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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **22nd July 2021** Signature: _____

A handwritten signature in black ink, appearing to be "P. J. M.", is written over the signature line.

CASE NO: 37420/2013

DATE: 22ND JULY 2021

In the matter between:

M[...], L[...], in her capacity as

Mother and Natural Guardian for and on behalf of:

M[...], T[...] B[...]

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH, GAUTENG PROVINCIAL GOVERNMENT**

Defendant

Coram: Adams J

Heard: 20 July 2021 – The 'virtual hearing' of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 22 July 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email and by being

uploaded to the *CaseLines* system of the GLD. The date and time for hand-down is deemed to be 12:30 on 22 July 2021.

Summary: Civil procedure – application to amend defendant’s plea in terms of Rule 28(4) of the Uniform Rules – delictual claims for damages based on professional negligence – whether amendment will introduce excipiable plea, which would be bad in law – defendant is entitled to plead a development of the common law, which is at variance with the present legal position – defendant granted leave to amend plea

ORDER

- (1) The defendant is granted condonation of the late delivery of his replying affidavit.
 - (2) The defendant is granted leave to amend his plea as set out in his notice of intention to amend dated the 9th of June 2020.
 - (3) The defendant shall effect this amendment within ten days from date of this order.
 - (4) There shall be no costs order relative to this application for leave to amend, as well in relation to the defendant’s application for condonation for the late delivery of his replying affidavit.
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JUDGMENT

Adams J:

[1]. A central issue in this opposed application by the defendant for leave to amend his plea relates to whether or not the proposed amendment of the plea would render same excipiable. The plaintiff contends that the proposed amended plea would be susceptible to an exception on the basis that it would not be disclosing a valid and legally sustainable defence. In her notice of objection to the proposed amendment, the plaintiff states that ‘[t]he defendant’s proposed

amendment is bad in law, alternatively, vague and embarrassing in consequence whereof the amendment, if allowed, would render the plea excipiable.’ This is the general tenet of the plaintiff’s objection to the intended amendment.

[2]. So, for example, the plaintiff’s objection to certain portions of the proposed amended plea, which would allege a defence based on the so-called ‘Public Healthcare defence’, is formulated as follows:

- ‘3.1 The Defendant refers, in paragraphs 9.7.1, 9.7.2, 9.10, 9.13, 9.15, 9.17, 9.19 and 9.21 of the proposed amendment to its alleged ability to render services and provide items being of “an acceptable quality”.
- 3.2 The aforesaid reference to such services and Items being of "an acceptable quality" Is not a valid defence in the law, as it currently stands, In that the Defendant is required to plead and prove, for its defence to succeeds, that the services and devices required by the minor child that are allegedly available at no or lesser costs, can be rendered and supplied at the same or higher standard than what is available in the private healthcare system.
- 3.3 Insofar as the references (referred to in paragraph 3.1 above) to such services and items being of “an acceptable quality” is in conflict with the reference in paragraphs 9.4, 9.8.2 and 9.23.2 to “the same or higher standard”, the averments pleaded are contradictory to what is pleaded in the paragraphs referred to in paragraph 3.1 above and are, therefore, vague and embarrassing.’

[4]. The defendant applies for leave to amend his plea in accordance with Uniform Rule of Court 28(4). The plaintiff opposes the application on the basis of the objections raised in her notice of objection. Plaintiff also opposes the application on the basis that, in bringing the said application, the defendant is *mala fide*, which is demonstrated by the long delay in bringing same, coupled with the fact that there had been a few false starts. As already alluded to, the intended amendment is aimed, in essence, at introducing a defence based on the ‘Public Healthcare defence’, in addition to defences based on a request by the defendant that the plaintiff should be compensated not in a lump sum, but in kind or in instalments. The proposed amendment therefore pleads that the common law should be developed to make such defences available to defendants, such as the present defendant.

[5]. In its amended form, the plea broadly sets out the defendant's defence and his request for a development of the common law. The manner in which the common law should be developed, as pleaded by the defendant in his proposed amended plea, may very well be at variance with the way in which the common law has already been developed by other similar cases. An example of such a variance is contained in the extract above. It is in such cases that the plaintiff contends that the plea would be excipiable as not being based on the law as it presently stands or as it has been developed to date. There is, in my view, no merit in this contention. The point simply is that the defendant's intention is to plead a further development of the common law. The objection is therefore misguided and therefore stands to be rejected.

[6]. This point applies to all of the other possible grounds of exception raised by the plaintiff.

[7]. It is trite that a court should endeavour to look benevolently instead of over-critically at a pleading, and it must be looked at as a whole. If there is any uncertainty in regard to a pleader's intention an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable. In that regard see: *Amalgamated Footwear & Leather Industries Jordan & Co Ltd*¹.

[8]. Amendments will always be allowed unless the application to amend is *mala fide*, or unless such an amendment would cause an injustice to the other side which cannot be compensated by costs. In other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which it is sought to amend were filed. *In casu*, I do not believe that the defendant, in bringing this application for leave to amend, is acting *mala fide*. I say so, despite the fact that, as correctly pointed out by the plaintiff, there appears to have been unnecessary delays in the prosecution and finalisation of the application for leave to amend. I am however satisfied the explanations given for the delay by the defendant's attorney are acceptable.

¹ *Amalgamated Footwear & Leather Industries Jordan & Co Ltd*, 1948 (2) SA 891 (C) at 893

[9]. Importantly, I reiterate my view that the defendant simply wishes to bring the pleadings in line with the issues in dispute between the parties, hence the application for leave to amend. The reality of the matter is that the development of the law, as proposed by the defendant in this matter and other cases before various other courts in the land, is an important issue and one which should be ventilated during the trial. I therefore do not believe that the application is *mala fide*.

[10]. I am therefore of the view that the defendant should be granted leave to amend. There is no merit in the plaintiff's objection to the proposed amended plea.

[11]. There was also an application for condonation by the defendant for the late delivery of his replying affidavit. The plaintiff opposed the application for condonation and filed an answering affidavit. I am satisfied that the defendant made out a case for condonation. In any event, during the hearing of the main application on the 20th July 2021, Mr Coetzer, Counsel for the plaintiff, confirmed that she is not persisting with her opposition to the condonation application. That was, in my view, the right thing to do. I therefore granted the defendant's application for condonation during the hearing of the main application.

Costs

[12]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*².

[13]. The defendant, in applying for leave to amend his plea, was asking for an indulgence from the court. This means that the defendant is liable to pay the cost of the application for leave to amend.

[14]. The plaintiff, on the other hand, should pay the cost of the opposition to the application. This cost order would however be cancelled out to a greater or lesser extent by the cost order to which the defendant is entitled. There is a further

² *Myers v Abramson*, 1951(3) SA 438 (C) at 455

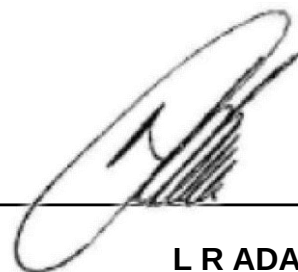
aspect which I should consider in relation to the award of costs and that relates to the delay by the defendant to bring this application for leave to amend.

[15]. I am of the view that no order as to cost shall be fair, reasonable and just to all concerned. Therefore, in the exercise of my discretion I intend granting no order as to costs.

Order

Accordingly, I make the following order:-

- (5) The defendant is granted condonation of the late delivery of his replying affidavit.
- (6) The defendant is granted leave to amend his plea as set out in his notice of intention to amend dated the 9th of June 2020.
- (7) The defendant shall effect this amendment within ten days from date of this order.
- (8) There shall be no costs order relative to this application for leave to amend, as well in relation to the defendant's application for condonation for the late delivery of his replying affidavit.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	20 th July 2021 – in a ‘virtual hearing’ during a videoconferences on the Microsoft Teams digital platform
JUDGMENT DATE:	22 nd July 2021 – judgment handed down electronically
FOR THE PLAINTIFF / RESPONDENT:	Advocate Martin Coetzer
INSTRUCTED BY:	Wim Krynauw Attorneys, Johannesburg
FOR THE DEFENDANT / APPLICANT:	Adv V J Chabane
INSTRUCTED BY:	The State Attorney, Johannesburg