

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

APPEAL CASE NO: 32194/04

STRIMER D M

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAVUNDLA, J.,

- [1] The plaintiff seeks the leave of this Court to have his particulars of claim amended. The application is being opposed.
- [2] The crisp question to be decided is whether after the plaintiff had specifically advised the defendant that she intends abandoning her claim in respect of past and future loss of earning and earning capacity by way of an amendment, and had further proceeded to effect such amendment, thus abandoning such claims, can she now re-introduce such claims by way amending her particulars of claim, or has she waived her right to such claim.
- [3] The plaintiff issued summons against the defendant, claiming payment in the amount of R351 000,00 in respect of damages is she allegedly suffered as a result of injuries he sustained in a motor vehicle collision involving the insured motor vehicle with registration number HRC 567 GP and motor vehicle with registration number FTN and 363 GP which was at the relevant time driven by the plaintiff on the 12th of January 2004.

[4] Paragraph 8 of her Particulars of Claim read as follows:

"As the direct result of the plaintiff's injuries as stated herein above, which she sustained and the consequence thereof, she sustained damages in the amount of R297,000,00, which a moment is computed as follows:

8.1 Past medical and expenses: R60,000,00

8.2 Future medical expenses R77,000,00

8.3 Past loss of earning and earning capacity R14,000,00

8.4 Future loss of earning and earning capacity R100,000,00

8,5 General damages for shock, trauma, pain and

Suffering, loss of life expectancy, temporal and
permanent incapacity, disfigurement etc,

Total R100,000,00

R351.000,00

[5] The summons and Particulars of Claim were issued on 7 December 2004.

On the 28 November 2005 the defendant, through its attorneys of record filed "Defendant's Request for Further Particulars for Purposes of Trial" The particulars requested under para 1 thereof related to the academic, technical and other qualifications of the Plaintiff, her employment details including salary etc. Under para 5 thereof the information requested pertained to the calculation and computation of the amount of R114,000,00 referred to in paragraphs 8.3 and 8.4 of the Particulars of Claim.

[6] In her affidavit she says that after receipt of this document (that is the Request for Further Particulars), she consulted with her attorney and her advocate who, after a thorough consultation, advised her that she does not have a claim for loss of earnings and earning capacity. She then

instructed her attorneys to abandon such claim as contained in subparagraphs 8.3 and 8.4.

- [7] On the 13 March 2006 the Plaintiff furnished through her attorneys of record answers to the Request for Further Particulars. In her response the plaintiff stated that:

"Ad Para 1 thereof

1.1.1 The plaintiff informs the Defendant hereby that by way of amendment of the particulars of Claim she is going to abandon her claim for Past loss of earnings and future loss of earnings and earning capacity...

Ad paragraph 5 thereof

19.1 The Plaintiff repeats that she is going to abandon her claim for Past loss and earning and future loss of earnings/ earning capacity by way of amendment."

- [8] Simultaneous to the filing of her Answer to the Request for Further Particulars, on the 13 March 2006 the Plaintiff served and filed a Notice of "5. By deleting paragraphs 8.3 and 8.4 of the Particulars of Claim and *per alia*, renumbering paragraph 8.5 to paragraph 8.3." Indeed on the 22 March 2006 the amended pages, with the aforesaid amendments, were served and filed."

- [9] In the affidavit in support of her application for the relief sought, the Plaintiff states that when the Particulars of Claim were prepared, she was still a student and it was uncertain what loss of earning, if any, had she suffered. That notwithstanding, paragraphs 8.3 and 8.4 for payment of loss of earning and earning capacity were included.

[10] The Plaintiff on the 15 March 2007 served and filed another notice of intention to amend in terms of Rule 28. The essence of this Rule 28 notice is that at the time of preparation of the Further Particulars of Claim for Purposes of Trial, the Plaintiff was not aware and was convinced that she has not sustained past and future loss of earnings. Consequently her attorneys of record prepared on the 10th March 2006 the answers to request for further particulars and served and filed same on the 13 March 2006.

[11] She says further in her affidavit that on the 25 May 2006, for the first time in her life she had an epileptic seizure and since then she suffers from epilepsy. She sought expert opinion to determine whether the epilepsy is accident related. She says that she is of the opinion that the epilepsy is accident related. I need mention that she has not attached any expert report in substantiation of this conclusion. She says that she has not been working ever since 1 June 2006 as the result of the epilepsy.

[12] On the 15 March 2007 the defendant filed another Notice of her intention to Amend in terms of Rule 28. In the said notice she intends to effect an amendment to paragraph 1 of the particulars of claim to state, inter alia that she is unemployed. She also wants to have the following amendments effected:
"3.

By adding the following paragraph after the existing paragraph 7.5
4 and before the existing paragraph 8:

'7.6 The Plaintiff is permanently occupationally disabled''

5. By substituting the amount of R60,000,00 wherever same appears with the amount of R 86 862,00.

By substituting the amount of R77,000,00 wherever same appears in paragraph 8.2 of the original Particulars of Claim with the amount of R156,545,00.

6.

By substituting the amount of R14,000,00 wherever same appears in paragraph 8.3 of the original Particulars of Claim with the amount of R38, 675,00.

7.

By substituting the amount of R100,000,00 wherever same appears in paragraph 8.4 of the original Particulars of Claim with the amount of R9,677,813,00.

8

By substituting the amount of R100,000,00 wherever same appears in paragraph 8.5 of the original Particulars of Claim with the amount of R500,000,00.

9.

By substituting the amount of R297,000.00 ,wherever same appears in paragraph 8 of the original Particulars of Claim with the amount of R10,459,895.

10

By substituting the amount of R351,000.00 wherever same appears in paragraph 8, paragraph 11 and prayer 1 with the

[13] Mr Geach who appeared on behalf of the defendant has submitted that:

The envisaged amendment seeks to revive the previously abandoned claim and the amendment will render the pleadings vague and embarrassing and excipiable;

13.1

13.2 The plaintiff contends that the initial intended amendment did not occur because of the premature amendment.

13.3 The envisaged amendment is impermissible once such claim was abandoned¹ and such intention was communicated to the defendant.

13.4 The plaintiff was duly represented by her attorneys when the abandonment² was effected and she has therefore waived her rights to the relevant claim.

¹For this submission reliance is made on *White v G A Fitchardt Ltd* 1926 OPD 181, *Metedad v National Eplores' General Ins Co Ltd* 1992 (3) SA 538 (W) at 540; *ABSA Bank v Master and ORS NNO* 1998 (4) SA 15 (N) at 31

² *Miller and Anor NNO v Dannercker* 2001 (1) SA 928 (C) par [15] at 936.

13.5

The defendant will be prejudiced as the result of the intended
amendment because it substantially increase the plaintiff's claim

[14] It has been submitted on behalf of the plaintiff by Mr. Visser that because the initial amendment was purportedly effected prematurely, there was therefore no amendment. Consequently the envisaged subsequent amendment is within the plaintiff's rights to effect at any time before judgment is granted.

[15.] Rule 28 of the Uniform Rules of the High Court provides as follows:

- "1 Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of the delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is deliver within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is deliver as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice to the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
- (6) Unless the court otherwise directs, and amendment authorized by an order of the court may not be effected later than 10 days after such an authorization.
- (7) unless the court otherwise directs, the party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- (8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take steps contemplated in rules 23 and 30."

- (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.
- (10) The court may, notwithstanding anything to the contrary in this rule, at any stage

[16] With regard to the initial notice of intention to amend, there was no objection thereto by the defendant³. The consequences thereof are that the amendment "will be effected." The intention of the plaintiff to effect such an amendment, in terms of which she abandons her claim contained in subparagraphs 8.3 and 8.4 is manifested in her answers to the Request for Further particulars, wherein she clearly stated that she intends to abandon such claims by way of amendment. The fact that she effected such amendment prematurely does not vitiate such amendment. The intended amendment did not prejudice the defendant and therefore it is unlikely that there would have been an objection forthcoming from it. The latter could be the reason which motivated the effecting of the amendment prematurely. I am of the view and so conclude that having regard to the demonstrable intention to abandon such claims (subparagraphs 8.3 and 8.4) and the subsequent effecting of the amendment, albeit prematurely, but consistent with such manifested intent, the amendment is valid. The fact that it was effected prematurely does not vitiate its validity since there was substantial compliance with the provision of rule 28(2).⁴

[17] This brings me to whether the subsequent application to amend, to which the defendant is objecting, should be granted. In *Amond v SA Mutual Fire & General Insurance Co.* 1971 (2) SA 611 at 613H- 614D the Court stated that:

"The principles relating to amendments are conveniently summarised in Herbstein and Van Winsen, *Civil Practice of the Superior Courts in South Africa*, 2nd ed., pp326-330.

³ Vide subrule (2) supra.

⁴ *Mynhardt v Maynard* 1986 (1) SA 456 at 463G-464A.

It is clear that the court has a discretion to grant or refuse any application for amendment *of* pleadings. The tendency *of* the decisions has been towards allowing amendments where this could be done without prejudice to the other party. (Moolman v Estate Moolman and Another, 1927 CPD 27 at p. 29.) On the other hand if the application to amend is *mala fide* or if the amendment causes an injustice to the other side which cannot be compensated by costs, or, in other words, if the parties cannot be put back for the purposes *of* justice in the same position as they were in when the pleading it is sought to amend was filed, the application will be refused. Moolman's case; Zarug v Parvathie, NO., 1962 (3) SA 872 (D).at 876; Rishton v Rishton, 1912 TPD 718).

In the case *of* an amendment involving the withdrawal *of* an admission there are certain *dicta* which appear to suggest that the withdrawal *of* an admission will only be permitted where it was made in consequence *of* a mistake in a narrow sense, e.g a clerical error or an error due to a misunderstanding. Thus in Rishton v Rishton, 1912 TPD 718, Wessels J., said at p. 720:

'In judging whether it ought or ought not to grant an amendment it is very necessary for the Court to consider whether the admission as contained in the pleading is exactly as the client would have wished the admission to have been made before the Court. "'

[18] The learned Leon J in the same matter of Amod v SA Mutual Fire & General Insurance Co5 proceeds to state that:

"I consider that the true position in the case of the withdrawal of an admission is as follows. The Court has a discretion but will require a reasonable explanation both of the circumstances under which the admission was made and of the reasons why it is sought to withdraw it. In addition, the Court must also consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special costs order will not compensate him then the application to amend will be refused."

[19] The matter of Zarug v Parvathie, is, inter alia, also referred to in the matter of Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73. At 76 G-77B the Court said:

"In Rosenberg v Bitcom 1935b 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 proper ventilation of the dispute between the parties.* '

(My emphasis.) 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 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.'

[20] In casu, the plaintiff has not attached any medical evidence to support⁶ her allegation regarding epilepsy and the loss of earning or earning capacity. This must be seen in the light of the fact that, notwithstanding her averment that she had an epileptic attack for the first time on 25 May 2006, she has consulted experts to determine whether the epilepsy is accident related, a conclusion which she makes without support of such expert opinion, a considerable time has gone by without such expert

⁶ Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another (supra) at 641A

opinion not being available. Her application in issue was filed in March 2007. There is no explanation why such expert opinion was not at hand at all and why such an amendment was not brought earlier.⁷

- [21] When the defendant abandoned her claim for the loss of earning and earning capacity, she had a thorough consultation with her advocate and her attorney of record. The decision to abandon paragraph 8.3 and 8.4 was not a lightly taken decision. The plaintiff on the advice of her legal representatives took a conscious decision to abandon her right to claim for the loss of earning and earning capacity. In this regard vide what was said by In Miller and Anor NNO v Dannecker⁸ the learned Ntsebeza AJ said:

"Waiver is the deliberate abandonment, renunciation or surrender of an existing legal right by the right holder, acting with full knowledge of the right (see *Laws v Rutherford* 1924 AD 261 at 263; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 436; *Van Rensburg en Andere v en Andere* 1975 (1) SA 279 (A), *_____ & Son (Pty) Ltd V Transvaal Provincial Administration* 1977 (4) SA 310 (A) at D 323 - 4".

- [22] The authorities state that the Courts generally are inclined to grant an amendment to an applicant. Where, however the amendment seeks to introduce a new cause of action the Courts are slow in coming to the rescue of an applicant⁹. The applicant, in casu, bears the onus of showing that there would be no prejudice were this Court to grant her leave to amend. She must also show that the abandonment was as the result of a *bona fide* mistake on her part that resulted in the abandoning of her right to claim for past and future loss of earning and earning capacity. In casu,

⁷ *Zarug v Parvathie supra.*, *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 SCA at 462 para[34] -463A.

⁸ 2001 (1) SA 928 (C) par [15] at 936.

⁹ *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA; *GMF Kontrakteurs (Edms) Bpk v Pretoria Council* 1978 (2) SA C-223A.

the applicant cannot turn around and say that it was as the result of a mistake that she gave the attorneys instructions to abandon her rights to claim under. ¹⁰ Further there has been no attempt at all on her part to show that the amendment sought will not prejudice the defendant.

[23] On the other hand, it has been submitted by Mr. Geach that there would be prejudice suffered by the defendant were the amendment to be granted. The prejudice, it is contended, lies in the very fact that the amendment sought will increase the claim of the plaintiff dramatically, to R9million.

[24] The purpose of the Road Accident Fund is to protect the victims of motor vehicle accidents. In the matter of *Nonxa v Multilateral Motor Vehicle Accident Fund*¹¹ the Court cited, inter alia, from the case of *Multilateral Motor Vehicle Accident Fund v Radebe* 1996 (2) SA 145 (A) at 152E-I where Nestadt JA said:

"It is true that the object of the *Act* is to give the widest possible protection to third parties. On the other hand the benefit which the claim form is designed to give the fund must be borne in mind and given effect to. The information contained in the claim form allows for the assessment of its liability, including the possible early investigation of the case. In addition, it also promotes the saving of the costs of litigation.....These various advantages are important and should not be whittled away. The resources, both in respect of money and manpower, of agents and particularly of the fund are obviously limited. They are not to be expected to investigate claims which are inadequately advanced. There is no warrant for casting on them the additional burden of doing what the regulations require should be done by the claimant. There can be no (substantial) compliance where the claimant has merely indicated to the

¹⁰ *Nonxago v Multilateral Motor Vehicle Accident Fund* [2005] 4 ALL SA 567 (SE) at 569 para[5]

¹¹ *Supra* at 577

fund how it, through its own efforts, can obtain the necessary information or documents."

In my view, the above dicta also applies in a case, such as the one at hand. In casu, the envisaged claim would be escalated far beyond what the plaintiff had initially claimed. Where the claimant consciously abandons his right to claim, the defendant will be prejudiced substantially were such

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 \PLAINTIFF'S ATT .tional E: MR. S Le ROUX ht that has been
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 ‘DEFENDANT'S ADV was not the case in this matter. It was a well
 consciously, considered decision that was taken by the plaintiff after
 thorough consultation with her legal advisors.

[25] Having regard to the authorities referred to herein above and the facts of this case, I am of the respectful view that the application for amendment must fail. It is trite that costs follow the event. Having regard to the substantial impact the intended amendment it would have had to quantum, I am of the view that it was prudent and necessary on the part of the defendant to instruct senior counsel to oppose to application. Therefore defendant is entitled to cost of opposing the application, including such costs of senior counsel.

[26] In the premises,

I make the following order:

1. The application for amendment is dismissed.
2. The applicant is ordered to pay the costs of the application, which costs shall include the costs of senior counsel.