

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 10246/2015

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

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DATE

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SIGNATURE

In the matter between:

SOLOMON: PHINA

Applicant/Plaintiff

And

PICK AND PAY RETAILERS (PTY) LTD

First Respondent /Defendant

MONDEO 369 CC

Second Respondent/Defendant

J U D G M E N T

HAWYES, AJ:

1. This matter was heard as an opposed motion in Johannesburg on the 27th October 2015.

2. Two issues require my decision. Firstly whether the Applicant should be permitted to amend her combined summons and particulars of claim and secondly whether First Respondents exception to Applicants pleadings and claim in general should be entertained. Applicant's application to amend is also accompanied by an application for condonation.

3. The chronology of the events is as follows:-

3.1 The Applicant instituted legal proceedings in the above court against the First and Second Respondents in which she claims damages against them jointly and severally and in the alternative arising from an incident where she sustained injuries as a consequence of having slipped and fallen on water that was lying on the floor of the First Respondents supermarket in Norwood. The incident occurred on the 26 March 2012.

3.2 The Applicants combined summons was served on the first Respondent on the 19th March 2015 and on the Second Respondent on the 20th March 2015.

3.3 The First Respondent served a notice of intention to defend on Applicant's attorneys on the 25th March 2015.

3.4 On the 19th May 2015 (some two months later) the First Respondent's attorney served a notice in terms of Rule 23 as read with Rule 30A on the applicant's attorneys in which it raised several complaints against the Applicant's combined summons and her particular claim.

3.5 More than a month later, i.e. on the 24th June 2015, the First Respondent's Attorneys served an exception on the Applicant's Attorneys in terms of Rule 23.

3.6 On the 2nd July 2015 the Applicant served a notice of her intention to amend her combined summons and her particulars of claim on the First Respondent's attorneys.

3.7 On the 16th July 2015 the First Respondent served a notice of its objection to the Applicant's notice of her intention to amend the aforementioned pleadings.

3.8 On the 13th August 2015 the Applicant served an application in terms of Rule 28(4) wherein she sought the leave of the court to amend her combined summons and her particulars of claim in accordance with her notice of intention to amend dated 2nd July 2015. She also sought a prayer expunging the First Respondent's notice of objection and also sought costs which were occasioned by the First Respondent's objection to the proposed amendment.

3.9 The Applicant correctly pointed out that the Second respondent had not reacted in any way to its receipt of the combined summons and had played no part, at all, in these proceedings.

APPLICATION TO AMEND AND CONDONATION.

4. First Respondent's chief complaint against Applicant's proposed amendment is that Applicant is attempting to introduce a new cause of action to the one originally mentioned in the defective particulars of claim. The Applicant initially referred to the negligence of the First Respondent and then pleaded a duty of care in its amended pleading. First Respondent argued that this "new" averment was introduced after the 26 March 2012 which meant that the claim had prescribed and could not be entertained.

5. The applicant argued that the claim at all material times, remained the same.

6. It is trite law i.t.o section 15(1) of the Prescription Act No. 68 of 1969 that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims repayment of the debt.

7. In reading the dicta of Trollip JA in **Neon and Claude Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A)** in deciding whether prescription was interrupted by legal process it was noted that the action must be one to enforce either the same right which would otherwise be rendered unenforceable by lapse of time. Trollip JA added that the substance rather than the form of the previous action must be considered in determining whether or not it interrupted prescription.

8. In **Mazibuko V Singer 1979(3) SA_258 (W)** Colom J at pages 265H to 266B drew attention, inter alia, to the fact that the Prescription Act penalised inaction not legal ineptitude. He then went on to say at page 266 B-C:

“The question to be asked, therefore is this one: ‘Did the Plaintiff in the earlier process, claim payment of the same debt as now forms the subject matter of the claim which is said to be prescribed?’ If the answer is in the affirmative, prescription has been interrupted, even if one of the grounds upon which the claim is now based differs from the ground or grounds relied on at the earlier stage...”

9. The **Mazibuko** judgement was approved by the Appellate Division in **Sentrachem (Pty) Ltd v Prinsloo 1997 (2) SA1 (AD)**. In **Prinsloo’s** case the Appellate Division reaffirmed that the correct analysis of a proposed

amendment is to determine whether a new debt has been pleaded in the proposed amendment.

10. Whilst there are issues with the form of the summons and particulars of claim (a matter which the application to amend endeavours to correct) there is no doubt that the substance of Applicants original claim remains the same. That claim relates to the alleged negligence of the First and Second Respondents for leaving water on the floor. In this instance the concept of negligence and a duty of care are intertwined with one another. Holmes JA in **Peri-Urban Areas Health Board v Munarin 1965 (3) SA 367 AD at page 373 E-F** acknowledged that in certain circumstances, “negligence is the breach of a duty of care.”

11. The Applicants amended pleadings seek to amplify rather than replace their original cause of action. As such the original cause of action was served upon the First and Second Respondents within the prescribed three year period.

12. Even imperfect processes serve to interrupt prescription. This fact was acknowledged by M. Loubser in his text book ‘Extinctive Prescription’ at page 135 where he stated: “A summons may interrupt the running of prescription even if it discloses no cause of action, provided that it is capable of amendment.”

13. I find that Applicants claim is materially the same as the amended claim and the amended claim has not prescribed. It is eminently capable of amendment without undue prejudice to the Respondents.

14. I turn now to deal with the aspect of condonation since it is common cause that Applicants attorney failed to comply with Rule 28(4) i.e. to bring the

Applicants application for amendment within ten days of receipt of the objection thereto.

15. Applicants attorney's explanation was a simple one. She was under extreme pressure of work at the time. First Respondent's argument is that Applicants explanation for the late filing of the documentation is too simplistic and does not advance substantiated facts to allow me to consider whether good cause has been shown for the late filing. I disagree. It is evident that Applicant's attorney' is an experienced attorney with right of appearance in the High Court. I am sure that she knows which summons should be used in specific instances. However, when one is under pressure lapses of judgement occur. That would probably explain why the wrong summons form was used in the rush to get documentation out with prescription looming and why the application to amend was filed late. The Applicant should not have to suffer because of the mistake of her attorney when there is no evidence of prejudice to the First Respondent. Applicants Counsel correctly placed the issue of time keeping in proper perspective. The First Respondent did not comply with strict time limits in submitting its own processes. This has not gone unnoticed.

FIRST RESPONDENT'S EXCEPTION I.T.O RULE 23

16. I will now focus on the various points taken by the First Respondent wherein it excepts to the pleadings of the Applicant.

17. The first and second causes of complaint which have been raised in the First Respondent's exception relate to the Applicant's failure to incorporate in her combined summons reference to the fact that the First Respondent is

entitled to file a notice of intention to defend in the event of it wishing to defend the action and thereafter to file a plea, exception or notice to strike out as envisaged in the rules.

18. I agree with Applicant's Counsel's submissions that although Applicant's combined summons did not comply strictly with the rules of Court, First respondent did not suffer prejudice and in fact filed its notice of intention to defend. The application to amend addresses this shortcoming.

19. In so far as the third cause for complaint is concerned First Respondent correctly alleges that since Applicants claim is an illiquid claim for damages the particulars of claim should have been separated from the combined summons itself, and not have been incorporated therein. The application to amend addresses this shortcoming.

20. I find that there is no substance in the First Respondents fourth cause of complaint since the registrar did in fact both sign and stamp the Applicant's combined summons.

21. It is common cause that Applicant's attorney has right of appearance in the High Court. The application to amend addresses the shortcoming of not citing this on the combined summons.

22. The First Respondents legal argument in its fifth cause of complaint is that the Applicant did not plead any reliance on a duty of care which was owed to her by the First Respondent. This has in essence been dealt with at paragraphs 9 to 11 of this judgement. The fact that it was not specifically mentioned at the outset does not change the nature of the claim which is one of negligence. The application to amend merely seeks to address the nature

of the negligence with greater particularity. The First Respondent is in a position to plead to these averments.

23. First Respondents next cause of complaint is that Applicants original Particulars of Claim did not comply strictly with Rule 18 (10) in that particulars cited in the sub rule were not furnished by the Applicant. Applicants Counsel readily conceded this point and argued that the proposed amendment to the Particulars of Claim included two medico-legal reports, one by Dr Gareth Lorge, a specialist physician and a second report by M David Hatchuel, a specialist surgeon, lecturer and examiner which reports both provide details of the Applicant's injuries, her pain and suffering, her depression, her loss of amenities of life, her disability flowing from the injury and the sequelae to her injuries which provide the Respondents / Defendants with sufficient particularity to enable them to plead and/or to tender. I agree.

24. In respect of the last cause of complaint raised by the First Respondent, Applicant's Counsel indicated that the Applicant had now provided the Defendant, in her proposed amendment to her combined summons and Particulars of Claim, with full details of her post medical and hospital expenses and necessary and sufficient information pertaining to her general damages.

25. Counsel for the Applicant quickly conceded that the Applicant was only able to provide an estimate of her claim for future medical and hospital expenses. He alleged further that Applicant was unable to provide further particularity in regard thereto at this stage and her inability to do so did not render such particulars as being expiable.

26. I have not been able to source authority to contradict this argument; certainly no counter argument was adduced by the First Respondent in this regard.

I accordingly make the following order:

1. Applicants application for leave to amend her combined summons and Particulars of claim is hereby granted.
2. Applicant's non-compliance with the relevant rules is condoned.
3. First Respondent's exception is dismissed.
4. First Respondent is to pay the Applicants costs for the Application to amend only.

MA HAWYES
ACTING JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT: Jothi Govender Inc

COUNSEL FOR THE APPLICANT: Adv J.H Josephson

ATTORNEYS FOR THE FIRST RESPONDENT: Whalley & Van der Lith Inc

COUNSEL FOR THE FIRST RESPONDENT: Adv. I.L Posthumus

DATE OF HEARING: 27 October 2015

DATE OF JUDGMENT: 28 January 2016