

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



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

**CASE NO: 61235/2011**

(1)	REPORTABLE: Yes/ No
(2)	OF INTEREST TO OTHER JUDGES: Yes/ No
(3)	REVISED.
_____	_____
DATE	SIGNATURE

In the matter between:

**MASTER RUNNERS (PTY) LTD T/A**

Applicant/ Plaintiff

**BEEFMASTERS**

And

**OAKLEY TRANSPORT**

First Respondent/ Defendant

**MICROMATH TRADING 561 CC**

Second Respondent/ Defendant

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**JUDGMENT**

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**MBONGWE, J:**

## **INTRODUCTION**

[1] The applicant, who is the plaintiff in the action proceedings between the parties, has brought this latest application in terms of rule 28(4) for leave to amend its particulars of claim and replication consequent to the respondents' objection to the applicant's notice of amendment in terms of rule 28(1) of the Uniform Rules of the Court. The applicant has also filed applications for the condonation of the late filing of its replication to the second respondent's answering affidavit (rule 27(3) and of the amendment thereto as well as an application in terms of rule 33(4), being for the separation of the hearing and determination of the issues of the amendment and, at a later stage, liability and quantum of the claim.

[2] The amendments sought are, first, in respect of the proper citation of the first applicant which the applicant seeks to align with citation in the first respondent's plea and, second, the addition of the plea of the joint and several liability of the respondents, the one paying the other to be absolved, or, alternatively, the first respondent being held vicariously liable with the second respondent.

[3] The applicant's applications are opposed by the respondents on different grounds which will be considered later herein and the respondents seek the dismissal of the applications with costs.

**FACTUAL MATRIX**

- [4] Two vehicles owned by the plaintiff were allegedly stationary, one behind the other, at a stop-and-go sign on a construction site on 9 June 2009 at or near the N12 between Bloemhof and Wolmaransstad when a vehicle with registration WHJ [...] GP collided with rear of the second vehicle causing it to rear-end or collided with the vehicle in front. Both plaintiff's vehicles were damaged as a result of the collision. Information provided by driver of the offending vehicle at the scene was that he was an employee of the first respondent, the owner of the offending vehicle and he (driver) was on duty when the accident occurred.
- [5] On the basis of the information provided, the applicant sought to institute action proceedings against the first respondent and claim payment of damages to its vehicles on the premise that the driver of the offending motor vehicle was the employee of the first respondent and was acting within the course and scope of his employment when the accident occurred or, further alternatively, had been driving the vehicle in pursuance of the business interests of his employer, the first respondent.
- [6] Prior to issuing summons, the plaintiff's attorneys had been communicating with the first respondent about the collision. This led to the second

respondent, through its insurance brokers, Jacobson & Mallet, represented by a Mr Dames, informing its insurers, Hollard, on 15 June 2009 about the plaintiff's claim arising from the accident of 9 June 2009.

- [7] Mr Maluleke of Zurich Insurance Company ("Zurich"), the insurers of the plaintiff's vehicles, approached Mr Dames on 3 August 2010 about the claim Zurich had against Hollard emanating from the collision. This resulted in EWS Attorneys coming on record as legal representatives of the first respondent.
- [8] On 12 August 2010 EWS Attorneys request Zurich to provide them with the merits documents of the accident and also enquire on what basis the applicant sought to hold the first respondent liable.
- [9] A letter of demand dated 11 November 2010 was sent by Zurich to AWS Attorneys. On 7 June 2011 Zurich furnished AWS Attorneys them with the merits documentation which included, *inter alia*, the sketch plan and the description of the accident.
- [10] On 11 August 2011 EWS again enquires from Zurich why it sought to hold the first respondent liable for the damages. The applicant responded by issuing the summons against the first respondent on 25 October 2011 and had it served on EWS Attorneys two days later, on 27 October 2011.

[11] The matter became defended by the first respondent who filed plea on 31 August 2012 denying liability. The applicant's attorneys followed up on the plea and, on 10 September 2012, enquired from the first respondent's attorneys what the basis of the denial of liability was. The response received dated 26 September 2012 was that the applicant had pleaded an incorrect registration number of the first respondent's vehicle and that no vehicle registered in the first respondent was involved in an accident on 9 June 2009.

### **2013**

[12] In a subsequent letter dated 10 June 2013 the first respondent's attorneys sent communication to the applicant's attorneys revealing the identity of the second respondent as the entity liable for payment of the applicant's damages. It is to be noted that this information was disclosed to the applicant's attorneys some four years and one day after the accident had occurred on 09 June 2009.

[13] Approximately two months later, on 5 August 2013, the insurers of the plaintiff's vehicles, Zurich, sent communication to the plaintiff's attorneys pertaining to investigations that had been conducted regarding the alleged identity of the second respondent as the wrongdoer.

[14] The information pertaining to the second respondent gathered on 10 June 2013 and 5 August 2013, respectively, informed the applicant's attorneys'

decision on 31 October 2013 to notify the first respondent's Attorneys of their intention to launch an application for the joinder of the second respondent as the second defendant in the action proceedings and requesting that the commencement of the hearing of the matter scheduled for 14 November 2013 be postponed.

## **2014**

[15] The applicant launched the application for the joinder of the second respondent on 15 May 2014. The first respondent and the proposed second respondent, both represented by EWS Attorneys, filed their opposition to the applicant's joinder application on 23 June 2014. The respondent's answering affidavit was signed by their attorneys, AWS. The applicant filed its replication on 7 November 2014, having earlier been granted an extension by EWS. On 30 November 2014.

[16] EWS Attorneys were substituted by HP Attorneys as the first and second respondents' attorneys of record on 7 April 2016. HP Attorneys withdrew the respondents' opposition of the applicant's joinder application resulting in its granting unopposed on 28 February 2017.

## **2016**

[17] EWS was substituted by HP Attorneys as the first and second respondents' attorneys of record on 7 April 2016. HP Attorneys withdrew the respondents' opposition to the applicant's joinder application on 8 February 2017 resulting in the application being granted unopposed on 28 February 2017.

[18] Following the granting of the joinder application in the present matter, the applicant filed the amended pages of its summons and particulars of claim on 30 November 2017 which included the citation of the second respondent as the second defendant in the action proceedings and allegations of facts necessary to establish the premise of the second defendant's liability for the applicant's claim.

[19] The first and second respondents filed their respective consequential amended plea and special plea of prescription, respectively, on 4 September 2017 as follows:

The FIRST DEFENDANT, inter alia;

19.1 specifically denies the *locus standi* of the plaintiff to institute these proceedings claiming the alleged damages;

19.2 specifically denies any liability to pay any damages suffered by the plaintiff as alleged or at all.

The SECOND DEFENDANT raised the special pleas that:

19.3 the plaintiff's cause of action arose on 9 June 2009. The plaintiff's claim prescribed three years later on 8 June 2012, prior to it joining the second defendant to the proceedings, alternatively;

19.4 the plaintiff alleges to have become aware of the identity of the

second respondent on 10 June 2013, but only brought the application for joinder of the second respondent on 14 May 2017; a period of three years from the date of the plaintiff acquiring knowledge of the second defendant's identity having lapsed on 9 June 2016.

## **THE PRESENT AMENDMENT APPLICATION**

### **PURPOSE OF AN AMENDMENT**

[20] The provisions of rule 18 of the Uniform Rules of Court require that when pleading, a party must plead the facts that establish its case; the material facts which the court considers, apply the rules of law to and draws conclusions from regarding the rights and obligations of the parties which it pronounces in a judgment that will follow. A summons that contains the plaintiff's opinions and conclusions instead of material facts is defective and excipiable for the failure to establish a cause of action.<sup>1</sup>

[21] A cause of action was described as:

*“the factual basis / set of material facts that begets the plaintiff's legal right to action...”<sup>2</sup>*

[22] The primary objective of an amendment of pleadings is:

*“to obtain a proper ventilation of the dispute between the parties to determine the real issues between them, so that justice may be done.”<sup>3</sup>*

<sup>1</sup> *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 at 216H-J

<sup>2</sup> *Evins v Shield Insurance Co Ltd* 1980 (2) 814 at 825G

<sup>3</sup> *Picardi Hotels Limited v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA)



## CAVEATS TO AMENDMENTS

[23] The purpose of the amendment of a pleading is to include therein relevant particularities in the facts that establish a cause of action, without altering the import of the already pleaded facts in a manner that may cause prejudice to the other party or parties which (prejudice) may not be compensated by an order for costs.

[24] Allowing a justified amendment accords with the objective of the provisions of section 34 of the Constitution of the Republic of South Africa, 1996, which espouse the right of access to justice, the right to be heard and the pursuit of the interests of justice.

[25] Rule 27(3) provides for the launching of an application for condonation of a delayed application in terms of rule 28(4). Set legal principles require, *inter alia*, that a full disclosure of the reasons for the delay be set out in the application for condonation, that the reasons for the delay be *bona fide* to warrant the granting the condonation and that it be in the interests of justice to do so.

## FIRST AND SECOND DEFENDANTS' PLEAS

[26] The first respondent, having previously on 31 August 2012 pleaded to the plaintiff particulars of claim, filed its amended plea, occasioned by the joinder of the second defendant, on 4 September 2018. On the same day, the

second defendant filed two special pleas and a plea. The first and second respondents pleaded, respectively, that;

26.1 The first defendant in effect denied ownership of the vehicle that caused the accident giving rise to the plaintiff's claim, that the driver of that vehicle had been employed by it or was carrying out its business interest when the accident occurred on 9 June 2009.

26.2 The first defendant also alleged that notwithstanding its initial plea on 31 August 2012, the plaintiff failed to join the second respondent as the second defendant in the action proceedings,

and;

26.3 the second defendant pleaded that plaintiff's claim, which arose on 9 August 2009, became prescribed, in terms of section 11D of the Prescription Act 68 of 1969, three years later on 8 August 2012, which was prior to the applicant serving the application for joinder of the second defendant as a party in the action proceedings.

[27] The applicant filed its replication to the second respondent's special pleas and plea on 11 August 2020, well out of time in terms of the rules and, in consequence whereof the applicant filed a further application for the condonation of the late filing of the replication on 13 August 2020. The latter

date was the date of the commencement of the hearing of the matter. The matter was, however, crowded out and subsequently enrolled for hearing on 18 March 2021.

[28] The parties subsequently held three pre-trial conferences consecutively on 28 February 2019, 6 August 2020 and 15 February 2021.

### **PAUSE**

[29] I pause to state that the undermentioned new detailed information had become known to the applicant resulting in it launching the present two applications for the amendments of its particulars of claim and the replication in terms of rule 28(1) on 15 February 2021. The new facts that had emerged were that:

29.1 A Mr Gert Blignaut of the first defendant had attended the accident scene on 9 June 2009 and gathered the following information, including that obtained from the police accident report :

29.1.1 Motor Vehicle Registration : WJH [...] GP

Operators Card : Micromath Trading 561 CC

29.1.2 Photo of Offending Vehicle : WJH [...] GP

bearing the Transport Logo : Lefofa Trans

## 29.1.3 Accident Report OAR recording:

Driver of vehicle WJH [...] GP : Sibusiso Ngema

Employer : Lefofa Trans

Natis Print of vehicle

WJH[...] GP : Micromath Trading 561 CC

## 29.1.4 Certificate of Service:

Issued by : Lefofa Trans

Issued to : Sibusiso Master Ngema

**ANALYSIS OF THE PURPOSE OF THE AMENDMENTS**

[30] The purpose of the applicant's currently sought amendments of the particulars of claim and replication to the second respondent's pleas is, as a result of the nature of the intricate ties between:

30.1 the offending vehicle WHJ [...] GP was registered in the name of the second respondent;

30.2 it bore the transport logo of a company called Lefofa Trans which was the employer of the driver of that vehicle when the collision occurred. The vehicle appeared in the list of the fleet of vehicles assigned to the first respondent and was to be driven by the same driver who allegedly caused the accident;

30.3 the same driver reported that the first respondent was his employer and owner of the offending vehicle;

30.4 The second respondents admitted that it traded as Lefofa Trans whose logo appeared on the offending vehicle;

30.5 The first respondent was initially contacted by or on behalf of the applicant about the collision and damages sustained based on the information that had been obtained from the driver of the offending vehicle at the scene of the accident. That communication, unbeknown to the applicant, mysteriously resulted in the second respondent's insurer, Hollard, being informed of the accident and the applicant's claim by the second respondent's insurance brokers.

30.6 Upon receipt of the application for its joinder, the second respondent became represented by the same firm of attorneys representing the first respondent and, later, both respondents terminated the services of their attorneys and employed the same substitute attorneys.

[31] The facts in paras 29 and 30 above, in my view, are an indication that the first and second respondents are in an intrinsic web-like business entanglement, share resources and appear, in my view, to be under the control of one mind – what interest, amongst other things, occasioned Mr Gert Blignaut of the first defendant's visitation and gathering the information

in para 29, above, at the scene of the accident on the day the accident had occurred.

[32] In addition, the first respondent's initial shielding of the identity of the second respondent and its involvement in this case until, in the mind of the first respondent, the applicant's claim had prescribed begs the question what interest does the first respondent have in the second respondent to afford it this purported protection.

#### **THE AMENDMENT SOUGHT EFFECT THEREOF**

[33] The applicant initially sought payment of its damages against the first respondent, but successfully joined the second respondent as the second defendant later. It then amended its particulars of claim to reflect the joinder and sought hold each defendant individually liable, or, alternatively, the first defendant vicariously liable with the second defendant. In the latest amendment sought in the present hearing, the applicant seeks to add a further alternative for holding the respondents liable by the addition of '*..or, alternatively, the first and the second defendants jointly and severally liable, the one paying the other to be absolved.*'

[34] It is specifically the sought inclusion of this further alternative premise for holding the respondents liable that is at the heart of the present hearing. The objection to this amendment is buttressed on the respondents' contention

that joint and several liability of the respondent has not been pleaded and the inclusion thereof would constitute the introduction of a new cause of action. This contention by the respondents could not be more misplaced, in my view, in that the facts constituting the cause of action remain the same; relief has already been sought against each respondent or against both respondents on the basis of vicarious liability. Seeking to hold the respondents jointly and severally liable the one paying the other to be absolved, merely adds another alternative premise for liability and not another (or new) cause of action. As a matter of fact, the set of facts on which the potential liability of the respondents appears to be founded, such as the intrinsic nature of the business interaction and the apparent sharing of resources between the respondents, perfectly accommodate reliance for the potential liability the respondents on both principles of joint and several liability and vicarious liability, inter alia. I find, consequently, that the respondents' grounding for the objection to the amendment is without merit and ought to be rejected.

### **CONDONATION PRINCIPLES**

[35] The applicant was served with the second respondent's special pleas and plea on 4 August 2018, but filed its replication thereto on 11 August 2020, that is, two years and one week later. Compliance with time limits indicated in the rules of the court or a court directive is mandatory. Any delay places an obligation on the party concerned to seek the indulgence of the court as

soon as it becomes aware of the necessity to do so in an application for condonation.<sup>4</sup>

[36] For an application for condonation to succeed, the applicant for condonation must of necessity provide a detailed explanation of the cause of the delay<sup>5</sup>

[37] One of the most important considerations for granting condonation is ensuring that the interests of justice are served.<sup>6</sup>

## **ANALYSIS**

### **JUSTIFICATION OF GRANTING THE AMENDMENTS**

[38] The applicant's election to seek to hold, additionally to either of the respondents individually, both the first and the second respondents jointly and severally liable, the one paying the other to be absolved (the all-encompassing approach), is necessary, in my view, in light of the unlikelihood of a successful disentanglement of the web-like business connectivity of the respondents in order identify each respondent's scope of activity and liability. A further justification for the finding that the amendment is necessary is the first respondent's self-asserted exculpation from possible liability.

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<sup>4</sup> *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671 B-D

<sup>5</sup> *Foster v Stewart Scott Inc.* (1997) n18 ILJ 367 (LAC)

<sup>6</sup> *Grootboom v National Prosecution Authority & Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013)



[39] With regard to the second respondent's plea of prescription, it will be amiss to not consider the extent of the calculated delay caused by the first respondent and that caused by both respondents' opposition of the applicant's joinder application. It will not serve the interests of justice, in my view, to allow the second respondent and, ultimately both respondents, to benefit from a technicality that was unjustifiably created and nurtured by the first respondent over a period of time solely for potential prejudice to the applicant.

[40] It needs be stated that none of the findings in this judgment should be construed to be a finding on the merits in this case.

## **CONCLUSION**

[41] In line with the findings above, I conclude that the amendments sought by the applicant are justified and necessary to facilitate a meaningful ventilation of the facts upon which the applicant seeks to hold the respondents individually liable or jointly and severally liable, the one paying the other to be absolved. The respondents' objections stand to be rejected.

## **ORDER**

[42] Following the findings in this judgment, an order is made that;

1. The applicant's application for condonation is granted.

2. Leave is granted to the applicant to effect the amendments sought in these proceedings.
3. The application for the separation of the determination of the issues in terms of rule 33(4) as stated in the notice of motion is granted.
4. The respondents are ordered to pay the costs.

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**MPN MBONGWE**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

This judgment was prepared by Judge Mbongwe. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 20 February 2024.

HEARD ON: 16 August 2023

DECIDED ON: 20 February 2024

**Appearances:**

For the Applicant: Adv FJ Erasmus SC

Instructed by: Prinsloo Attorneys

For the Third Respondent: Adv PM van Ryneveld

Instructed by: Herman Prinsloo Attorneys