- 6.2 The last day for filing of the replication of subsequent pleading has elapsed and it has not been filed;
- 6.3 The parties agree in writing that the pleadings are closed and such agreement is filed with the Registrar; or
- 6.4 The parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

[7] The Appellate Division in *Ngubane*<sup>6</sup> endorsed the court *a quo*'s reasoning in holding that a claim for pain and suffering in our law is neither transmissible on the death of the injured person before *litis contestatio* nor is it capable of being transferred by cession, at any rate before the pleadings have closed. This was an endorsement of an earlier decision in the matter of *Hoffa NO v SA Mutual and Fire General Co Ltd*<sup>7</sup> where it was concluded "[t]hat in our law the claim by the injured party in respect of pain and suffering, and the loss of the amenities of life ...does not pass to the injured party's estate".

[8] Significantly, the court in *Hoffa* did not deal with the question of transmissibility of such a claim where *litis contestatio* had taken place. In *Milner NO*<sup>8</sup> the Appellate Division was invited to enquire into whether or not the decision in *Jankowik and Another v Parity Insurance Co (Pty) Ltd*<sup>9</sup>, where it was held that a claim for general damages was transmitted to the deceased's estate provided that *litis contestatio* had been reached at the time of the deceased's death, was correctly decided. The court declined the invitation and without enquiring into *Jankowik* it was assumed that it was correctly found that a claim for non-patrimonial loss suffered by a deceased plaintiff is

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<sup>6</sup> Supra at 608H

<sup>7</sup> 1965 (2) SA 994 (C) at 955C-D

<sup>8</sup> Supra 358B

<sup>9</sup> 1963 (2) SA 286 (W) at 290D-E

transmitted to his estate if *litis contestatio* had taken place prior to his death. In *Road Accident Fund v Mtati*<sup>10</sup> the Supreme Court of Appeal endorsed the decision in *Jankowik*. Thus, if *litis contestatio* had been reached at the time of the death of the deceased, then his claim for general damages had transmitted to his estate. On that basis, in *Jansen van Vuuren NNO v Kruger*<sup>11</sup> the court, on appeal, dealt with a claim where the plaintiff, claiming general damages for defamation, had died during the trial and was thereafter substituted by the executors of his estate. On appeal, the court *a quo*'s dismissal of the claim for general damages was overruled and the plaintiffs', acting on behalf of the estate in their representative capacities, were awarded general damages.

[9] In *Jankowik* it was held that *litis contestatio* does not affect the cause of action. It merely transmits the claim or the liability to the estate of the party dying after *litis contestatio* has been reached.<sup>12</sup>

[10] Thus the critical question to be determined in the present matter is whether or not at the time of the death of the deceased *litis contestatio* had been reached. It will be recalled from the agreed facts between the parties that the deceased instituted action on 24 May 2011 and that the defendants' plea in respect thereof was filed on 5 December 2011. The time for filing a replication in terms of Rule 25(1) lapsed on 28 December 2011. Accordingly, in terms of Rule 29(1)(b) the pleadings closed on 29 December 2011. In other words, *litis contestatio* was reached. In terms of the *Jankowik*, *Milne NO* and *Mtati* judgments, the deceased's rights became frozen<sup>13</sup> at that moment. Accordingly, at the time of the deceased's death on 8 July 2015 his claim for general damages against the defendants was transmitted to his estate.

[11] As set out above, there were two amendments to the particulars of claim, the first on 8 February 2012 which predated the deceased's death and the second on 10 July 2017 after the deceased's death. The defendants' amended plea to the last mentioned amendment was filed on 1 February 2019.

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<sup>10</sup>2005 (6) SA 215 (SCA) at para [39]

<sup>11</sup> 1993(4) SA 942 (A)

<sup>12</sup> See *Jankowik*, *supra* at 290D-E

<sup>13</sup> See *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 547D

[12] Mr *Gqamana* SC, for the defendants, argued that as the plaintiff had amended his particulars of claim in 2017, being the date after the death of the deceased, that event had reopened the pleadings and as such rendered the transmission of the claim for general damages not transmissible to the deceased's estate. In support of this submission reliance was placed on the judgment of the Supreme Court of Appeal in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>14</sup> where the following was stated:

*"[15] The answer is that when pleadings are re-opened by amendment or the issues between the parties altered informally, the initial situation of litis contestatio falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of litis contestatio was conceived. In Roman law, once this stage of proceedings was reached, a new obligation came into existence between the parties, to abide the result of the adjudication of their case.*

*...*

*When the parties decide to add to or alter the issues they are submitting to adjudication, then the 'agreement' in regard to those issues is altered and the consequences of their prior arrangement are altered accordingly. Accordingly, when in this case they chose to reformulate the issues at the commencement of the trial, a fresh situation of litis contestatio arose and the rights of the Fund as plaintiff were fixed afresh on the basis of the facts prevailing at that stage."*

[13] Accordingly, the defendant further submitted that by further amending the pleadings on 10 July 2017, *litis contestatio* had not been reached and it follows that the claim for general damages was not transmissible to the deceased's estate.

[14] In reply, Mr *le Roux*, on behalf of the plaintiff, contended that the amendment to the defendants' plea followed a notice of intention to amend the plaintiff's particulars of claim which indicates that amendment to the particulars of claim were

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<sup>14</sup> 2012 (4) SA 593 (SCA) at para [12]

sought when the pleadings were closed. Reliance for this submission was placed on the judgment of *Potgieter v Sustien*<sup>15</sup> where the court held that Rule 29 did not merely create a rebuttable presumption that the pleadings were closed, but rather constituted a substantive formal rule and, when a pleading was filed or amended after the close of the pleadings in terms of the Rule, it did not alter the fact that the pleadings were closed. The submission was further that the amendments which the plaintiff sought were affected with the defendants' consent in that no objection thereto was filed. It was also submitted on behalf of the plaintiff that when the particulars of claim were amended in 2017 the claim for general damages had already been transmitted to him in his representative capacity in 2016 when he was so appointed.

[15] At the time the deceased died, the pleadings had already been closed, i.e. prior to the 10 July 2017 amendment. In other words *litis contestatio* had been reached with the result that the deceased's claim was transmitted to his estate. That being done, it could not have subsequently, in my view, been undone by the 2017 amendment. Stated otherwise, the claim had accrued to the deceased's estate at the time of his death as the pleadings had by then closed and the issues crystallised. The deceased's cause of action remained unaltered by the 2017 amendment and the scope of the litigation was not altered thereby. The court in *KS v MS*<sup>16</sup> interpreted the *Endumeni* judgment as follows with regard to the effect of an amendment after *litis contestatio*:

*'Nor do I understand the judgment of Wallis JA to mean that any amendment, however, immaterial or minor it may be, would result in fresh litis contestatio. It is when the parties "add to or alter the issues they are submitting to adjudication", by amendment or agreement, that "a new obligation" comes into existence and a fresh situation of litis contestatio arises.'*<sup>17</sup>

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<sup>15</sup> 1990 (2) SA 15 (T)

<sup>16</sup> 2016 (1) SA 64 (KZD)

<sup>17</sup> At 69C-D



[16] I align myself with the views expressed by the court in *KS v MS*. Thus, the deceased's claim in the instant matter remained unaltered by the 2017 amendment, the cause of action against the defendants remaining the same.

### Conclusion

[17] In considering the issues which have to be determined, I have reached the following conclusions:

- 17.1 the deceased's claim against the defendants had not abated when he passed away on 8 July 2015 as the pleadings in terms of Rule 29(1)(b) elapsed on 28 December 2011;
- 17.2 at the time of the deceased's death *litis contestatio* had been reached;
- 17.3 the amendment of the particulars of claim on 10 July 2017 did not have the effect of re-opening the pleadings as the deceased's cause of action remained unchanged and the further amendment did not undo a claim which had already been transmitted to the deceased's estate.<sup>18</sup>

[18] In the result, I make the following order:

- 18.1 The plaintiff is entitled to pursue the claim in his representative capacity for general damages on behalf of the deceased;
- 18.2 The costs occasioned by the determination of the special case shall be borne by the first defendant.

**G J GAJJAR**

**ACTING JUDGE OF THE HIGH COURT**

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<sup>18</sup> See *Fisher v Natal Rubber Compounders (Pty) Ltd* 2016 (5) SA 477 (SCA) at para [9] where it was held that despite a cession of a claim and a subsequent amendment thereto the same claim was been pursued throughout.

Appearances:

For Plaintiff:       Adv H le Roux instructed by Lessing Heyns Keyter & Van der  
Bank Inc, Port Elizabeth

For Defendants:    Adv N W Gqamana SC instructed by the State Attorney,  
Port Elizabeth