IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 2010.10.04 SIGNATURE

CASE NUMBER: 16492/06
DATE: 5 October 2010

DOUGLAS RADEBE
PLAINTIFF

V

NOVA RISK PARTNERS LTD
1st DEFENDANT

COMMERCIAL AND GENERAL INSURANCE BROKERS (PTY) LTD
2nd DEFENDANT

Judgment:
Mabuse J

JUDGMENT

MABUSE J:

1. This is an interlocutory application. The Plaintiff approached this court with an application to amend initially paragraphs 4.6b, 5, 6 and prayer B of his particulars of claim. The court granted the application and promised to furnish reasons for its order later. These are the reasons.

2. The Plaintiff is an adult businessman who resides at Mogwase in the North-West Province. He instituted this action against the defendants in his personal capacity. The First Defendant is a company duly registered in terms of the company statutes of this country and has its place of business located at 7 Fricker Road, Ilovo. The First Defendant was at all material times registered in terms of insurance statutes of the Republic of South Africa to conduct business as an insurer. The Second Defendant is a company duly registered in terms of the company laws of the Republic of South Africa with its place of business located at 22 Jan Smuts Avenue, Forest town, Johannesburg. The First Defendant was at all material times acting for the Second Defendant.

3. On 28 March 2003 the Plaintiff purchased a Toyota Prado motor vehicle from a motor dealer known as Rustenburg Toyota at Rustenburg in the North-West Province. The Plaintiff, who was at all times assisted by one Mrs. Minie Botha, required the said motor vehicle to be insured. On 27 March 2007 the Second Defendant submitted to the Plaintiff a three page quotation for comprehensive insurance in respect of the said motor vehicle.

4. On the same date the Plaintiff accepted the Second Defendant's aforementioned quotation by signing it at the foot of each and every page. Furthermore he authorised the Second Defendant to deduct the regular premiums from his current bank account and sent his acceptance of the quotation and authorization to be faxed to the Second Defendant by the aforementioned Minie Botha.

5. During April 2003 the Second Defendant confirmed that the Plaintiff's aforementioned motor vehicle had been comprehensively insured by the First Defendant to the value of R465 800,00. The said confirmation which was written reads as follows:

"RE: CONFIRMATION OF INSURANCE COVER – MR. RADEBE

We confirm cover on behalf of Dominion Nova Risk Partners for the following motor vehicle:

Owner / Driver:	*Mr. MD RADEBE*
Vehicle:	*Toyota Prado*
Year:	*2003*
Reg. Number:	*TBA*
Value:	*R465 800.00*
Vehicle use:	*Private*
Cover:	*Motor Comprehensive*
Period:	*From 02/04/2003 to 30/04/2003 and monthly thereafter.*
Certificate Nr.:	*EXE0018."*

6. Accordingly, either on 27 March 2003, in the alternative on 2 April 2003 the Plaintiff and the First Defendant, who was at all material times represented by the Second Defendant, concluded a written insurance agreement in terms of which the First Defendant insured comprehensively the Plaintiff's motor vehicle against risks mentioned in the Standard Motor Vehicle Insurance Policy issued by the First Defendant. One of the risks for which the said motor vehicle was comprehensively covered was damage to the said Toyota Prado arising from motor vehicle collisions. On 2 July 2004 and near Germiston the Plaintiff's aforementioned motor vehicle was damaged as a result of a motor vehicle collision in which it was involved with another motor vehicle.

7. On 4 July 2005, acting in terms of the insurance agreement, the Plaintiff duly notified the Second Defendant in its capacity as representative of the First Defendant of the said motor vehicle accident and the Plaintiff had at that stage complied in all respects with all its obligations under the policy. Subsequently the Plaintiff's said motor vehicle was towed, on the instructions of the Second Defendant, to Proline Panel beaters at 301 Fourth Street, Wynberg, Johannesburg. Proline, acting on the instructions of the Second Defendant, assessed the damage occasioned to the Plaintiff's motor vehicle in the region of R209 081.72 inclusive of VAT. Despite the existence of the said insurance policy or agreement the First Defendant has refused to make any payments to the Plaintiff in respect of the damage to the Plaintiff's motor vehicle.

8. The Plaintiff contends that, in the circumstances, the First Defendant is liable for payment to the Plaintiff of the amount of R209 081.72 plus interest thereon at 15.5%. The First Defendant refuses to pay the said amount on the basis that the premiums in respect of the said policy were not paid. In the light of the Second Defendant's denial, the Plaintiff contends that it was an express, alternatively a tacit, and further alternatively an implied term of the agreement, that the Second Defendant would obtain comprehensive insurance for the Plaintiff in respect of his motor vehicle as provided by Standard Motor Vehicle Insurance Policy issued by the First Defendant and secondly, that the Second Defendant would submit to Plaintiff's bank the necessary documents for the deduction from the Plaintiff's bank account of the required payment. The failure to make proper arrangements for the deduction of the premiums from the Plaintiff's bank account can therefore be exclusively attributed to the Second Defendant.

9. The Plaintiff regarded the Second Defendant's failure to make proper arrangements for the deduction of the premiums from his bank account as breach of the terms of the agreement and the primary cause of the damages that he has suffered as a result of the motor vehicle collision. At all material times the Second Defendant was acting as an agent for the First Defendant. The Plaintiff contends that in the premises the First and Second Defendants are jointly and severally liable to him for payment of the damages referred to herein above.

10. As at the time of the launching of this action the said motor vehicle was still in the possession of Proline who refused to release it pending payment of the expenses it incurred in respect of the towing and evaluation of the said motor vehicle. The Plaintiff was subsequently advised by his legal representative that the summons which had been issued and which set out the cause of action against the Defendants had to be amended. Accordingly on 21 July 2008 the Plaintiff's attorney's caused a notice of amendment of his particulars of claim to be served on the Respondent. The Plaintiff's notice of amendment which is attached to the papers confirms the paragraphs that I have referred to herein above as the paragraphs the Plaintiff had contemplated amending. On 3

August 2009 the Defendants filed an objection against the Plaintiff's contemplated amendment.

11. The Second Defendant's grounds of objection to the Plaintiff's contemplated amendment are fully set out in the said objection. Notwithstanding the grounds of objection against the contemplated amendment, the Plaintiff contends that the proposed amendment is substantially the same as the original cause of action. It is his view that the Defendants cannot be prejudiced by the aforesaid amendment and that in any event his claim has not become prescribed. This matter is a very important matter to him in the light of the fact that his motor vehicle has been damaged and he has a result of the damage suffered extensive damages.

12. The tendencies of the decisions in our courts have been to grant applications for amendment of the pleadings where such could be allowed without prejudice to the other party. In **Moolman v Estate Moolman and Another 1927 CPD 27** Watermeyer J remarked that:

"*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 injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for purposes of justice in the same position as they were when the pleading, which it is sought to amend, was filed.*"

13. In this division the law as set out in **McDuff & Co (in Liquidation) vs Johannesburg Consolidated Investments Co. Ltd 1923 TPD 309 at 310** is still applicable and has been followed with approval in subsequent authorities. In the said case the court cited with approval certain passages quoted by Wessels J in **Rishton v Rishton 1912 TPD 718 at p. 720** from English decisions. Relying on those decisions which had the same effect, the court stated:

"*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 cost or otherwise.*"

And again:

"*However, neglectful or careless may have been the first commission and however late 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 cost.*"

See also **Bidcon v City Counsel of Johannesburg 1931 WLD 273 at 293**; **Rosenburg v Bidcon 1935 WLD 115 at 117**; **Henning v South British Insurance Company Limited 1963 (3) SA 175 at 177**. In **Walker v Taylor 1934 WLD 101** a proposed amendment was objected to on the basis that the effect of it was to oust the jurisdiction of the court. The court held that the amendment should be allowed and that the opposing party could expect to the amended declaration or plead especially to the jurisdiction of the court. Finally, in **Shill v Milner 1937 AD 101 at 105** the court held that the importance of pleadings should not be unduly magnified. It stated 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 inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for the pleadings ...*"

14. I now wish to turn to the grounds on which the Second Respondent objected to the Plaintiff's contemplated amendment. The Second Defendant's objection in respect of paragraphs 2 and 4 of the Plaintiff's notice of amendment is based on prescription. The Second Respondent contends that the claim which the Plaintiff intends prosecuting has become extinguished by prescription in terms of the provisions of the Prescription Act 68 of 1968 ("the Prescription Act").

15. In terms of paragraph 2 of the Plaintiff's notice of intention to amend, the proposed new paragraphs 5.1 to 5.6 of the Plaintiff's particulars of claim, the proposed new first alternative claim is based on, so contends the Second Defendant, breach by the Second Defendant of a totally new partly oral and partly written agreement of mandate entered into by and between the Plaintiff and the Second Defendant which was not pleaded at all in the Plaintiff's first alternative amendment.

16. According to the Second Defendant's counsel, if the current allegations and relief claimed are compared with the allegations and relief claimed in the proposed particulars of claim, what the Plaintiff seeks to recover from the Defendant in the Plaintiff's current particulars of claim is a very different debt or claim to that which the Plaintiff seeks to receive in the proposed amendment claim. In the Plaintiff's current particulars of claim the Plaintiff seeks payment of money for damages he sustained, the cost of repairing the aforementioned motor vehicle resulting from a breach of contract by the First Defendant of an agreement of insurance concluded between it and the Plaintiff, in other words a debt payable by reason of a contractual undertaking by the First Defendant to indemnify the Plaintiff for the loss he has sustained.

17. The Second Defendant contends that in view of the fact that the aforementioned debt arose more than three years before the Plaintiff served his notice of intention to amend on 21 July 2009, the said debt has become prescribed in terms of the provisions of the Prescription Act. On this basis, the Second Defendant held the view that the Plaintiff should be refused leave to amend his particulars of claim. The test to be applied is whether the Plaintiff's contemplated amendment sought to introduce a new cause of action. A distinction is drawn between a "debt" and a "cause of action". Even if an amendment seeks to introduce a new cause of action it is permissible, so it was argued by counsel for the Second Defendant, provided that the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed. According to the Plaintiff's counsel, it is important to draw a clear line of distinction between an amendment whose effect is to introduce a new cause of action and one which merely introduce fresh and alternative facts

which merely serve to support the original right of action as set out in the cause of action.

18. The Second Defendant's attitude to the contemplated amendment is understandable as a court will not allow an amendment to a pleading that seeks to introduce a new cause of action which has prescribed. Thus to allow an introduction of a new cause of action which would have the effect of defeating a statutory limitation as to the time limit within which an action is to be brought may be refused on the basis that it may prejudice the other party. See **Trans African Insurance Company v Maluleka 1956 (2) SA 273 AD**. See also **Evins v Shield Insurance Company Limited 1980(2) SA 814 AD** which has been followed in several other authorities. Corbett JA dealt with the position of the introduction of the new cause of action as follows:

"The concept of a cause of action is also of particular importance in regard to the prescription of claim for damages in delict. If a cause of action for such damages has accrued and the prescriptive period has run, the claimant's right of action is prescribed and he is precluded by prescription from suing for damages arising from the same cause of action even though the loss giving rise to the claim for damages occurred or becomes manifest after the prescriptive period has run ... It is different if the claim for damages flows from a distinct cause of action (which is not prescribed) or if the wrong is a continuing one which in effect gives rise to a series of rights of action arising from moment to moment ... Another aspect of the concept of a single cause of action in the realm of prescription relates to the amendment of the Plaintiff's claim as originally pleaded by him. Whether Plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages ..."

In a leading case with regard to amendments which introduce a new cause of action the court stated as follows in **Sentracham Limited v *Prinsloo 1997 (2) SA 1 (a) at p. 15-16***:

"Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlik dieselfde skuld probeer afdwing. Die skuld of vordering in reg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word."

The law in the said case was followed in **CGU Insurance Limited vs Rumdel Construction Pty. Ltd 2004 (2) SA 622 SCA** where the following was stated at page 267 a-c:

"It overlooks the broad meaning given by this court to the word "debt in the Prescription Act" and in doing so in effect it created the debt with the Plaintiff's cause of action. The Defendant's argument is that by introducing a new contract, the Plaintiff has introduced to a new cause of action. But it does not follow that by curing a defective cause of action by introducing the contract upon which it really relies, the Plaintiff summons necessarily claims of different debt. Indeed, it is settled law that a summons which sets out an expiable cause of action can interrupt the run of prescription provided that the debt is cognisable in the summons and is identifiable as substantially the same debt as the debt in the subsequent amendment."

19. I now need to examine what the Plaintiff alleged in his original summons. In paragraph 5.3 of his particulars of claim the Plaintiff stated as follows:

"In the event of it being found that the premiums were not paid, then in that event the Plaintiff pleads that it was an express, alternatively a tacit, further alternatively, an implied term of the agreement, set out in annexures A1 to A3 read with annexure B hereto;

(a) That the Second Defendant would obtain comprehensive insurance for Plaintiff in respect of the Plaintiff's vehicle as provided by the Standard Motor Vehicle Insurance Policy issued by the First Defendant; and,

(b) That the Second Defendant would submit to Plaintiff's bank the necessary documents for the deduction from the Plaintiff's bank account of the required premium."

In paragraph 5.3 of his original particulars of claim the Plaintiff stated as follows:

"Consequently the non-payment of the premiums was exclusively caused by the Second Defendant's failure to submit the required documents to the Plaintiff's bank."

He continued and alleged in paragraph 5.1 of his particulars of claim that:

"Second Defendant's said failure was in breech of the terms of the said annexures A1 to A3 and B as a result of which the Plaintiff suffered damages in the amount referred to in paragraph 4.12 above."

20. It would appear that in the Plaintiff's notice of amendment the same contractual claim is also set out and the Plaintiff claimed damages as a consequence of the Second Defendant's breach of the contract that was concluded between the Plaintiff and the Second Defendant. This appear quite clearly from the following paragraphs in the notice of amendment:

20.1 That the Plaintiff acting in person and the Second Defendant represented by Mrs. Minni Botha, alternatively by Chantelle Tate, concluded a contract of mandate in that the Second Defendant was to obtain comprehensive insurance in respect of the Plaintiff's motor vehicle, a Toyota Prado; that the Second Defendant would be entitled to deduct the amount of the premium from the Plaintiff's account at Nedbank; that the Second Defendant breached the contract of mandate, inter alia, by failing to obtain comprehensive insurance cover; failing to deduct the amount of the premium from the Plaintiff's bank account at Nedbank and by failing to advise the Plaintiff that the insurance cover had elapsed; that as a result of the aforesaid breach the Plaintiff has suffered damages. The damages are computed in two amounts being the sum of R209

081.72 being the reasonable cost of repairs to the Plaintiff's vehicle which is the amount that was claimed in the original summons at the sum of R45 000.00 being the towing and storage costs of Proline.

22. Accordingly I do not agree with the view expressed by the Second Defendant's counsel that the Plaintiff's contemplated amendment amounted to an introduction of a new cause of action or that the cause of action that the Plaintiff wanted to introduce by way of an amendment had become prescribed by the provisions of the Prescription Act.

23. I found accordingly that the Plaintiff's proposed amendment was substantially the same as the original cause of action. The Plaintiff was also of the view that the Plaintiff's contemplated amendment would not in any way prejudice the Second Defendant. It is for these reasons that on 11 August 2009 I granted the order as set out hereunder:

    1) The Plaintiff's application for leave to amend his Particulars of Claim is hereby granted.

    2) The Plaintiff is hereby granted leave to amend his Particulars of Claim in accordance with paragraphs 1,2 and 4 of his notice of amendment dated 21 July 2009.

    3) It is hereby ordered that costs should be in the cause.

    4) The trial of the matter is postponed hereby sine die.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Plaintiff's Attorneys:	*Bonthuys Bezuidenhout Inc. Attorneys*
Plaintiff's Counsel:	*Adv. C Da Silva (SC)*
2nd Defendant's Attorneys:	*MJ Hood & Associates Attorneys*
2nd Defendant's Counsel:	*Adv. L Hollander*
Date of Judgment:	*5 October 2010*