IN HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 131/2013

In the matter between:

BONISWA PANE Applicant

and

MEC: OF DEPARTMENT OF HEALTH
FREE STATE PROVINCE Respondent

HEARD ON: 26 FEBRUARY 2015

DELIVERED ON: 16 MARCH 2015

MOCUMIE, J

[1] The plaintiff and defendant are parties in case 131/2013 in which plaintiff has issued summons against defendant for a specified amount of damages she allegedly suffered as a result of defendant's employees' negligence during a surgical operation she underwent whilst admitted at Manapo Hospital in Phuthaditjaba, Free State on or about 24 January 2010. This is an application to seek an order from this court for leave to amend plaintiff's particulars of claim in terms of Rule 28 of the Rules of this court.

[2] In its objection to the application the defendant simply states in its answering affidavit:

'4.2 The plaintiff is seeking an amendment to introduce a new cause of action. This new cause of action is stated in paragraph 5E of the plaintiff's notice in terms of Rule 28(1) and (2).This cause of action was never mentioned or relied on in the particulars of claim and has therefore prescribed...

4.3 [T]he amendment sought by the plaintiff would render the particulars of claim excipiable.The plaintiff cannot simply plead that 'the defendant's medical negligence is gleaned from Manapo hospital records'

[3] In *Commercial Union Assurance Co Ltd v Waymark*[1] the court stated:

'The principles applicable to this issue have been set out in numerous cases. In *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) Corbett CJ stated at 565G:

'Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles.'

The following statement by Watermeyer J, as he then was, in *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29 has been accepted and followed as reflecting the situation in our law:

'The question of amendment of pleadings has been considered in a number of English cases. See for example: *Tildesley v Harper* (10 ChD 393); *Steward v North Met Tramways Co* (16 QBD 556) and 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

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[1] *Commercial Union Assurance Co Ltd v Waymark* 1995 (2) SA 73 (TK) at 76-77.

cannot be put back for the purposes of justice in the same position as they were when the pleading it is sought to amend was filed.'

In *Rosenberg v Bitcom* 1935 WLD 115 at 117 Greenberg J, as he then was, stated:

'Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever such an amendment *facilitates the proper ventilation of the dispute between the parties.*'

In *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C Henochsberg J held:

'An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay.'

Caney J stated in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A:

'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that *he has something deserving of consideration, a triable issue*; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.'(My emphasis) And at 639B:

'The mere loss of the opportunity of gaining time is not in law prejudice or injustice. Where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely in order to punish the plaintiff for his neglect.'

And at 642H:

'In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment.'

In *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 958B, Selikowitz J stated:

'Where a proposed amendment will not contribute to the real issues between the parties being settled by the Court, it is, I think, clear that an amendment ought not be granted. To grant such amendment will simply prolong and complicate the proceedings for all concerned and must, in particular, cause prejudice to the opposing party who will have to devote his energy and expend both time and money in dealing with an issue, the resolution of which may satisfy the needs (or curiosity) of the party promoting it, but which will not contribute towards the adjudication of the genuine dispute between the parties. Mr *Seligson* urged me to adopt this guideline for the exercise of my discretion here where the applicant applies to amend his cause of action. It is, in my view, necessary in this application that I consider whether or not the claim for relief under s 32(2) is competent before I grant the amendment. If the claim is, in the circumstances of this case, not in law a viable claim I would be doing not only the respondent but also the applicant an injustice by granting the amendment.'

The principles enunciated in the abovementioned cases can be summarised as follows:

1. The Court has a discretion whether to grant or refuse an amendment.
2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.
3. The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue'.
4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.
5. The party seeking the amendment must not be *mala fide*.
6. It must not 'cause an injustice to the other side which cannot be compensated by costs'.
7. The amendment should not be refused simply to punish the applicant for neglect.
8. A mere loss of time is no reason, in itself, to refuse the application.

9. If the amendment is not sought timeously, some reason must be given for the delay.'

[4] The facts to which these principles must be applied are that subsequent to the closure of the pleadings and pretrial conference being held, on further consultation with her attorney, the latter arranged that she sees a medical specialist who will assist during her oral evidence in court when the matter goes on trial. The said doctor was provided with all the medical records relating to the incident that occurred to the plaintiff on 23 January 2010 and the subsequent dates she went to the hospital, which documents have been discovered. In the light of the doctor's report, it has become necessary to further elaborate to the court on all the information necessary to prove her case in a more simplistic manner flowing from the historical date of the medical negligence caused to her by respondent's employees on 23 January 2010 and subsequent date.

[5] Although the original particulars of claim did not contain allegations in each paragraph that defendant was consequentially liable for the negligence of its employees after January 2010, there are introductory paragraphs that made it clear that this was the case.

'3. On or about 23rd January 2010 the plaintiff bled profusely as a result of a miscarriage of her pregnancy.

4. Resultant from her stated medical ill condition, Manapo hospital at Phuthaditjaba admitted her [for] medical treatment.

5. On or about the 24th January 2010, the defendant's hospital, Manapo discharged her albeit still having sharp pains from her swollen stomach.'

[6] On the fact presented I must agree with plaintiff, the amendments sought do not raise a new cause of action as alleged by defendant. The amendments seek to simplify the case according to the chronology of facts in line with the medical records of defendant's hospital and to facilitate the proper ventilation of the dispute between the parties. The defendant, in its plea, admits that the same cause of action indeed occurred on 23 January 2010 and continued to the subsequent dates. The pleadings cannot be rendered excipiable as the defendant suggests. The amendments do not bring about a new claim.

[7] In an application of this nature, it is important to distinguish between an amendment introducing a new cause of action (i.e. right of action) and one which merely introduces fresh and alternative facts supporting the original right of action as set out in the cause of action. An amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory limitation as to time.The proposed contentious paragraph (5E) is consequential to the same cause of action which started on 23 January 2010 which defendant admits occurred as alleged and that it continued until 11 February 2010. I consequently cannot find that it has prescribed.

[8] In so far as paragraph 8 of the proposed amendment is concerned, as correctly conceded by plaintiff, it is indeed vague and should be struck out on that basis.

[9] In the result the following order is granted.

ORDER

1. Application to amend the particulars of claim as set out in the Notice in terms of Rule 28 (1) and (2) of the Superior Courts Practice Rules is granted.
2. Plaintiff is granted leave to amend her particulars of claim as set out in the Notice referred to in paragraph 1 of this order, excluding paragraph 8 of the Notice referred to.
3. Costs to be costs in the cause.

B.C. MOCUMIE, J

On behalf of the applicants: Mr Ponoane
Instructed by:
Ponoane Attorneys
BLOEMFONTEIN

On behalf of the respondents:	Adv. B.S Mene Instructed by: State Attorneys BLOEMFONTEIN