IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU LOCAL DIVISION, DURBAN

Case No: 9443/2010

In the matter between:

INBAVATHI MOODLEY	Applicant/ Plaintiff
And	
RENASA INSURANCE COMPANY LIMITED	First Respondent/Defendant
HOLLARD INSURANCE COMPANY LIMITED	Second Respondent/Defendant
TRACKER NETWORK (PTY) LIMITED	Third Respondent/Defendant
FORSDICKS BMW	Fourth Respondent/Defendant

Coram: Koen J
Heard: 22 March 2016
Delivered: 31 March 2016

ORDER

(a) An order is granted in terms of paragraphs 1 and 2 of the Notice of Application in terms of rule 28(4) dated 10 September 2014.
(b) The Applicant and the Second Respondent are each liable for their own costs of the application.

J U D G M E N T

KOEN J:

[1] The Applicant seeks an order granting her leave to amend her Particulars of Claim:

'1.

By the introduction of the following:
"24A

1. Alternatively to paragraph 24.2 the Plaintiff's claim is for payment of the sum of R674 250,00 being the amount insured (R710 000.00) minus the excess payable in terms of the policy with the First Defendant (R35 750.00)."

2.

By the addition of the following prayer:
"2. Alternatively, payment of the sum of R674 250.00;"'[1]

She further seeks an order that she be directed to pay the wasted costs, if any, occasioned by this amendment, and an order that the Second Respondent[2] pay the costs of the application.[3]

[2] The application is opposed by the Second Respondent, Hollard Insurance Company Limited. The other Respondents abide by the decision of this court.

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[1] These are the amendments foreshadowed in her notice in terms of terms of Rule 28(1) dated 30 January 2014.

[2] The Respondents bear the same numbers as Defendants in the action pending against them by the Applicant as Plaintiff.

[3] These are in terms of respectively paragraphs 2 and 3 of her application in terms of Rule 28(4). In paragraph 4 she sought a costs order also against any other Respondents who may oppose the application.

[3] I do not intend quoting in detail from the pleadings, but will briefly summarize by way of background what the allegations in the pleadings by the parties reveal, insofar as relevant to this judgment:

(a) The Applicant purchased a BMW X5 vehicle from the Fourth Respondent (Forsdicks BMW) on 24 December 2009. The purchase was financed with a loan from BMW Financial Services South Africa for a price of R713 500.00. It was a requirement of that finance that the vehicle had to be comprehensively insured;

(b) The vehicle was comprehensively insured with the First Respondent (Renasa Insurance Company Limited) on 24 December 2009. This insurance required that the vehicle be fitted with a vehicle tracking system. The Fourth Respondent was contracted by the Applicant on 24 December 2009 to fit such a system to the vehicle and the Third Respondent was contracted to monitor and track the vehicle, and in the case of a loss thereof to locate the vehicle, using this tracker device;

(c) The Applicant concluded an insurance policy with the Second Respondent on 24 December 2009, a copy of part of which was annexed as annexures 'F1' and 'F2' to the Particulars of Claim, referred to as a 'shortfall protection' policy. The Applicant alleges that:

'In terms of this policy the Second Defendant undertook to compensate the Plaintiff in the event that the Plaintiff's insurer (that is that the First Defendant) failed to compensate the Plaintiff'. The terms of the Policy are:

> "Violation
> If your vehicle is damaged, stolen or written off and the claim is rejected by the underlying policy due to you unintentionally violating a condition of the underlying policy, shortfall protection will pay:
> If the vehicle is repairable : Cost of repair less the underlying policy excess.

> If the vehicle is a total loss : Maximum indemnity less the underlying excess".'[4]

(d) The vehicle was stolen on 15 February 2010. The First Respondent has denied liability. Its reasons for doing so are not relevant to this judgment;

(e) The Applicant lodged a claim against the Second Respondent alleging that she fulfilled all her obligations in terms of the insurance policy in lodging the 'insurance claim' and that the insurance contract was in force at the time of the theft. The Second Respondent however repudiated the Applicant's claim by letter dated 22 June 2001. Its reasons for doing so are likewise not relevant to this judgment, save to record that they are founded on the provisions of the policy;

(f) Based on the above the Applicant claimed that the Respondents each in the alternative 'is liable to compensate the Plaintiff for the sum of R713 500,00 being the value of the vehicle at the time of the theft'[5];

(g) In response the Second Respondent in its amended plea set out *inter alia* the terms of the insurance policy in detail and specifically pleaded that, at best, it could be liable to indemnify the Applicant for the 'Maximum Indemnity' as defined in the policy, being 'the Sum insured

[4] Paragraph 21.3 of the Particulars of Claim.
[5] Paragraph 24 of the Particulars of Claim.

or the Market Value of the Vehicle, whichever is the lesser, or the Statutory Settlement Balance, which[ever] is the greater …' less the 'First Amount Payable'. These terms bear specific defined meanings in terms of the provisions of the policy;

(h) It is this plea which gave rise to the amendment sought by the Applicant.[6]

[4] The amendments sought were objected to and the application for the amendment opposed on the basis that the amendment would:

(a) introduce a different claim to that originally pursued which by the time the notice of amendment was filed would have prescribed, alternatively

(b) render the Particulars of Claim excipiable, at least at the level of them being vague and embarrassing.[7][8]

[5] As much as both the aforesaid grounds are competent grounds on which a court may refuse leave to amend, it bears reminding that courts are indulgent in granting amendments so as to ensure that the true issues are

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[6] The amendment is one sought consequentially upon the amendment of the Second Respondent's plea, a situation often prompted in practice when some or other issue is raised in the plea. It is part of the process of defining the true issues in dispute between the parties. A "consequential" amendment is however not limited to the next pleading which follows sequentially in the conventional order of successive pleadings.

[7] *Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC & Others* 2003 (6) SA 289 (W) para 15.

[8] A technical objection was also raised that the application for the amendment was sought late thus requiring that condonation should be sought for the late filing of the application. Nothing was however said in that regard in argument and in my view correctly so. Insofar as may be necessary condonation is granted.

ventilated and will generally take an indulgent approach unless prejudice will result to any party affected by the amendment which cannot be remedied by an appropriate order as to costs. Thus it was held in *YB v SB & Others NNO*[9] that:

> [11] The primary consideration in applications of this nature seems to be whether the amendment will have caused the other party prejudice which cannot be compensated for by an order for costs or by some or other suitable order such as a postponement (*Imperial Bank Ltd v Barnard and Others NNO* 2013 (5) SA 612 (SCA) para 8). It is of course necessary to bear in mind that a further important object of allowing an amendment is 'to obtain a proper ventilation of the dispute between the parties' (*Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A). Our courts have also increasingly recognised that court rules and pleadings are not there for their own sake but to advance 'the good order, and the administration of justice' (*Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) at 253D – G). It is accepted law that a court will not allow amendments where their effect would render such a pleading excipiable or where it does not cure an excipiable pleading. (Erasmus *Superior Court Practice* service 42, 2012 B1 – 183). In *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310G Tebbut AJ (as he then was) held, however, that, 'If the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.'[10]

[6] In deciding whether to grant or refuse a pleading, a court exercises a discretion. Thus it was said in *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another*[11] that:

> 'The decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court. *Robinson v Randfontein Estates Gold Mining Co. Ltd.*, 1921 AD 168 at p. 243. The principles by which that discretion is exercised are not, however, easy to define, in the light of the multiplicity of reported cases, not entirely harmonious, on the subject. That the attainment of justice between the parties is not to be obstructed by a too rigid adherence to the pleadings appears to be implicit in what DE VILLIERS,

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[9] 2016 (1) SA 47 (WCC).

[10] Paragraph 11.

[11] 1967 (3) SA 632 (D) confirmed as the leading authority by the AD in *Caxton Ltd v Reeva Forman (Pty) Ltd and Another*1990 (3) SA 547 (A) at 565 G-I.

J.A., said in *Shill v Milner*, 1937 AD 101 at p. 105, namely: 'The importance of pleadings should not be unduly magnified', followed by the quotation of the dictum of INNES, C.J., in *Robinson v Randfontein Estates Gold Mining Co. Ltd*., 1925 AD 173 at p. 198, as follows:

'The object of pleading is to define the issues: and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings.'

…The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. Overall, however, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.

In *Whittaker v Roos and Another*, 1911 T.P.D. 1092 at p. 1102, WESSELS, J., said:

'This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. … But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties.'

In *Rishton v Rishton*, 1912 T.P.D. 718, the same learned Judge said at p. 719:

'There is, however, another principle in our practice, and that is to allow a party, up to the very last stage of the case, the full right to amend, so that the Court may not be deceived or judgment may not be wrongly given against the party, and also to enable the Court to know exactly the nature of the dispute and the facts of the dispute in a particular case. But the practice which has been gradually adopted in English Courts now crystalized by rules and orders, which has also been followed very largely in our Courts, is to allow amendments to be made provided the other side is not in any way prejudiced by such amendments. In *Tildesley v Harper*, 10 Ch.D. 393, Lord BRAMWELL said (p. 396):

'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise.'

BRETT, M.R., in *Clarapede and Co v Commercial Union Association*, 32 W.R. 262, said the following (p. 263):

'However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

...In the Cape Division the matter was expressed by WATERMEYER, J., in *Moolman v Estate Moolman and Another*, 1927 CPD 27 at p. 29, as follows:

' … the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice 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.'

In this Province, in *Morgan & Ramsay v Cornelius & Hollis*, 1910 NPD 262 at p. 264, BALE, C.J., said:

'The Court has very wide powers to effect a change in the pleadings at any stage of the action - it has been said, though not decided here, even after argument and before judgment;'

and DOVE - WILSON, J., said at p. 265:

'In my opinion the Court ought to allow all such amendments as may be necessary for the purpose of determining in an existing action or proceedings the real question between the parties. Personally I see no objection to a new ground of action or defence being stated by way of amendment, nor should I in all circumstances object to amendment merely because it goes the length of changing the character of the action, where that is necessary to determine the real question between the parties.'

BROOME, J.P., in *Heeriah and Others v Ramkissoon*, 1955 (3) SA 219 (N) at p. 222, adopted the remarks of BOWEN, L.J., in an English case, namely:

'Now, I think it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights . . . I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace . . . It seems to me that, as soon as it appears that the way in which a party has framed his case will not lead to a decision on the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right . . . I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine.'

I had occasion in a judgment with which my Brethren HENNING and HARCOURT agreed, in *Simmons, N.O v Gilbert Hamer & Co. Ltd*., 1963 (1) SA 897 (N) at p. 906, to say:

'. . . it is desirable not to be bound inflexibly to rules of procedure unless compelled to this by the clear language of the law, and that the present day tendency is away from formalism in procedure and in the direction of assuring that justice is done by allowing, whenever necessary, amendments to pleadings and the admission of further evidence, whether oral or on affidavit, subject to the absence of prejudice to the other party not remediable by an appropriate order as to costs',

…These observations, in all four Provinces, make it clear, I consider, that the aim should be to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing the issues on record is not to stand in the way of this; his punishment is in his being mulcted in the wasted costs. …

In relation to delay in applying for an amendment, in *Rosenberg v. Bitcom*, supra at pp. 118, 119, GREENBERG, J., made observations of which

> RAMSBOTTOM, J., said in *Park Finance Corporation (Pty.) Ltd v Van Niekerk,* 1956 (1) SA 669 (T) at p. 676:
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> 'Mr. Eloff contended that there had been unreasonable delay in applying for the amendment, and that as a result the defendant would be prejudiced if the amendment were allowed. He contended that unreasonable delay was in itself a ground for refusing the amendment, and relied on *Rosenberg v Bitcom*, 1935 W.L.D. 115. There is some authority to support this contention, although I am not sure that *Rosenberg v Bitcom* does help him.'
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> Then, after discussing that case, he said at p. 667:
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> 'It is not clear to me that GREENBERG, J., held that an amendment might be refused if either the delay had been unreasonable or the omission had been *mala fide* or intentional, as is stated in the head-note. That would be inconsistent with the remark of BRETT, M.R., from which GREENBERG, J., expressed no dissent. I think that the passage
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> 'The two requisites therefore are in the first place unreasonable delay, and, secondly, that the omission should be *mala fide* or intentional' may be merely a restatement or summary of the passage in Bullen & Leake to which he had referred. It was not necessary for GREENBERG, J., to decide whether unreasonable delay alone is a sufficient ground for refusing an amendment, since a satisfactory explanation was given. The error that the plaintiff sought to rectify was not made and the application was granted. Speaking for myself, I do not know why long delay alone should be a bar to the granting of an amendment where 'the amendment facilitates the proper ventilation of the dispute between the parties'. If an amendment at a late stage should cause prejudice to the other side which cannot be prevented by a postponement or compensated by costs the amendment would be refused on that ground, but where there is no prejudice which cannot be prevented or compensated in that way I do not know why it should not be granted.'[12]

[7] *Mr Harcourt SC*, on behalf of the Applicant, readily, and correctly conceded that the Particulars of Claim were not a model of clarity. He sought some excuse for that in the submission that the possible causes of action against some of the Respondents are potentially complex, it not being clear whether they are properly founded in contract or delict. That potential difficulty however does not arise in respect of the Second Respondent. The claim against it can only arise from the contract of insurance and can only be for an indemnity, which the Particulars of Claim articulated by stating that the

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[12] At 637A – 641G.

Second Respondent is liable to the Applicant ‘on the grounds that the Plaintiff fulfilled all her obligations in terms of the insurance and claim and that the Second Defendant’s repudiation was wrongful and unlawful’.

[8] I agree with the submission that all the Applicant seeks to achieve by the amendment is to better lay a basis for what she believes she would be entitled to claim in the light of the Second Respondent’s plea.

[9] As regards the issue whether the amendment now introduces a claim different to that originally pleaded, and which because of the intervening lapse of time would have prescribed, the general body of authority is clear that it is not necessary for an initial claim to have been pleaded flawlessly to interrupt prescription (as much as it is recognized that where a completely different cause of action is sought to be introduced, plainly such an amendment should be refused). However, where the ‘debt’, being the word used in the Prescription Act 68 of 1969, remains of the same nature and only the amount thereof and the basis for contending that a lesser amount is due are new, for example due to overlooked deductions, an amendment should not be refused. In order to interrupt prescription in terms of s 11(d) of the Prescription Act, all the legal process initiating the claim had to do was to identify the debt. It is sufficient even if a complete cause of action was not made out.

[10] Thus in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd*[13] it was said that:

> '….the appellant's argument commenced with the sound premise that an amendment was permissible provided that the debt claimed in the amendment was the same or substantially the same as the debt originally claimed. It then, however, overlooked the broad meaning given by the Court to the word 'debt' in the Prescription Act 68 of 1969 and, in doing so, equated the debt with the respondent's cause of action. By curing a defective cause of action by introducing the contract upon which it really relies, the respondent's summons did not necessarily claim a different debt.[14] The Act did not define 'debt' but from its use it was evident that 'debt' meant different things in different contexts. It did not have the technical meaning given to the phrase 'cause of action' when used in the context of pleadings but bore a wider and more general meaning. The debt was not the set of material facts but that which was begotten by the set of material facts.[15]
> … when a court was called upon to decide whether a summons interrupted prescription it was necessary to compare the allegations and relief claimed in the summons with the allegations and relief claimed in the amendment to see if the debt was substantially the same. In the present case there was no amendment to the relief claimed. The amendment did introduce a new insurance contract as the basis for the claim of the loss which occurred in March 1996, but an objective comparison between the original particulars of claim and the particulars of claim as amended made it clear that, although part of the cause of action was now a different contract, the debt was the same debt in the broad sense of the meaning of that word. The contractual relationship alleged in the summons and the amendment was and remained one of insurer and insured and the debt was and remained the same debt for the same loss, notwithstanding that it had become payable by reason of an earlier contract of insurance and not the one originally pleaded'.[16]

[11] Similar sentiments are apposite in respect of the issues before me. The proposed amendment to claim a lesser amount[17] in the alternative is not the introduction of a new or different debt which might run the risk of prescription.

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[13] 2004 (2) SA 622 (SCA) at 623D- 624A.
[14] Paragraph 5 at 626H/I and 627 A-B.
[15] Paragraph 6 at 627 E-F/G, 628 A/B and 628B/C-C.
[16] At 623D-624A.
[17] An amendment will always be allowed when it seeks merely to correct an incorrect computation of the amount of a claim - see *Wigham v British Traders Insurance Company Ltd* 1963 (3) SA 151 (W); Herbstein & Van Winsen *The Civil Practice of the High Courts and the Suoreme Court of Appeal of South Africa* 5th ed (2009) at 687; *Churchill v Standard General Insurance Co. Ltd.* 1975 (3) SA 503 (W) at 509.

It does not introduce a new cause of action but only clarifies a pleading which insufficiently or imperfectly sets out the original cause of action.[18]

[12] This is also consistent with what was said in *Sentrachem Ltd v Prinsloo,*[19] which held that when deciding whether an amendment introduces a new claim which it is contended has prescribed, in the context of s 15(1) of the Prescription Act, that the term

> '"cause of action" is misleading and the term "right of action" is preferable. It is not necessary for the purposes of prescription that a summons discloses a cause of action as long as it is not a nullity incapable of amendment. The real test is whether the same claim was preferred in earlier process, that is whether debt as set out in amended process is recognisable from that in the original process, so that the subsequent amendment amounts to no more than a clarification of defective pleading'[20].

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[18] *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering t/a L.H. Marthinusen* 1992 (4) SA 466 (W) at 473 G-H; Herbstein & Van Winsen supra at 687

[19] 1997 (2) SA 1 (A).

[20] See also *Imperial Bank Ltd v Barnard and Others* NNO 2013 (5) SA 612 (SCA) at 616 C-F and 612 B-D where it was held that an amendment would cause prejudice if, for example, its effect would be to deprive the other party to the action of the opportunity to raise an otherwise good plea of prescription. Thus, a late amendment which has the effect of introducing a new cause of action or new parties would inevitably cause prejudice to the other party in the action, as it would defeat an otherwise good defence of prescription. However, a plaintiff is not precluded by prescription from amending his or her claim, 'provided the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed, and provided, of course, that prescription of the debt originally claimed has been duly interrupted'. In *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) Trollip JA, referring to 1977 (1) SA 506 (A), said the following at 474A:
'In Churchill's case, supra at p. 517B – C, this Court, through Rumpff, CJ, pointed out that, while the previous summons need not set out an unexcipiable cause of action, nevertheless, for its service on the debtor to interrupt prescription of a right of action, the latter must at least be recognisable or identifiable ('kenbaar') in the previous cause of action.'
… It follows, in my view, that the amendment sought and granted by the court below does not have the effect of substituting a different plaintiff. It merely corrects a misnomer in the first paragraph of the particulars of claim, where it is not made clear that the respondents are not acting in their personal, but representative, capacities. No new cause of action will be introduced by the amendment.…. The claim sought to be enforced in the original summons and particulars of claim will remain the same after the amendment has been effected. It is not in dispute that the combined summons was served on the appellant. Prescription was therefore interrupted in terms of s 15(1) of the Prescription Act. The question of prejudice which would otherwise be caused by the amendment does not arise'.

[13] It was only necessary for the original summons to have identified the debt to interrupt prescription. That it did. Whether as a matter of law that claim should correctly be calculated with reference to the 'value of the vehicle at the time of the theft' and whether the amount of the 'value' coincides with the 'market value' is for the trial court to decide. Ultimately, as against the Second Respondent it might be proved that the Second Respondent's liability to compensate was, at best, for a lesser amount being the maximum indemnity less the underlying excess, whereas the potential liability against the other Respondents might be for different amounts. The excess deduction will not be a matter of pleading but a matter for evidence.

[14] As a matter of pleading, all the Applicant has to allege in her Particulars of Claim are the relevant facts. The requirements for proper pleading are explained succinctly by the learned authors in Herbstein & Van Winsen[21] as follows:

'IV PARTICULARITY
Subrules 18(4) and (5) provide as follows:
18(4) Every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.
(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively but shall answer the point of substance.
The requisites of good pleading are said to be 'that it should contain a statement of (1) fact, now law, (2) material facts only, (3) facts, not evidence, and (4) facts stated in a summary form' and that 'material facts' are all facts which must be proved in order to establish the ground of claim or defence.
Every pleading must contain a clear and concise statement of the material facts, preferably in chronological order, upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity

[21] '(5th Ed.) Vol. 1 p 565 – 566..

to enable the opposite party to reply to it. The necessity to plead material facts is in accordance with the general requirement of the common law. If a party relies on a fact, and will fail in the claim or defence unless at the trial that fact is proved, that fact will be a 'material fact'…
A pleading must allege the facts that are required in order to disclose a cause of action or defence. A pleading that states conclusions and opinions instead of material facts, or that draws a conclusion without alleging the material facts which, if proved, would warrant that conclusion, is defective".

[15] *Buchner & another v Johannesburg Consolidated Investment Co. Ltd*[22] contains a useful summary of what pleadings should contain:

> 'Court Rule 18(4) lays down:
> 'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'
> I emphasise the words 'shall contain a clear and concise statement of the material facts'.
> The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based.'

[16] The Applicant's pleadings as sought to be amended remain terse and the details of the cause of action relied upon sparse. Nevertheless, as a matter of law the Applicant could, at best, never succeed against the Second Respondent for more than the 'Maximum Indemnity' (as defined in the policy) less the 'First Amount Payable'. The proposed amendment does allege that the Applicant will contend that the Maximum Indemnity (from which the 'First Amount Payable' will of course fall to be deducted) will be the amount insured, which she contends is R710 000,00. Whether that amount is correct, and what the first amount payable which falls to be deducted therefrom amounts to, are

[22] 1995 (1) SA 215 at 216 G – 216 J.

matters for evidence. Whether the ‘Market Value’ as defined or the ’Statutory Settlement Balance’ would be less or more than the Sum Insured, are matters for evidence and possible defences available to the Second Respondent to raise. It does not appear to me to be ‘defences’ which the Applicant would need to negative, by alleging in her pleadings what the ‘Market Value’ of the vehicle and the ‘Statutory Settlement Balance” are, for her particulars not to be excipiable. To hold otherwise would in my view impose too onerous a duty on the Applicant and would go beyond what pleadings require. If the sum insured is not the amount for which the Applicant should succeed, then the basis for any other lesser amount which the Applicant would be confined to and which would preclude the Applicant’s claim as pleaded, should be pleaded by the Second Respondent and the triable issues in the trial be broadened accordingly. I am not persuaded that the amendment would introduce an excipiable pleading. To the extent that particulars necessary for trial might be lacking, these can be remedied by an appropriate request for further particulars. To the extent that I might possibly be erring in my conclusion that the amendment would not introduce an excipiable pleading, I am mindful of the comments of Tebbut AJ in *Crawford-Brunt v Kavnat and another*[23] that:

> 'If the pleading would appear to be possibly open to exception or even if the Court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.'

[17] Indeed it has been held that where the supervention of prescription is not common cause, an application for an amendment is not the proper place to deal with it and it should rather be dealt with in a special plea.[24]

[18] Most significantly in conclusion, is that the Second Respondent cannot really point to any prejudice. The high water mark of its argument is that the

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[23] 1967 (4) SA 308 (C) at 310G.

[24] 1996 (4) SA 1139 (W) at 1142.

loss of a defence of prescription points to the prejudice it will suffer. That submission is however disposed of by my finding earlier that no new prescribed cause of action would be introduced if the amendments are granted.

[19] Accordingly, the application for leave to amend should be granted.

[20] The Applicant must pay any wasted costs occasioned by the amendment.

[21] The opposition to the notice to amend and the application to amend by the Second Respondent cannot in my view be described as unreasonable, such as to justify mulcting the Second Respondent with the costs of the application. The amendment could very well have been avoided if the Applicant had pleaded her causes of action with more care, with proper reference to the terms of the policy of insurance, and with greater attention to detail. She has however been successful in obtaining leave to amend her Particulars of Claim. In the exercise of my discretion on costs it seems appropriate that the Applicant and the Second Respondent each be directed to pay their own costs relating to the application.

[22] The following order is issued:

(a) An order is granted in terms of paragraphs 1 and 2 of the Notice of Application in terms of rule 28(4) dated 10 September 2014.

(b) The Applicant and the Second Respondent are each liable for their own costs of the application.

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DATE OF HEARING: 22 MARCH 2016

DATE OF DELIVERY: 31 MARCH 2016

APPLICANT'S COUNSEL: MR. A.W.M. HARCOURT SC
INSTRUCTED BY: GOVENDER, PATHER & MORGAN
(REF: MR S. MORGAN).

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