

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 2020/34451

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED: YES/NO	
.....	
DATE	SIGNATURE

In the matter between:

M[...] G[...]

Applicant

and

DR ATHINOULA SAVVIDOU

First Respondent

DR LESLEY MESABA MALULELKE

Second Respondent

JUDGMENT

BOTSI-THULARE AJ

Introduction

[1] This is an opposed application for leave to amend particulars of claim in terms of rule 28 (1) of the Uniform Rules of Court. The applicant (plaintiff in the main action) is M[...] G[...], an adult businessman and a widower to the deceased L[...] G[...] (L[...]). This application is opposed by Dr Athinoula Savvidou (first respondent, first defendant in the main action) a female specialist physician situated in Olivedale Hospital Johannesburg. Dr Lesley Mesaba Maluleke (the second respondent, second defendant in the main action), did not oppose this application.

[2] The applicant seeks to amend the particulars of claim as set out in the Notice of Intention to amend in terms of rule 28 (1).

Background Facts

[3] On 29 July 2020, the applicant instituted an action against the first and second respondent in his personal capacity, the claim arose from the death of his wife. The death was caused as a result of a brain damage due to allegedly negligence by the first and second respondent. During that time, the first defendant entered appearance to defend and on 26 November 2020 she filed a plea denying liability. The second respondent also entered appearance to defend, but his attorneys of record withdrew on 12 August 2022, and he has been unrepresented since then.

[4] The consequent need to amend the particulars of claim has its basis on introducing claims by the applicant in other capacities other than just his personal capacity. The applicant in his notice of intention to amend the particulars of claim, intends to alter his claim to one arising not only from his wife's brain injury, but also to one arising from her death, and to introduce a claim in his capacity as an executor of his wife's estate for loss of support on behalf of their two children namely L[...] (born on 1 December 2011) and S[...] (born on 1 May 2013).

[5] Counsel for the applicant submits that the applicant in his capacity as an executor of L[...] 's estate, has a claim for the hospital, medical and related expenditure incurred by L[...] between the date of the brain damage and the date of her death, for her loss of income between those two dates and for the costs of applications that were brought pursuant to the brain damage. The applicant now also has a claim in his representative capacity on behalf of L[...] and S[...] for the loss of support arising from the loss of their mother and their distress.

The first respondent 's objection in terms of rule 28(3) of the Uniform Rules of Court.

[6] The first respondent raises two objections to the amendment sought

6.1. the applicant seeks to irregularly introduce additional plaintiffs to the existing summons (issued in his personal capacity) as a result of his wife's death on 11 June 2021. However, the first respondent does not persist on this ground.

6.2. the applicant in his personal capacity and representative capacity seeks to introduce claims for damages arising from the death of his wife as a result of the first and the second defendant's alleged negligence. In doing so, the applicant failed to comply with rule 18(10) in that he failed to set out his alleged claims, both in his personal and representative capacity in such that it will allow the first respondent to assess the quantum thereof.

Issues for determination

[7] The issue to be determined is whether or not the first respondent will suffer prejudice and injustice if the applicant is granted leave to amend?

Law applicable to the facts

[8] Rule 28, which deals with the amendment of pleadings, reads as follows –

“28(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

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

(4) If an objection which complies with sub-rule (3) is delivered within the period referred to in sub-rule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.”

[9] It is permissible for the court exercising its discretion and notwithstanding anything contrary to the rule that at any stage before the judgment, to grant leave to amend any pleading and document.¹

[10] The legal principles are trite, and the court hearing application for leave to amend has a wide judicial discretion to be exercised.² A party seeking an amendment bears the onus of showing that the amendment is made bona fide and that there is an absence of prejudice.³

[11] The principles governing the granting of an amendment have been summarised by White J in *Commercial Union Assurance Co Ltd v Waymark NO.*⁴ These are the following:

¹ Rule 28(10) of the Uniform Rules

² *Minister of Police and another v Jwili* (Application for Leave to Amend) [2023] JOL 57270 (GJ) citing *Krische v Road Accident Fund 2004 (4) SA 358 (W)* at 363 at para 9.

³ *Ibid.*

⁴ 1995 (2) SA 73 (TK)

“(a) The court has a discretion whether to grant or refuse an amendment;

(b) An amendment cannot be granted for the mere asking; some explanation must be offered therefore;

(c) The applicant must show that prima facie the amendment ‘has something deserving of consideration, a triable issue’;

(d) The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the dispute, between the parties;

(e) The party seeking the amendment must not be mala fides;

(f) The amendment must not cause an injustice to the other side which cannot be compensated by costs;

(g) The amendment should not be refused simply to punish the applicant for neglect;

(h) A mere loss of opportunity of gaining time is no reason, in itself, for refusing the application;

(i) The amendment is not sought timeously; some reason must be given for the delay.”

[12] In *Affordable Medicines Trust & Others v Minister of Health and Another*,⁵ the Constitutional Court approved the approach to be adopted in applications for leave to amend the pleadings and described same which was stated in *Commercial Union supra*:

⁵ (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 9.

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- *The practical rule adopted seems to be adopted that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice and prejudice to the other side which cannot be compensated by 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 pleading which it is sought to amend was filed.*"

[13] In *Greyling v Nieuwoudt*⁶ the court stated that:

*"The general trend of the Rule implies that amendments necessary for the determination of the real issue should be allowed. However, to prevent abuse, certain safeguards have been imposed which suggest that the line of approach should in each case be an inquiry into whether the application is bona fide in the sense that material new factors have arisen or have come to the notice of a party, thereby making the application necessary; whether the application was thereupon timeously made and whether any injustice would be caused by the amendment which cannot be avoided by a postponement or compensated by costs."*⁷

[14] It has been held by our courts in a number of cases, that the aim in allowing amendment to pleadings is to do justice between parties by deciding the real issues between them.⁸ In *Rosenberg v Bitcoin*⁹ it was held that our courts should be in favour of an amendment whenever such amendment facilitates the proper ventilation of a dispute between the parties.

Application of the facts

Introduction of a new claim

⁶ 1951 (1) SA 88 (O)

⁷ Id at para 91

⁸ See *Transec (Pty) Ltd v The Premier of the Province of the Eastern Cape* [1998] ZAECHC 4; *Trans Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 633 (CLD)

⁹ 1935 WLD 115 See also *Cross v Ferreira* 1950 (3) SA (C) 446 C at 447

[15] I now turn to consider the first respondent 's objections, focus will be given to the second objection since the first respondent does not persist with the first objection. The second objection states that the applicant seeks to introduce a new claim for damages in his capacity and in his representative capacity, in doing so the plaintiff failed to comply with rule 18(10) in that he failed to set out his alleged damages to enable the first respondent to assess the quantum. The first respondent argues that this will cause prejudice should the court grant the applicant leave to amend.

[16] Rule 18(10) provides that :

“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—”

[17] The first respondent further submits that the applicant's attorneys admitted failure to comply with rule 18(10) and said they have not set out the damages in such a way that it would enable the defendants to assess the quantum.

[18] The defendant goes on to argue that there is a distinction between the claims, in the original claim , the applicant did not claim for loss of support , however in the proposed amendment, the applicant claims for loss of support, not only for himself, but also in his representative capacity on behalf of his minor children.

[19] The introduction of a new cause of action has also been recognized as a reason for amendment. In affirming this approach, Hill J in *OK Motors v Van Niekerk*¹⁰ said the following:

¹⁰ 1961 (3) SA 149 (T).

*"It is for the reasons of convenience that fresh causes of action may be incorporated in original proceedings even if such fresh cause of action have arisen after the issue of summons. (See Pullen v Pullen 1928 WLD 133)". This approach was followed in many subsequent cases by our courts.*¹¹

[20] The plaintiff submits that the particulars of claim as amended will still make precisely the allegations made before the amendments and contain similar allegations relating to loss of support, including the children's loss of support. The amounts being claimed for loss of support are estimated figures, the plaintiff is not presently in a position to furnish a more specific calculation. In this instance, the parties will be constrained to separate liability from quantum in terms of rule 33(4) which will resolve liability first. The plaintiff relied on *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W), *Rubico (Pty) Ltd v Paywell (Pty) Ltd* [2001] 2 All SA 671 (W) and *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ), this court stated that where liability and quantum have been separated a party need not discover documentation in relation to quantum until liability has been resolved favorably.

[21] The applicant further submits that first respondent was given the undertaking that the applicant's attorney will enter into "time consuming and expensive process" to fully investigate the quantum once liability has been successfully resolved.

[22] Accordingly, the primary purpose of the amendment of particulars of claim is to set out the real issues between the applicant and the respondent so that justice may be done. In other words, the purpose of amending stated paragraphs in the particulars of claim establish the real issues in dispute between the parties and to purify the case so as to enable the first respondent to identify the actual point in dispute. An amendment should be granted if its purpose leads to a proper ventilation of the issues.

Reasons for judgment

¹¹ Id p152

[23] Having considered both parties' submissions, there will be no prejudice or injustice that will be suffered by the first respondent as a result of permitting the amendment as proposed, the issue of quantum will be dealt with once liability is established.

[24] Accordingly, the proposed amendment will ensure that the dispute of liability between the parties is resolved expeditiously. This is so having regard to the fact that the pleadings can, as a rule, be allowed at any stage of the litigation before trial has commenced.

[25] Having regard to the papers submitted in this litigation, I am satisfied with the explanation given by the applicant pertaining to the grounds for the amendment of the pleading. Accordingly, the application for leave to amend the pleading must succeed

Order

I therefore grant the order as follows

[26] 26.1 Leave to amend the applicant's particulars of claim as set out in its Notice in terms of Rule 28(1) dated 23 November 2022 is hereby granted.

26.2 The First respondent is ordered to pay costs on scale as between attorney and client including the cost of two counsel.

MD BOTSI-THULARE AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Applicant

Applicant's Counsel: Adv JF Mullins SC

Adv LA East

Instructed by: LLA Attorneys

Ms M Lanser

Respondent's Counsel: Adv LC Segeels-Ncube

Instructed by: Clyde &Co

Mr A Ferreira

DATE OF HEARING: 02 August 2023

DATE OF JUDGMENT: 24 October 2023