

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 26601/2015**

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER</u> <u>JUDGES: NO</u>

In the matter between:

**A W**

Plaintiff

and

**MEC FOR HEALTH – GAUTENG**

Defendant

---

**J U D G M E N T**

---

**MODIBA, J:**

- [1] This is an opposed interlocutory application to amend the plaintiff's particulars of claim, brought in terms of Rule 28(4) of the Uniform Rules of Court.
- [2] The genesis of the application is a trial action in which the plaintiff sues the defendant for damages arising out of the alleged negligence of the defendant's nursing and medical staff when they treated the plaintiff at Hillbrow Community Health Centre ("*the clinic*") and Charlotte Maxeke Johannesburg Academic Hospital ("*the hospital*").
- [3] The plaintiff also seeks condonation for the late filing of this application. He could not bring it within the prescribed time frame because his attorneys could not locate the court file, without which the Registrar would not enrol the application.
- [4] The defendant does not oppose the condonation application. I am satisfied that the plaintiff has shown good cause for the late filing of the application and that the defendant stands to suffer no prejudice if it is granted. It therefore stands to be granted.
- [5] In paragraphs 11 to 13 of the original particulars of claim, the plaintiff sets out the basis on which he alleges that the defendant's nursing and medical staff were negligent. It is pertinent that I quote these paragraphs:
- “11. *In furtherance of the terms of the oral agreement as aforesaid, alternatively pursuant to a further oral agreement concluded on the same terms and conditions between the Plaintiff and the*

*Defendant, at Parktown, Johannesburg on the 6<sup>th</sup> of September 2014:*

*(a) the Plaintiff was examined by the Defendant's personnel at the hospital on the 6<sup>th</sup> of September 2014;*

*(b) a diagnosis was made by the Defendant's personnel that the Plaintiff had developed a compartment syndrome of the right lower leg and would have to undergo a fasciotomy of the right lower limb;*

*(c) the Plaintiff was admitted to the hospital on the 6<sup>th</sup> of September 2014 for that purpose; and*

*(d) the Plaintiff underwent the fasciotomy, under general anaesthetic, on the 9<sup>th</sup> of September 2014.*

12. *Pursuant to, and as a consequence of the Defendant's treatment of the Plaintiff in both the clinic and the hospital as aforesaid:*

*(a) the Plaintiff developed compartment syndrome of his right lower leg;*

*(b) had to undergo a number of further surgical procedures to debride the soft tissue around his right lower leg in an endeavour to preserve the integrity thereof; and*

*(c) ultimately had to undergo a below knee amputation of his right lower leg on the 11<sup>th</sup> of May 2015.*

13. *In treating the Plaintiff as aforesaid, the Defendant and/or the Defendant's personnel acted in breach of the oral agreement and/or agreements, alternatively their duty of care, as aforesaid in that they were negligent in one or more of the following respects:*

- (a) *the Defendant's personnel at the clinic applied the below-knee posterior plaster slab to the Plaintiff's right lower leg in such a manner so as to not allow for any swelling in the lower leg after the application thereof;*
- (b) *the Defendant's personnel at the clinic applied the below-knee posterior plaster slab to the Plaintiff's right lower leg in a manner that was inappropriate in the circumstances and not in accordance with accepted standard medical practice;*
- (c) *the Defendant's personnel at the clinic failed to have any, or sufficient regard to the fact that fractures of the ankle or the lower limb are associated with compartment syndrome and to have regard to this fact when applying the below-knee posterior slab to the Plaintiff's right lower leg;*
- (d) *the Defendant's personnel at the hospital, upon examining the Plaintiff, failed to appreciate or diagnose that the Plaintiff required immediate surgery to reduce the compartment pressure in his right lower leg;*
- (e) *the Defendant's personnel at the hospital, upon examining the Plaintiff, failed to direct that the Plaintiff undergo immediate surgery, in the form of a fasciotomy, in order to reduce the compartment pressure in his right lower leg;*
- (f) *the Defendant's personnel at the hospital, failed to immediately take any, alternatively appropriate measures to prevent the further degeneration of the soft tissue in the Plaintiff's right lower leg upon him being admitted to the hospital on the 6<sup>th</sup> of September 2014;*

- (g) *the Defendant's personnel at the hospital delayed in performing the fasciotomy upon the Plaintiff's right lower leg in circumstances when it was inappropriate and not in accordance with standard medical practice to do so;*
- (h) *the Defendant's personnel at both the clinic and the hospital failed to provide the Plaintiff with appropriate or proper medical treatment as would reasonably be required in the circumstances;*
- (i) *the Defendant's personnel at both the clinic and the hospital failed to take such steps as were reasonably necessary to ensure the Plaintiff's best care and well-being; and*
- (j) *the Defendant's personnel at both the clinic and the hospital failed to exercise such care and skill as was reasonably required of them in the circumstances."*

[6] The plaintiff seeks to introduce the following paragraph to its particulars of claim, after paragraph 13:

*"Alternatively to paragraphs 11 to 13 above the Plaintiff pleads inter alia that:-*

- (a) prior to transfer to the hospital on 06 September 2014, the clinic made a diagnosis of possible cellulitis or an open fracture of the right ankle;*
- (b) the examination by the Defendant's servants at the hospital revealed that the Plaintiff's right calf was enlarged, right leg was warm, tender, swollen with a small laceration on the medial aspect of the ankle;*
- (c) the Defendant's servants at the hospital made an assessment of possible cellulitis with thrombophlebitis of the right lower limb;*

*(d) the plan following the assessment referred to above was to do bloods, x-rays and dopier;*

*(e) he was seen by the Registrar of the hospital (on 06 September 2014) who ordered that he be given intravenous antibiotics and to admit him on 06 September 2014 to theatre for incision and drainage;*

*(f) as a result of the aforesaid, he duly signed a consent to operate on 06 September 2014 at 14h46;*

*(g) the incision and drainage in theatre was only carried out two (2) days later on the 08 September 2014;*

*(h) as a result of the negligent delay in carrying out the incision and drainage as aforementioned, the Plaintiff developed necrotizing fasciitis pyomyositis which ultimately resulted in the below knee amputation of his right lower leg on 11 May 2015.”*

[7] The defendant objects to the proposed amendment on the following grounds:

7.1 The amendment introduces a new cause of action, alternatively a new issue against the defendant:

7.1.1 in respect of which he has not given the defendant the requisite notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (*“the Act”*);

7.1.2 which has prescribed.

7.2 The proposed amendment, if granted stands to cause the following prejudice to the defendant:

7.2.1 the Act allows the defendant a period of 30 days within which to investigate the claim;

7.2.2 the defendant has already briefed its experts on the basis of the plaintiff's current claim. The proposed amendments would require the experts to amend their opinion.

[8] When adjudicating the dispute between the parties, I am guided by the following legal principles, set out in the ancient *Moolman v Estate Moolman*<sup>1</sup> judgment:

8.1 it is trite that a litigant may amend his or her pleadings at any stage of the proceedings before judgment;

8.2 a court hearing an application for an amendment has a discretion to grant it. Such discretion ought to be exercised judiciously.

8.3 the general approach to amendments is that they should be allowed, unless the amendment application is made in bad faith and would cause an injustice which cannot be compensated with a costs order. This principle equally applies to an amendment which introduces a new cause of action.<sup>2</sup>

[9] In *De Kock v Middelhoven*<sup>3</sup>, when discussing what constitutes a cause of action, the court per Mabuse J had this to say at paragraphs 9 to 12:

---

<sup>1</sup> 1927 CPD 27 at page 29

<sup>2</sup> See *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 153D.

<sup>3</sup> 2018 (3) SA 180 (GP)

[9] Accordingly, whether or not something is a cause of action is determined by the essential ingredients of such a cause of action or, to put it simply, by the material characteristics.

[10] According to *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 606E – H, in the case of an Aquilian action for damages for bodily injuries, the basic ingredients of the plaintiff's cause of action are:

- (a) a wrongful act by the defendant causing bodily injury;
- (b) accompanied by fault, in the case of *culpa or dolus*, on the part of the defendant; and
- (c) *damnum*, in other words, loss to the plaintiff's patrimony, caused by the bodily injury.

[11] In *Evins v Shield Insurance Co Ltd* supra [22] at 839A the court, referring to the abovementioned ingredients of an Aquilian action, stated that:

'The material facts which must be proved in order to enable the plaintiff to sue (or *facta probanda*) would relate to those three basic ingredients and upon the occurrence of these facts the cause of action arises.'

[12] Therefore, in order to establish whether the causes of action are similar or different, one merely has to look at the facts that a litigant has to prove in order to succeed with his or her claim. Once the *facta probanda* are different, then the causes of action can never be the same. This simply means that the causes of action are different."

[10] The plaintiff's cause of action is as surmised in paragraph 2 above. He alleges that he was incorrectly diagnosed, there was a delay in administering the appropriate treatment and when he was treated, the treatment did not comply with the requisite medical standards, resulting in the below the knee amputation of injured leg. This cause of action is set out in both the notice to institute legal proceedings and the particulars of claim. The grounds of negligence he seeks to rely on are set out in paragraphs 11 to 13 of the particulars of claim. The plaintiff's proposed amendment merely introduces grounds of negligence in the alternative to those set out in the original particulars of claim, nothing more. Against such an amendment, there is no prohibition. The plaintiff's cause of action remains as set out in the notice to institute legal proceedings and in the original particulars of claim.

[11] Therefore, the prejudice the defendant complains of if the proposed amendment is allowed largely does not arise. Where it does arise, it may be compensation with a cost order. The notice to institute



legal proceedings hitherto issued by the plaintiff prior to issuing summons, remains valid. The need for the plaintiff to serve a new notice does not arise. Therefore the defendant's complaint in respect of prejudice resulting from the time the new notice would be served does not arise.

[12] Similarly, the question of prescription in respect of a new cause of action becomes nugatory.

[13] Any other prejudice complained of, such as the need for the parties' experts to revise their reports, may be remedied by a cost order. The trial is set down for mid-2020. The parties' experts have more than sufficient time to revise their expert reports should the amendment render the revision necessary.

[14] Having judiciously considered the proposed amendment against the cause of action relied on by the plaintiff as set out in the notice to institute legal proceedings and in paragraphs 3 to 10 of the particulars of claim as well as the defendant's grounds of opposition, I find that the plaintiff has made out a proper case for the amendment application to succeed.

[15] In its answering affidavit, the respondent seeks an order against the plaintiff in respect of the wasted costs of a previously postponed trial, which were reserved by the Deputy Judge President Mojaelo.

[16] This request is inappropriate for the following reasons:

16.1 the appropriate stage to determine such costs is at the upcoming trial;

16.2 the defendant's answering affidavit is an inappropriate document to seek such an order. At the very least, the defendant ought to have brought an application for such relief.

[17] Therefore the defendant's request for these ill-conceived.

[18] In the premises, the following order is made:

### **ORDER**

1. Condonation for the late filing of the amendment application is granted.
2. The application succeeds.
3. The plaintiff is granted leave to amend his particulars of claim in accordance with the notice of amendment dated 26 November 2018.
4. The defendant is ordered to pay the costs of this application on an opposed basis.
5. The costs of the previously postponed trial remain reserved.

---

**L.T. MODIBA**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

### **APPEARANCES**

Counsel for the Plaintiff: Mr M. Sibisi

Instructed by: Tomlinson Mnguni James Attorneys

Counsel for the Defendant: Ms J. Maluleke

Instructed by: Mncedis Ndlovu & Sedumedi Attorneys

Date of hearing: 07 May 2019

Date of judgment: 14 May 2019