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

JUDGMENT

Not Reportable

Case no: 5936/2021

In the matter between:

THE ROAD ACCIDENT FUND

Applicant/Defendant

and

ADVOCATE HENRY GERHARD McLACHLAN N.O

Respondent/ Plaintiff

In his capacity as curator ad litem on behalf of

LIEZL BARKHUIZEN ("The Patient")

Neutral citation: *Road Accident Fund v McLachlan NO* (Case no 5936/2021) [2025]
ZAWCHC 321 (01-08-2025)

Coram: NUKU J

Heard: 17 June 2025

Delivered: 01 August 2025

Summary: **Practice – Pleadings - Amendment – Withdrawal of an admission —** failure to allege and prove *bona fides* and injustice that cannot be put back for the purposes of justice in the same position as the plaintiff was when the plea sought to be amended was filed.

ORDER

1. The application for leave to amend the defendant's plea is refused.
 2. The defendant is ordered to pay the plaintiff's costs of the application. These costs shall include those arising from the postponement of the application on 24 April 2025, as well as counsel's costs, which shall be on Scale "B".
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JUDGMENT

Nuku J

[1] This matter arises from a motor vehicle collision that took place on 26 November 2005 (collision), involving a vehicle whose driver or owner could not be identified and another vehicle driven by Ms. Liezel Barkhuizen (the Patient) at the time. As a result of the collision, the Patient sustained multiple bodily injuries. These injuries include memory loss. Consequently, she is being represented by Advocate HG MacLaghlan, who has been appointed as her curator ad litem, to pursue her claim against the defendant.

[2] The Patient's claim was submitted to the defendant, and a summons was issued because the defendant failed to compensate the Patient. The plaintiff's particulars of

claim made the following allegations, which were admitted by the defendant in its plea dated 17 May 2022, namely:

‘On or about the 26th November 2005 and at approximately 02h30 and on Muizenberg Main Road, Muizenberg, Cape Town, Western Cape, a collision occurred when a motor vehicle with an unknown registration number (hereinafter referred to as “the insured driver”), there and then driven by an unknown driver, moved over the solid white line and into the lane of the motor vehicle with registration number C[...], there and then driven by the Patient at the time.’

[3] The pleadings were closed, after which the registrar of this Court issued a notice in terms of rule 37A of the Uniform Rules of Court, informing the parties’ legal representatives that the matter had been scheduled for a pre-trial conference on 6 June 2023 before Samela J.

[4] A minute dated 31 May 2023, of a meeting held between the parties’ legal representatives and presented to Samela, J on 6 June 2023, records that:

- ‘1. The Defendant has filed a Notice in terms of Rule 28 to amend its Plea by withdrawing admissions made in the Plea.
2. The Plaintiff intends to object to the proposed amendment.
3. The Defendant will subsequently bring a formal application to the Court to allow the proposed amendment.
4. The parties kindly request the above Honourable Court to postpone the Rule 37A Conference for a period of 6 months to allow the Defendant to bring the Application.’

[5] The pre-trial conference was postponed at the request of the parties' legal representatives. A minute dated 6 November 2023, from a meeting held between the parties' legal representatives in preparation for the second pre-trial conference, recorded that the defendant had failed to apply for an amendment despite the plaintiff's objection. It was also noted that the defendant reserved its right to submit such an application.

[6] The second pre-trial conference was postponed to 9 May 2024, and on that date, Samela, J certified the matter as trial-ready only regarding the determination of liability (merits).

[7] The compliance certificate signed by the legal representatives of both parties, included among the documents submitted to Samela, J for consideration regarding whether the matter was trial-ready, records as one of the issues not in dispute that:

'On or about the 26th November 2005 and at approximately 02h30 and on Muizenberg Main Road, Muizenberg, Cape Town, Western Cape, a collision occurred when a motor vehicle with an unknown registration number (hereinafter referred to as "the insured driver"), there and then driven by an unknown driver, moved over the solid white line and into the lane of the motor vehicle with registration number C[...], there and then driven by the Patient at the time.'

[8] The compliance certificate also noted that the defendant had no intention of calling any witnesses. All of this was recorded despite the fact that the defendant had sought to amend its plea.

[9] On 10 June 2024, the registrar of this Court enrolled the matter for the trial to commence on 12 November 2024, and the parties' legal representatives were informed accordingly.

[10] On 29 October 2024, ten court days before the trial begins, the defendant's legal representatives issued a second notice of intention to amend. The proposed amendment primarily aimed to achieve two objectives. Firstly, it was to withdraw an admission that the insured motor vehicle had crossed the solid white line into the path of the vehicle driven by the Patient when the collision occurred. Secondly, it was to introduce an allegation that there was no collision with another vehicle, but rather that the Patient drove her motor vehicle into a solid concrete wall.

[11] The plaintiff objected to the proposed amendment on four grounds. The first was that the amendment amounts to a withdrawal of an admission of fact in circumstances where there are no factual or evidential bases justifying the said withdrawal of admission. The second was that the proposed amendment did not raise a triable issue in light of the absence of factual or evidential bases justifying the withdrawal of admission. The third was that the proposed amendment was highly prejudicial to the plaintiff and was not made in good faith. The last was that the defendant seeks to create a fresh dispute and reopen an issue that had been compromised between the parties.

[12] The timing of the filing of the notice of intention to amend meant that the trial could not proceed on 12 November 2024. The defendant delivered its application for leave to amend on 14 November 2024. The defendant's attorney, Mr Craig Ian Hindley (Mr Hindley), who had been dealing with this matter from inception, deposed to an affidavit in support of the application for leave to amend.

[13] The only averments relevant to the application for leave to amend that Mr Hindley made are as follows:

- '7. I was instructed to draft the Defendant's Plea dated 17 May 2022, annexed hereto as annexure "FA2", and mistakenly admitted the contents of paragraphs 5 of the Plaintiff's particulars of claim dated 30 March 2021 annexed hereto as annexure "FA3", and in so doing mistakenly admitted that a collision had occurred between the motor vehicle which the patient

was driving and an unidentified vehicle which is averred to have moved over the solid white line into the lane of travel in which the patient was travelling.

8. Defendant's / Respondent's instructions were to dispute the merits and quantum of the Plaintiff's claim.
9. It is clear from paragraph 4.2 of Defendant's plea that the Defendant considered Plaintiff to be the sole cause of the collision.
10. The admission of paragraph 5 was done in error for which I am responsible; it is in the interest of justice that the application for amendment be granted.
11. I further state that the Road Accident Fund's prospects of success are good if Plaintiff is called upon to prove the merits of her case.
12. I respectfully state that the Road Accident Fund will be severely prejudiced in the event of the application for leave to amend Defendant's plea not being granted.'

[14] The plaintiff opposes the application and maintains the grounds of opposition as outlined above. Additionally, the defendant was criticised for failing to explain the circumstances that led to the alleged error and when Mr Hindley became aware of it. It was also stated that the defendant had received a witness statement indicating that the unidentified motor vehicle crossed the solid white line, and that the defendant had not provided the plaintiff with any evidence to support the new assertion that the Patient's motor vehicle collided, not with another vehicle, but with a wall.

[15] No replying affidavit was filed on behalf of the defendant, and the application for leave to amend was scheduled for hearing on 24 April 2025. The defendant's legal

representatives neither submitted the practice note nor the defendant's heads of argument. This was despite the plaintiff's legal representatives forwarding a draft joint practice note to the defendant's legal representatives for their comments. Even more concerning was Mr Hindley's unexplained absence on 24 April 2025, when the matter was scheduled to be heard.

[16] Rather than proceeding without Mr Hindley, the plaintiff's legal representatives, who were prepared to proceed on the day, chose to have the matter postponed to a date arranged with the defendant's legal representatives. This was to avoid delays that might arise from obtaining a judgment by default, which could be susceptible to rescission. The application was adjourned to 17 June 2025, with costs reserved for later determination. The defendant's legal representatives did not file the defendant's heads of argument, despite this adjournment.

[17] Despite all the apparent shortcomings regarding the application for amendment, it was submitted that the defendant has established a case for the leave to amend to be granted. The contrary was argued on behalf of the plaintiff. Emphasis was placed on the defendant's failure to provide an explanation for the alleged error that led to the admission, which the defendant now seeks to withdraw. It was also argued that the prejudice the plaintiff would suffer if the amendment is granted, is of a nature that cannot be alleviated by a cost order. Particular reference was made to the witness who had provided a statement setting out how the collision occurred and who might no longer be available. This, in circumstances where the version of that witness had been admitted, which dispensed with the need for the plaintiff to ensure the availability of that witness.

[18] Plaintiff referred this Court to the decision of the Constitutional Court in ***Affordable Medicines Trust***¹ where the principles governing the granting or refusal of an amendment are as follows:

¹ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para [9]

'The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Company Limited* and the *Waymark* NO. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be put back for the purposes of justice in the same position as they were then the pleading which it is sought to amend was filed. These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand?

[19] The plaintiff's case, in short, was that the application for amendment was not made in good faith and would cause an injustice to the plaintiff that cannot be put back to the same position the plaintiff was in when the pleading, which it is sought to amend, was filed.

[20] The defendant was warned twice about the basis on which the plaintiff intended to object to the proposed amendment. One would have expected the defendant to address the issues raised by the plaintiff when objecting to the proposed amendment, upfront. However, this was not the case. Instead, the defendant filed a perfunctory affidavit that did not engage at all with the plaintiff's basis of objection. Conclusions were drawn without the necessary factual material on which those conclusions were based. I have reproduced the relevant parts of the affidavit; they speak for themselves, and it is not necessary to repeat them.

[21] One ground of objection suffices to illustrate the point. It is the objection that the amendment sought by the defendant amounted to a withdrawal of an admission, in circumstances where there were no factual or evidential bases justifying such withdrawal. This objection must be considered in light of (a) the admission, in the plea sought to be amended as well as in the compliance certificate, that the unidentified motor vehicle crossed over the solid white line into the path of travel of the patient's

motor vehicle, (b) the indication that the defendant did not intend to call any witnesses, (c) the fact that the plaintiff had provided the defendant with a witness statement confirming the admission that the defendant now sought to withdraw, and (d) the defendant's failure to respond to the allegation that the withdrawal of the admission was not based on any factual or evidential basis.

[22] This is a basis of objection that directly questions the good faith of the defendant in submitting the application for the amendment. The plaintiff's lack of response suggests that the defendant has no valid answer. If the defendant has no valid answer, the relevant question is whether the amendment is sought for the proper ventilation of issues or to exploit the Patient's memory loss, coupled with the possibility that the witness who provided a statement might no longer be available. And if that is the answer to the foregoing in the affirmative, in my view, that would establish both the lack of good faith as well as an injustice to the plaintiff which cannot be put back for the purposes of justice in the same position as the plaintiff was when the plea sought to be amended was filed.

[23] Moreover, despite the courts' permissive attitude towards amending pleadings, there is a view that amending a pleading by withdrawing an admission is somewhat different from other amendments and is more difficult to achieve because it involves a change of stance, requiring a full explanation to persuade the court of the *bona fides* of the party seeking the amendment. As already stated, no explanation has been forthcoming from the defendant.²

[24] Additionally, it is also considered that withdrawing an admission is more likely to prejudice the other party, who has been led by the admission to believe that the fact in question does not need to be proven and may therefore have failed to gather the necessary evidence.³

² Cilliers et al, Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed, 2009, at p683

³ President-Versekeringsmaatskappy Bpk v Moodley 1964 (4) SA 109 (T) at 110H–111A.

[25] To summarise, it was the defendant's responsibility, as the applicant seeking to amend, to provide a proper explanation for withdrawing the admission, and the defendant failed to do so. Despite being informed of the basis of the plaintiff's objections to the amendment, including the injustice the plaintiff would face if the amendment was permitted, the defendant did not address all of the plaintiff's grounds of objection in its application. Consequently, the defendant has not demonstrated its entitlement to the amendment, and the application must be dismissed.

[26] In regard to costs, I am of the opinion that the costs should follow the result. Such costs shall include those incurred due to the postponement of the matter on 24 April 2025, as well as counsel's fees on scale "B".

Order

[27] As a result, the following order shall issue:

The application for leave to amend is refused with costs, including (a) costs incurred due to the postponement of the matter on 24 April 2025, and (b) costs of counsel on scale B.

L G NUKU
JUDGE OF THE HIGH COURT

Appearances

For Applicant/ Defendant:

Mr C I Hindley

Instructed by:

State Attorney, Cape Town

For respondent/ Plaintiff:

Mr C Bisschoff

Instructed by:

Kruger & Co Attorneys, Goodwood