



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 19275/2015

In the matter between:

JOHN – JOHN DUTHIE

Applicant

and

CILLIERS AND ASSOCIATES

Respondent

AND

CASE NO: 19375/2015

In the matter between:

JACOBUS OCTOBER

Applicant/Plaintiff

and

CILLIERS AND ASSOCIATES

Respondent/Defendant

Heard on: 18 November 2024

Delivered on: 29 November 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email publication and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 29 November 2024.

JUDGMENT

MANTAME J

[1] These two applications in terms of Rule 28 (4) of the Uniform Rules of Court served before this Court simultaneously as the issues arising thereto are the same. Notwithstanding this similarity, they were not formally consolidated. The parties were advised that for swift finalisation of these issues, there would be one judgment.

[2] The two applicants/plaintiffs filed a damages claim against the respondent/defendant. In their particulars of claim, as plaintiffs under Case No. 19275/2015 and 19375/2015 respectively, they alleged that they sustained severe injuries during a motor vehicle accident that occurred on 17 March 2010 subsequent to which they approached the respondent/defendant during or about mid 2010 for legal advice and assistance with their claim for compensation due to bodily injuries sustained.

[3] According to the applicants/plaintiffs in their paragraph 5 of their particulars of claim, the respondent/defendant accepted a mandate to perform professional services as their attorney, inter alia as follows;

- (a) To proceed with an action against the Compensation Commissioner in terms of Compensation for Occupational Injuries and Diseases Act (COIDA);

- (b) To take all reasonable steps, precautions and procedures to ensure the diligent, professional and fair prosecution of the applicant's/plaintiff's claim;
- (c) To make use of all remedies and methods to ensure the diligent, professional, fair and accurate composition of the applicants/plaintiffs claim;
- (d) To obtain and peruse all necessary and available documentation as well as consult with applicants/plaintiffs in order to correctly ascertain the facts;
- (e) To serve summons timeously in the correct forum or court;
- (f) To appoint the appropriate medical experts taking into consideration the nature and extent of the applicant's/plaintiff's injuries;
- (g) To quantify the claim regarding the applicant's/plaintiff's injuries judiciously and with due care and consideration; and
- (h) To exercise the necessary skill, adequate knowledge and diligence expected of an average practising attorney.

[4] The applicants/plaintiffs alleged further in their respective paragraphs 6 of their particulars of claim that the respondent was obliged to perform "*the services in a proper and professional manner and without negligence*" in terms of an "*implied term of the agreement between the parties*". In addition, the applicants/plaintiffs pleaded in the said paragraph that the respondent was obliged, in terms of a further "*implied term of the agreement*" to advise the applicant of "*all remedies in law emanating from the injuries sustained.*"

[5] In paragraph 7 of the particulars of claim the applicants/plaintiffs, pleaded that the respondent/defendant breached "*the agreement*" by failing to perform its duties "*in terms of the agreement in that:*

“7.1 They neglected and/ or omitted to investigate the possibility of lodging a claim against the Road Accident Fund, 56 of 1996 as amended by Act 19 of 2005 (herein referred to as “the Act”) and to timeously submit a claim in terms of the Act;

7.2 They allowed the claim to prescribe;

7.3 They failed in general to perform the work necessary to litigate the matter.”

[6] In paragraph 8 of the particulars of claim the applicant alleges that:

“It was in the contemplation of the parties to the agreement that the plaintiff would suffer damages in the event that the matter was incorrectly or negligently prosecuted by the Defendant or the employees of the Defendant.”

[7] To this end, the respondent/defendant has denied that he ever accepted the mandate. The respondent/defendant pleaded that it accepted a mandate to advise and assist the applicants/plaintiffs with their claim against the Compensation Commissioner in terms of COIDA. The respondent/defendant denied that it also accepted an instruction to assist the applicants/plaintiffs with a claim against the Road Accident Fund (the RAF)

[8] In its amended plea, the respondent/defendant pleaded that it was not prepared to accept an instruction to represent the applicants/plaintiffs in a claim against the RAF alternatively it did not accept an instruction to assist with a claim of this nature. In the further alternative, the respondent/defendant pleaded that in the event that the applicants/plaintiffs intended to proceed with a claim against the RAF, the applicants /plaintiffs were aware that they should seek alternative legal representation. This amended plea caused the applicants/plaintiffs to deliver a replication which was met with a notice in terms of Rule 23 (1) of the Uniform Rules of Court. Pursuant thereto, the applicants/plaintiffs then gave its notice to amend the

replication in terms of Rule 28 (1) of the Uniform Rules of Court which now forms the basis of this application.

[9] In its opposition of this amendment, the respondent/defendant stated that the applicants/plaintiffs based their case on an implied term. As an implied term is one that exists in law and is not a term of an agreement which has to be agreed upon between the parties, it was therefore clear that this is different from a term which is accepted between the parties. The onus therefore lies on the applicants/plaintiffs to prove the existence of such an implied term. It is therefore unnecessary to plead that the respondent/defendant accepted such a term as this implied term, if proven would exist in the agreement irrespective of whether the defendant accepted same or not.

[10] The applicants/plaintiffs proposed amendments are that the entire paragraph 3.2 of the applicants/plaintiffs replication be deleted which reads as follows:

“3.2 The Plaintiff pleads specifically that:

3.2.1 The Defendant accepted the mandate as pleaded in paragraphs 5 and 6 of the Plaintiff's particulars of claim.

3.2.2 The Defendant not only accepted the mandate, but on an inquiry by the Plaintiff on various occasions in respect of progress, the Defendant assured the Plaintiff that the claims, inclusive of the claim against the Road Accident Fund, were indeed instituted and attended to in the required manner.

3.2.3 The Plaintiff had no reason not to accept the foresaid (*sic*) to be the truth and correct.

3.2.4 The Plaintiff, in the premise, had no reason to seek alternative legal advice at the time.”

[11] The paragraph the applicants/plaintiffs wish to introduce reads as follows:

“3.2 The Plaintiff pleads specifically that the Defendant accepted the mandate as pleaded in paragraph 5 and 6 of the Plaintiffs particulars of claim.”

[12] The respondent/defendant objected to this proposal on the basis that:

- (a) The applicants/plaintiffs seek to, through amendment, include an allegation that the respondent/defendant accepted the mandate to *“advise the Plaintiff of all remedies available in law emanating from the injuries sustained...”*
- (b) The intended amendment is not in response to an allegation by the respondent/defendant in the plea, as amended;
- (c) The proposed amendment seeks to expand and increase the ambit of the applicant’s/plaintiff’s case as contained in the particulars of claim;
- (d) The proposed amendment, if allowed, will severely prejudice the respondent/defendant.

[13] The issues as set out by the applicants/plaintiffs are (i) whether the applicant’s claim against the respondent/defendant is contractual in nature, or (ii) whether the respondent/defendant is justified in denying the terms as pleaded in the particulars of claim more in particular whether or not it was agreed that the respondent/defendant would assist in the applicants/plaintiffs claims against the RAF; (iii) whether facts and not evidence are generally requested to be pleaded, and that sight should not be lost of the distinction between *facta probanda* (the facts to be proven) and *facta probantia* (the facts that would prove the first said) and whether such amendment would cause prejudice on the applicants/plaintiffs, and no new cause of action would be introduced. In the contrary, the respondent/defendant asserted that the issues relating to this objection for amendment are much simpler than what is envisaged by the applicants/plaintiffs.

[14] The respondent/defendant submitted that the applicants/plaintiffs relied on the contract or agreement that they failed to attach in their particulars of claim. In terms

of Rule 18 (6) of the Uniform Rules of Court, *“A party who in his or her pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written, a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”*

[15] In addition, the proposed amendment is not a response to an allegation by the respondent/defendant in the amended plea. It merely seeks to expand and increase the ambit of the applicant's/plaintiff's case or introduce a fresh cause of action and thereby causing severe prejudice to the respondent/defendant. Although the applicants/plaintiffs seek to amend paragraph 5 and 6 of the particulars of claim, paragraph 6 is somewhat contradictory to paragraph 5 as it seems to allege that the respondents/defendants were responsible for providing a spectrum of legal advice to the applicant's/plaintiff's, while paragraph 5 refers specifically to the COIDA matter only.

[16] Further, paragraph 7 of the particulars of claim state that the respondent/defendant was negligent in reflecting and/or omitting to investigate the possibility of lodging the RAF claims and thereby allowing the claims to prescribe and failing to perform the work necessary to litigate the matter. On the other hand, the particulars of claim do not specifically allege that the respondent/defendant accepted a mandate to lodge the RAF claims on behalf of the applicants/plaintiffs or that the respondent/defendant represented to the applicants/plaintiffs that it was willing to pursue such claims and/or issue the RAF claims.

[17] The respondent/defendant submitted that in their replication the applicants/plaintiffs make reference to the respondent/defendant specifically making utterances to the applicants that the RAF claims had been instituted and was being followed up. The respondent contended that it is an established principle that if a plaintiff in his particulars of claim alleges breach of contract, and that is sufficiently answered in a plea, the plaintiff cannot in his replication alter the basis of his claim to one of fraud¹.

¹ United Dominions Corporation (Rhodesia) Ltd v Van Eyssen 1961 (1) SA 53 (SR)

[18] Similarly in this matter, the applicants/plaintiffs make the allegation of misrepresentation made to him by the respondent/defendant which do not appear in the particulars of claim. The applicant's/plaintiffs response is not a response to the amended plea, given that the respondent/defendant has long denied having accepted a mandate to assist the applicants/plaintiffs in their RAF claims. The amended plea merely gave the details thereof. In the applicant's/plaintiff's submissions, this was a misrepresentation on the part of the respondent/defendant. In any event, it was said, in terms of Rule 25 of the Uniform Rules of Court, replication is only necessary when the plaintiff intends: (i) admitting allegations in the plea; (ii) admitting [confessing] but at the same time avoiding allegations in the plea; (iii) responding to a special defence such as one based on prescription; (iv) and when plaintiff intends disputing allegations in the plea. The absence of a replication essentially amounts to a denial of all the allegations in the plea.

[19] As stated above in its replication the applicants/plaintiffs should have been restricted to answering the allegations made by the respondent/defendant in its plea. The applicants/plaintiffs may not introduce a fresh claim or a fresh cause of action. The respondent/defendant repeatedly contended that the applicants/plaintiffs seek to expand and increase the ambit of its case or it introduced a fresh cause of action. In response to these submissions, the applicants/plaintiffs stated that, if the amendment is allowed, the respondent/defendant is at liberty to file an amended plea.

[20] In such circumstances, the applicant's/plaintiff's approach cannot be corrected. It is trite that the applicants/plaintiffs who wishes to introduce a new cause of action after the defendant has delivered its plea, the correct course is to apply for an amendment of his summons². It then follows that the applicants/plaintiffs may not be allowed to effect amendments which may be different from its initial case through the back door, that is at replication stage. The respondent/defendant is correct that the amendment sought is not in response to an allegation by the respondent/defendant in its plea, as amended. As a consequence thereof, new

² Faischt v Colonial Government (1903) 20 SC 211. De Beer v Minister of Posts and Telegraphs 1923 AD 653 at 657; United Dominions Corporation (Rhodesia) Ltd v Van Eyssen 1961 (1) SA 53 (SR) at 58C. Knightsbridge Investments (Pvt) Ltd vs Gurland 1964 (4) SA 273 (SR) at 279C.

allegations may be made in reply only when they are called for by the plea. A replication which does introduce a fresh cause of action is known as a “*departure*” and is bad³.

[21] In any event, the respondent/defendant had already pleaded on the nature of the mandate that was given to it by the applicants/plaintiffs. If, for instance they intended to revisit the same issue, an amendment should have been sought to their particulars of claim. As stated above, Rule 18 (6) of the Uniform Rules of Court gives a proper guidance that a party who relies upon a contract shall state whether it is written or oral in nature. And where, when and by whom it was concluded. If it is a written contract, a true copy thereof should be attached in the pleading.

[22] Sight should not be lost to the fact that the applicants/plaintiffs, as stated in Rule 25 of the Uniform Rules of Court answered to the defendant’s plea with a replication. A replication may not contradict the particulars of claim or introduce a fresh claim or cause of action not stated in the particulars of claim.

[23] Uniform Rules of Court are there to regulate the conduct of proceedings in Court. Pleadings that are filed in preparation for trial should conform to the rules. Courts should not allow a situation whereby litigation would descend to total chaos simply because its rules were not adhered to. A cause of action should be pleaded in the summons and particulars of claim and not in replication. A plea is only competent in response to summons and particulars of claim or a stated case. It was incorrect for the applicants /plaintiffs to suggest that if the amendment to replication is granted, the respondent could file a plea. In fact, that was an acknowledgement that they indeed introduced a new cause of action in their replication.

[24] Pleadings are the foundation of any litigation. In fact, they define specific issues in dispute between the parties and serve as a roadmap for the evidence to be presented during trial. The issues in dispute cannot be tucked away somewhere in replication and from the main pleadings.

³ Joerning v The Paarl Ophir Gold Mining and Milling Co Ltd (1898) 5 Off Rep 9, Broad v Bloom 1903 TH 427.

[25] The test on whether to grant or refuse an amendment is a question of discretion. However, such discretion has its own guiding principles⁴ and could be summarized as follows:

- (a) An amendment cannot be granted for the mere asking – some explanation must be offered;
- (b) The applicant must show that, *prima facie*, the amendment has something deserving of consideration, a triable issue;
- (c) The modern tendency lies in favour of an amendment if such “facilitates the proper ventilation of the dispute between the parties”;
- (d) The party seeking the amendment must not be *mala fide*;
- (e) It must not cause injustice to the other side which cannot be compensated by costs;
- (f) The amendment should not be refused simply to punish the applicant for neglect;
- (g) A mere loss of time is no reason, in itself to refuse the application;
- (h) If the amendment is not sought timeously, some reason must be given for the delay; and in general;
- (i) The Court leans in favour of granting an amendment if doing so will ensure that justice is done between the parties by deciding the real issues between them⁵.

⁴ Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (TK) at 77 F – I, as approved in Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at para [9]; Erasmus, Superior Court Practice at pages B1 -178 to B1 184 C

⁵ Caxton Ltd v Reeve Forman (Pty) Ltd 1990 (3) SA 547 (A) at 565 G – 566 A

[26] In this matter, if this Court were to grant an amendment in favour of the applicants/ plaintiffs such decision would cause grave prejudice and injustice to the respondents/defendants. In fact, it would result in confusion in determining the triable issues as the applicant's/plaintiff's case would be scattered around the record of proceedings.

[27] In the circumstances, it would be unnecessary to deal with the applicant's/plaintiff's issues for determination as stated above. Such would have been competent if their replication was prompted by the amended plea. As a consequence, thereof, the applicants/plaintiffs have not made out a case for the granting of an amendment to their replication.

[28] In the result, the application for an amendment of the applicant's replication is dismissed with costs

MANTAME J
WESTERN CAPE HIGH COURT

COUNSEL FOR THE APPLICANT: ADV JG VAN DER MERWE
INSTRUCTED BY: A NORTJE/ - GERT NEL INC

COUNSEL FOR THE RESPONDENT: ADV SHAINA NAIDOO
INSTRUCTED BY: CILLIERS AND ASSOCIATES