IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23266/2012

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

_____ _____

DATE SIGNATURE

In the matter between:

V A OOSTENDORP Applicant

And

OAKLEY TRANSPORT First Respondent

FALCON REMOVALS Second Respondent

COMAKO TRANS CC Third Respondent

In re:

V A OOSTENDORP Plaintiff

And

OAKLEY TRANSPORT First Defendant

FALCON REMOVALS Second Defendant

COMAKO TRANS CC Third Defendant

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an interlocutory application brought by the plaintiff in action proceedings and applicant herein for leave to amend its particulars of claim in terms of rule 28(4) of the Uniform Rules of the Court. The application stems from the action proceedings the applicant instituted against the first respondent for damages arising from a motor vehicle collision involving the applicant's vehicle and a vehicle allegedly belonging to the first respondent and driven, at the time of the collision, by an alleged employee of the first respondent whose negligent driving the applicant alleges was the cause of the collision. A period of over three years had lapsed since the cause of action had arisen when the first respondent filed its plea denying liability. The identities of the second respondent as the owner of the offending vehicle, followed by that of the third respondent, as the employer of the allegedly negligent driver of that vehicle, were revealed to the applicant. Upon their

joinder as co-defendants, the second and third respondents raised pleas of prescription against the applicant's claim.

[2] The applicant, having sought relief / payment against the first respondent, then or, alternative against the second respondent or, alternative against both the first and second respondents jointly and severally, the one paying the other to be absolved, seeks, in the present amendment application, the addition of further alternatives which create three scenarios – either of the respondents being the owner of the offending vehicle, alternatively, the employer of the driver thereof, or, alternatively, being the party whose business interest was being pursued at the time the accident occurred. To this end, the applicant seeks to amend its particulars of claim to include a claim based on joint and several liability of the respondents, the one paying, the others to be absolved.

[3] In addition, through the amendment of its replication, the applicant seeks to hold the first respondent liable on the ground of misrepresentation that it had until the filing of its plea more than three years after the accident had occurred, gave the impression that it was entertaining the applicant's claim and withheld the identities of the second and the third respondents as the liable parties and thus enabling the claims against them to possibly prescribe. To this end, the applicant intends to hold the first respondent liable on the principle of estoppel.

THE FACTS

[4] The applicant instituted an action for damages against the first respondent arising from a motor vehicle accident which occurred on 10 December 2009 involving a vehicle owned by or in the lawful possession of the applicant and a vehicle with registration VJJ 187 GP allegedly owned by the first respondent and driven at the time by Mr M. Dlamini, an alleged employee of the first respondent acting in the cause and scope of his employment with the first respondent at the time the accident occurred or was driving in pursuance of the business interests of the first respondent.

[5] The accident occurred along the R300 near Paarl in the Western Cape when vehicle V[…] GP allegedly intruded onto the lane for opposite bound traffic where it collided with and caused damage to the applicant's vehicle amounting to the sum of R176 885,00.

[6] On 9 April 2010, Ms Kuhn, a representative of the applicant's insurer, Zurich, made contact with a Ms Vos of the first respondent in connection with the accident. That communication resulted in the first respondent, through its brokers, notifying its insurer about the accident. This was followed by EWS Attorneys coming on record as legal representatives of the first respondent. EWS Attorneys requested Zurich to provide them with documents relating to the accident, which were duly provided.

[7] On 7 September 2010, in an ostensible response to Zurich, EWS Attorneys informed Zurich that their client, the first respondent, had not yet consulted with '<u>their driver</u>'.

[8] The applicant issued summons which was served on the first respondent on 10 May 2012 and in which the applicant sought payment from the first respondent on the basis that it was vicariously liable for the wrongful actions of its employee, Mr Dlamini. The claim was for the amount of R176, 885.00. The first respondent filed its plea on 10 August 2012 admitting that Mr Dlamini was its employee and the driver of the vehicle V[…] GP at the time of the accident, but denied that it was liable for payment of the applicant's damages claimed. Following the denial of liability, the applicant requested further particulars, specifically the basis for the first respondent's denial of liability premised on vicarious liability.

[9] In a reply dated 6 June 2013, EWS Attorneys attached a registration document of vehicle V[…] GP which revealed the identity of its owner, the second respondent.

[10] On 9 August 2013 EWS Attorneys sent a letter to the applicant's attorneys advising that they earlier erroneous advised that the driver of vehicle V[…] GP at the time of the accident was an employee of the first respondent and revealed the identity of the third respondent as the employer of that driver. On 12 December 2013 the applicant's attorneys responded indicating that they will bring an application for the joinder of the second and the third respondents.

[11] It is to be noted that the revelation of the identities of the second and the third respondents came three and half years after the accident had occurred, that is, approximately six months after the applicant's claim would ordinarily have become prescribed in terms of the Prescription Act of 1969.

[12] The applicant brought the application for the joinder of the second and the third respondent on 15 May 2014. The application was opposed by the respondents who filed their answering affidavit on 23 June 2014. The applicant filed its replying affidavit on 7 November 2014 having earlier been granted an extension. The joinder application was, in any event, granted on 28 February 2017 following the withdrawal of the opposition by the respondents' new attorneys of record in a letter dated 8 February 2017.

[13] On 12 June 2018 the applicant filed its amended particulars of claim citing the second defendant and setting out the cause of action against it. The first respondent filed its consequential amended plea and the second and the third respondents their plea and two special pleas of prescription on 4 September 2018 as follows:

13.1 The first respondent denied that it employed the driver of the offending vehicle or owned the vehicle or that the vehicle was driven in pursuance of the first respondent's business, thus, denying liability.

13.2 Second and third respondents' denial of liability is premised on the contention that the plaintiff's claim against them, if any, had become prescribed when they were joined in the proceedings.

[14] The applicant filed it replication on 11 August 2020, that is, two days before the matter was to be heard in court. The respondents took issue with the applicant's late filing and alleged prejudice to them. The matter was,

however, crowded out and that alleviated the prejudice the respondents had alleged.

[15] The parties held another pre-trial conference on 15 February 2021. On the same day the applicant filed a rule 28(1) notice of amendment of its particulars of claim. On 26 February 2021 the respondents filed their rule 28(3) notice of objection to the intended amendments causing the applicant to launch the rule 28(4) application for leave to amend its particulars of claim and also file an application for the separation of the determination of the issues in terms of rule 33(4).

[16] Both applicant's applications are opposed by the respondents who filed their answering affidavit. The applicant filed its replying affidavit on 17 March 2021. The applicant seeks to effect amendments to its particulars of claim as follows:

16.1 The deletion of para 2 of the particulars of claim and the insertion of the following;

1.

"The First Defendant is Oakley Trans (Pty) Ltd, a company with limited liability, duly registered in terms of the Company Laws of the Republic of South Africa with registered address at 100 Diamant Street, Klerksoord, Pretoria, Gauteng."

16.2 By the insertion of the following at the end of paragraph 5 of the particulars of claim:

2.

"…. *alternatively the first-, second- and the Third Defendants are herein cited jointly and severally, the one paying, the others to be absolved."*

16.3 By the insertion of paragraph 7.4 as follows:

3.

"7.4 In the alternative to the above the First Defendant accepted the risk pertaining to vehicle with registration number and letters V[…]GP and liability arising from such risk (including the use of the vehicle and the conduct of the driver thereof in the furthering of its interests) and transferred the risk to its insurer."

RESPONDENTS' OBJECTIONS

[17] The grounding for the respondents' objection to the applicant's proposed amendments is that;

17.1 it is contended that the applicant initially sought relief against the first or the second respondent, or, alternatively, the first and the second respondents, jointly and severally. These scenarios are premised on alleged employment of the driver of the offending vehicle by the first respondent and the ownership of the vehicle by the second

respondent. However, the point is raised that the applicant's claim has prescribed against the second respondent. Neither scenarios sought to be relied upon by the applicant against the second respondent can hold. The granting of the amendment will, consequently, serve no practical purpose against the second respondent and, therefore, its alleged joint liability with the first respondent is without basis. Furthermore, the first respondent, even if it was accepted that it was the employer of the driver of the offending vehicle, which it has denied and this is supported by the admission of the employment of the driver by the third respondent and, even if it was accepted that it was the first respondent's business interests that were being pursued when the accident occurred, the applicant's reliance on joint and several liability of the respondents cannot stand in the light of the prescription of its claims against the second and third respondents.

[18] The applicant's raising of the first respondent's misrepresentation and application of estoppel to hold the first respondent liable cannot stand either as that was never pleaded and cannot be raised for the first time in a replication as, inter alia, the first respondent cannot procedurally respond to the new allegations.

ANALYSIS AND CONCLUSION

[19] I agree fully firstly that the applicant's claims against the second and the third respondents have prescribed and find, secondly, that the first respondent's

alleged joint and several liability with the second and the third respondents falls with the prescription of the claims against it co-respondents. The first respondent can in none of the pleaded circumstances of the applicant's case be held individually liable. The application the amendments directed at the liability of the respondents stands to be dismissed.

COSTS

[20] With their success in these proceedings, the respondents are entitled to an order for costs in their favour.

ORDER

[21] Resulting from the findings and conclusion in this judgment, the following order is made:

1. The application for leave to amend is dismissed.
2. The applicant is ordered to pay the costs.

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MPN MBONGWE

JUDGE OF THE HIGH COURT

This judgment was prepared by Judge Mbongwe. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 21 February 2024.

HEARD ON:	16 August 2023
DECIDED ON:	21 February 2024

Appearances:

For the Applicant:	Adv FJ Erasmus SC
Instructed by:	Prinsloo Attorneys
For the Third Respondent:	Adv PM van Ryneveld
Instructed by:	Herman Prinsloo Attorneys