IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 3463/2017P

In the matter between:

N[...] N[...] OBO N[...] S[...] L[...] **APPLICANT**

and

MEC FOR HEALTH, KWAZULU-NATAL **RESPONDENT**

ORDER

In the premises the following order is made:

1. The applicant's application is dismissed.
2. No order as to costs.

JUDGMENT

Mathenjwa J

[1] This is an interlocutory application brought by the applicant (plaintiff in the main action) to amend her particulars of claim. The application is opposed by the respondent who is the defendant in the main action.

[2] The main action is based on a claim for damages instituted by the applicant on 24 March 2017 for medical negligence arising from the birth of the applicant's minor child who developed complications related to cerebral palsy after birth at the respondent's Benedictine Hospital, Nongoma.

Factual background

[3] In her particulars of claim the applicant stated that on 14 February 2010 she went into labour and arrived at the Benedictine Hospital at 01h30. The applicant delivered the child through normal delivery at 03h50. The male infant required "oral-nasal suctioning" to clear his airway. According to the neonate notes the meconium-stained liquor aspiration was noted. The minor child was sent to the nursery for a stomach washout where 3ml of meconium was aspirated from his stomach. According to the paediatric doctor's notes made at 10h00 on 15 February 2010 the minor child had hypoxic ischaemic encephalopathy, neonatal convulsions and developed the sequelae of cerebral palsy.

[4] Dr Koll in the joint minutes of obstetricians dated 7 June 2021 sought clarity regarding particulars of the person who filled the admission and discharge register form (revenue form) and what role the form played in the admission of the applicant to hospital. When preparing for trial which was initially scheduled to take place on 15 June 2021 Dr Koll advised the applicant's attorney to ask for discovery of the revenue form by the respondent. Thus, the applicant requested the respondent to discover the form in terms of Uniform rule 35(3) which was subsequently discovered by the respondent on 10 August 2022.

[5] When the matter came to court on 15 August 2022 the applicant produced the revenue form which recorded that the applicant was admitted on 13 February 2010 and discharged on 14 February 2010. Due to the production of that document the trial was further adjourned to 31 July 2023.

[6] At the trial on 31 July 2023 the applicant gave evidence that she was admitted to Benedictine Hospital on 13 February 2010 around 20h30 or alternatively 21h00 which was in direct contradiction to the version stated in her particulars of claim. She was cross-examined by the respondent's counsel about the apparent contradictions between her version in court and her version in the pleadings. The contradictions further appeared from the letter of demand sent by the applicant's attorneys to the respondent, the questionnaire filled out by the applicant and dispatched by her attorneys to the respondent's Head of Department and the version

presented by her to her expert witnesses which always was that she was admitted to hospital on 14 February 2010 at 01h30. Subsequently the applicant's legal representatives indicated that they required an amendment to the applicant's particulars of claim. Mngadi J who presided over the trial granted an order postponing the trial and ordered the applicant to bear the wasted costs occasioned by the postponement.

The amendment sought

[7] The applicant seeks to amend her particulars of claim as follows. Paragraph 3.1 states the following:

'3.1. All material times hereto and more particularly during the period 14 February 2010 the defendant was, by reason of:

3.1.1 Hospital's existence, holding out to the public and particularly to the plaintiff that it renders reasonable medical care, treatment and advice; and / or.

3.1. 2 The plaintiff's treatment and / or admission to the hospital and the undertaking to render medical care and treatment to the plaintiff:'

The applicant proposed that paragraph 3.1 be amended and replaced with the following averments:

'3.1 At all material times hereto and more particularly:

From around 21h30 on 13 February 2010 (when the plaintiff, while being in labour, first presented herself to the labour ward of the hospital, during the parturition and until the ultimate birth of minor child around 03h50 on 14 February 2010;

After the ultimate birth of the minor child and until the ultimate discharge of the minor child from the hospital around 10h00 on 19 February 2010, the defendant was by reason of;'

[8] Paragraph 5 of the particulars of claim states that:

'5. The hospital's medical and nursery personnel who treated and / or attended to the plaintiff and the minor child during the period 14 February 2010:

5.1 were either permanent or temporary employees.

5.2 alternatively were duly authorised agents or representatives of the hospital acting as such in the fulfilments of the hospital's vicarious delegations of the plaintiff to

render professional and proper medical treatment, care and assistance to the plaintiff and the minor child'.

The applicant proposed the following amendment:

'5. The Hospital's medical and nursery personnel who treated and / or attended to the plaintiff and the foetus from around 21h30 on 13 February 2010 when the plaintiff while being in labour first presented herself to the labour ward of the hospital, during the parturition and until the ultimate birth of the minor child around 03h50 on 14 February 2010; after the ultimate birth of the minor child and until the ultimate discharge of the minor child from the hospital around 10h00 on 19 February 2010, the defendant was, by reasoning…'

[9] Paragraphs 7.3 to 7.6 of the particulars of claim provides as follows:

'7.1 During 2010 plaintiff was 24 years old and pregnant for the second time.

7.2 Plaintiff had an uneventful antenatal course with 5 antenatal visits.

7.3 According to the labour notes:

7.3.1 Plaintiff went into labour at about midnight on 14 February 2010 and arrived at the Benedictine Hospital at 01h30.

7.3.2 Normal delivery occurred at 03h50 and a male infant with a birth weight of 2.9kg was delivered that required "oral-nasal suctioning" to clear the airway.

…

7.4 According to the neonate notes:

7.4.1 Apgar scores were recorded as 7/10 at 1 minute…

7.4.3 The meconium stained liquor aspiration was noted and the minor child was sent to the nursery for a stomach wash out. During the procedure 3ml of meconium was aspirated from the stomach.

7.5 The Paediatric doctor's notes at 10h00 on 15 February 2010 states that the minor had hypoxic ischaemic encephalopathy and neonatal convulsions'.

[10] The applicant seeks the following amendment to paragraph 7:

'7.3 The Plaintiff went into labour during 13 February 2010 and subsequently presented and was admitted to the labour ward of the Benedictine Hospital around 21h30 on 13 February 2010.

7.4 According to the labour notes:

7.4.1 Normal delivery occurred...

7.5 The neonate was born in aggressed condition, did not cry at birth, suffered fits within hours after birth causing the neonate to be admitted to the nursery of the hospital from 14 January 2010 to 19 January 2010, where the neonate was intubated and treated in an incubator…'

Parties contentions

[11] The founding affidavit was deposed to by the applicant's attorney who stated that during preparation for the initial trial which was scheduled to take place from 15 to 23 August 2022 he was advised by the Obstetrician Dr Koll to request the respondent to discover all documents which indicate when the applicant was admitted to hospital. The respondent subsequently discovered the revenue form which indicates that the applicant was admitted on 13 February 2010 and discharged on 14 February 2010. It was contended on behalf of the applicant that the proposed amendment sought to properly ventilate the issues between the parties regarding the respondent's breach of its legal duty towards the applicant.

[12] The respondent contended that the applicant's application for amendment is *mala fide* and based on an incorrect admission and discharge form from the Revenue office which is a form that is filled ex post facto and not filled out on the date of admission but filled in thereafter for purposes of statistics. The author of the aforesaid from is now deceased. The respondent contended that the applicant was not mistaken about the date of her admission, being 14 February 2010. The reason being that all information given by the applicant to her experts and to the respondent from 2015 until March 2023 are that the applicant was admitted to hospital on 14 February 2010 around 01h30. According to the respondent the applicant concocted the version that she was admitted on 13 February 2010 for the first time on 24 March 2023 when she filled an expert report of Dr Kara, her new specialist Paediatrician.

[13] The respondent contended that the proposed amendment does not raise a triable issue. Firstly, the revenue form relied upon by the applicant does not form part of the hospital maternity records but is a form that is completed after the applicant is discharged for statistics purposes. Furthermore, the form itself does not advance the applicant's case because all maternity records clearly indicate that the applicant was admitted on 14 February 2010. The examination on admission form

recorded that the applicant was admitted on 14 February 2010. The discharge form recorded that the applicant was admitted on 14 February 2010 and discharged on 19 February 2010, the admission register held at the hospital reflects that the applicant was admitted on 14 February 2010 and a questionnaire completed by the applicant recorded that she was admitted to hospital on 14 February 2010.

[14] The respondent contended that the applicant's correction of the version that she was admitted to hospital on 13 February 2010 is a reaction to the respondent's defence that nothing could be done to have prevented any injury or harm to the minor child as the applicant's cervix was already 10cm dilated when she was admitted at the hospital.

[15] The issue for determination in this application is whether the applicant has succeeded in satisfying the court that the amendment should be granted. In reaching a conclusion whether the applicant is entitled to the relief sought I have to determine whether:

(a) the application is *mala fide*;
(b) the amendment sought raises a triable issue; and
(c) the applicant has explained the reasons for the amendment.

[16] Mr *Pieterse* for the applicant contended that the amendment sought is to align the evidence of the applicant in court with her version in the pleadings. The amendment is necessary given the fact that the outcome of the respondent's liability turns on the date when the applicant was admitted to hospital. It was submitted on behalf of the applicant that the matter involves a minor child and a refusal of the amendment would close the door on the applicant to fully ventilate the issues in dispute. When responding to a question by the court regarding the failure of the applicant to explain the reason for seeking an amendment in her founding affidavit, the applicant's counsel averred that the reasons are known to both parties because they were raised during trial in the main action.

[17] Mr *Nankin* for the respondent submitted that the applicant's application is *mala fide* and grounded on incorrect information contained in the form that was filled after the applicant was discharged. The author of the form is also deceased and thus

he is no longer available to clarify any query about the information. It was further submitted on behalf of the respondent that the amendment sought does not raise a triable issue in that all hospital documents completed at the maternity ward show that the applicant was admitted on 14 February 2010, not 13 February.

Analysis of the facts and applicable legal principles

[18] It is trite that an amendment should be granted 'unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'[1] The date on which the applicant was admitted to hospital is crucial in determining whether the respondent could have prevented the applicant's child from being diagnosed with hypoxic ischaemic encephalopathy, neonatal convulsions and developing the sequelae of cerebral palsy. In her particulars of claim the applicant alleged that she arrived at the hospital on 14 February 2010 at 01h30 and delivered the child at 03h50. In assessing the respondent's liability, the court must consider the respondent's conduct within the timeframe of two hours, that is from the time when the applicant arrived at hospital up to the time when the child was delivered. In the proposed amendment the applicant states that she went into labour during 13 February 2010 and subsequently presented herself to and was admitted to the labour ward in the hospital around 21h30 on 13 February 2010. In terms of the amendment the respondent's liability for professional negligence would be determined within the period of, 12 hours, that is from the date and time when the applicant was admitted to hospital on 13 February 2010 at 21h30 to 14 February 2010 at 03h50 when she delivered the baby.

[19] I am mindful that a breach of the respondent's legal duty to the applicant is not limited to the time when she was admitted in hospital. However, the submission by the applicant's counsel that a determination of the respondent's breach of its legal duty turns on the date and time when the applicant was admitted to hospital evidences that such date and time are intrinsically linked to the cause of action.

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[1] *Moolman v Estate Moolman* 1927 CPD 27; *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC) para 89.

The respondent would be facing completely new facts which are intrinsically linked to the cause of action that would require it to come up with a completely new defence. For that reason, it is clear that if the proposed amendment is granted the parties would not be put in the same position as they were when the pleading being sought to amend was filed.

[20] It is trite that the applicant having already made her case in her pleadings, if she wishes to change or add to this, must explain the reason and show *prima facie* that she has something deserving of consideration, a triable issue; she cannot be allowed to harass her opponent by an amendment which has no foundation. She cannot place on the record an issue for which she has no supporting evidence, where evidence is required.[2] While an amendment can be made at any stage before judgment in the proceedings, an amendment is not for taking, a party seeking the indulgence must explain the reason for bringing the amendment and satisfy the court that the amendment if granted will raise a triable issue.[3] The applicant does not explain how the information which she gave to the respondent and her own experts and reflected in the pleadings that she was admitted in hospital on 14 February 2010 has turned out to be incorrect. She has not explained whether she was mistaken in that regard. There is no affidavit from the applicant nor supporting affidavit from her sister who accompanied her to hospital stating or confirming that the proposed new date regarding her admission to hospital is based on their own recollection.

[21] Another anomaly in this case is the fact that the founding affidavit to the notice of motion was deposed to by the applicant's attorney. For that reason, the attorney would not know what went into the applicant's mind when she stated and held the version for more than five years that she was admitted to hospital on 14 February 2010. The attorney would not know whether the applicant was mistaken with regard to her date and time of admission to hospital. There is no doubt that the information contained in the revenue form that the applicant was admitted to hospital on 13 February 2010 and discharged the following day on 14 February is incorrect. The reason being that it is common cause that the applicant was discharged from

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[2] *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A-B.
[3] Ibid at 641A.

hospital on 19 and not 14 February 2010. Furthermore, it is not in dispute that the revenue form is not one of the forms completed in the maternity ward, it is completed after the patient is discharged from hospital. The information contained in this form is in variance with the information contained in all the documents completed at the maternity ward where the applicant was admitted and discharged. Thus, the proposed amendment does not raise a triable issue nor will it affect the outcome of the case.

[22] I am mindful that this matter deals with a minor child, and in 'all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied'.[4] However the facts raised in the proposed amendment will not contribute to the determination by the court of the real issues between the parties nor will it possibly affect the outcome. Even if the amendment was granted for the sake of the minor child that would not affect the outcome of the case. If the amendment which the applicant proposes would have no significance to the outcome of the case, the applicant would suffer no prejudice if the amendment is not allowed.[5]

[23] In establishing whether the applicant was *mala fide* in seeking the amendment, I considered the circumstances relating to the introduction of the revenue form which allegedly prompted the amendment; the date and time when the applicant became aware of the existence of the form for the first time; date when the application for the amendment was made and the reason proffered for the proposed amendment. It is not in dispute that the applicant became aware of the existence of the revenue form in June 2021 because in the joint experts minutes dated 7 June 2021 Dr Koll sought clarity about who filled the revenue form and what role it played in the admission of the applicant to hospital. On becoming aware of the existence of the form the applicant did not ask the respondent to discover it in terms of rule 35(3), nor did she amend her particulars of claim. It was only during the preparation for trial which was initially scheduled to take place on 15 August 2022 when the applicant's attorney was advised by Dr Koll to request discovery of the form. It is an anomaly that medical experts would advise the attorney to ask the

[4] Section 9 of the Children's Act 38 of 2005.
[5] *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A).

respondent to discover the form. The legal practitioner is an expert in law, including rules of discovery and whether a document ought to be discovered.

[24] When the revenue form was discovered on 10 August 2022, five days before the initial date of trial, the trial was postponed to 31 July 2023. When the trial commenced on 31 July 2013 the applicant had not amended her particulars of claim. She gave her evidence in chief and only after she had been cross-examined about the apparent contradictions in her evidence in court and the version in her particulars of claim, that her legal team sought to amend the pleadings. Based on the chronology of events leading to the proposed amendment, I can only conclude that the application is *mala fide* and opportunistic. Since 2021 the applicant was aware of the existence of the revenue form, but did not find it necessary to amend her particulars of claim. If the principle that an amendment can be made at any time prior to judgment in the proceedings were to be applied arbitrarily that would destroy the main purpose of an amendment, which is to allow parties to ventilate issues. An amendment should not be aimed at aligning a litigant's evidence in court with her or his version in the pleadings because an amendment is not concerned with evidence in court, it concerns the pleadings and pleadings is not evidence.

[25] For all the above reasons the applicant's application for amendment should be dismissed. Considering the circumstances of this case, it would not be in the interests of justice to burden the applicant with costs. Therefore, there will be no order as to costs.

Order

[26] In the premises the following order is made:

1. The applicant's application is dismissed.
2. No order as to costs.

Mathenjwa J

Date of hearing:	27 January 2025
Date of judgment:	07 May 2025

Appearances:

Applicant's counsel:	J C Pieterse
Instructed by:	EVN Legal Practitioners Inc. Durban

Respondents' counsel:	S Nankin
Instructed by:	State Attorney KwaZulu- Natal