



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

Case No. 11933/2020

In the matter between:

ANTONE PIENAAR (nee` VAN HEERDEN)

First Plaintiff

SCHALK WILLEM PIENAAR

Second Plaintiff

and

LEIGH COWENS

First Defendant

PAM GOLDING PROPERTIES (PTY) LTD

Second Defendant

Coram : Mapoma, AJ

Dates of Hearing: 28 July 2025 (Delivered electrically)

Date of Judgment: 05 August 2025

AMENDED JUDGMENT

MAPOMA, AJ

[1] This is an opposed interlocutory application by the plaintiffs for leave to amend the particulars of claim in terms of Rule 28(4) of the Uniform Rules of the Court. I will refer as a matter of convenience to the applicants and respondents as the plaintiffs and defendants respectively. The second defendant, who is directly affected by the proposed amendment, opposes the application on the basis that the proposed amendment seeks to introduce a new cause of action which would effectively resuscitate a claim that has already become prescribed in terms of section 12(d) of the Prescription Act 68 of 1969 (“the Prescription Act”). The second defendant further contends that the proposed amendment is highly prejudicial to it on various grounds that are to be elaborated further in this judgment.

[2] The first defendant did not oppose the application save to insist on wasted costs against the applicants, occasioned by the postponement of the trial that was set down for 28 to 31 July 2025 due to the interlocutory application before Court.

Background facts

[3] On 28 August 2020, the plaintiffs issued summons against the defendants for delictual damages arising from the alleged latent defects on an immovable property they bought from the first defendant through the marketing of the second defendant as the estate agent. The summons was preceded by the plaintiffs’ letter of demand dated 13 September 2018 from their legal representatives, in which the plaintiffs based their claim against the second defendant on the allegations that the latter committed fraudulent misrepresentation that induced them to purchase a defective property.

[4] In their particulars of claim the plaintiffs based their claim against the second defendant on alleged failure to comply with the provisions of the Consumer Protection Act 68 of 2008 (“the CPA”), contending that the second defendant supplied them with defective goods, thereby holding it jointly and several liable with the first defendant for damages the plaintiff suffered in the form of costs incurred to cure the defects on the property to restore it to a habitable state.

[5] After delivery of the defendants' respective pleas, the pleadings were closed in November 2020. The matter was initially set down for trial on 24 November 2024, but the matter was postponed, and the trial was set down for a 4-days period, namely 28 to 31 July 2025.

[6] On 10 June 2025, the second defendant amended its plea by introducing a special plea, where it challenged the applicability of the CPA to the transaction of sale of immovable property and sought dismissal of the claim against it. On 8 July 2025, the second defendant launched an application in terms of Rule 33(4), wherein it sought separation of issues for trial. Essentially, the second defendant sought an order for the special plea to be determined separately prior to the hearing of the remaining issues on merits.

[7] On 21 July 2025, and in particular four days before the commencement of the trial that was set down for 28 July 2025, the plaintiffs delivered their notice of amendment in terms of Rule 28(1) to amend the particulars of claim. The notice gave the would-be objector 10 days within which to object to the proposed amendment. This meant that the 10 days *dies* would be still running during the days set down for trial and would expire only on 4 August 2025.

[8] In the proposed amendments, the plaintiffs sought to introduce by Claim D, a new delictual claim against the second defendant for damages arising from an alleged fraudulent, alternatively negligent misrepresentation in the sale of the property. On 23 July 2025 the second defendant delivered its notice of objection to the proposed amendment. On 24 July 2024, the plaintiffs launched this interlocutory application in terms of rule 28(4) for leave to amend their particulars of claim and set down the application for hearing 28 July 2025, the date of trial. The matter was then argued full steam before Court on the day of hearing.

[9] The plaintiffs contend that the proposed amendment introduces an essentially new cause of action as a common law claim in the alternative to the claim under the CPA against the second defendant, but the claim or debt is the same. As such, according to the plaintiffs, what is sought to be introduced by amendment is not a new claim. In this regard, the plaintiff buttressed its contention by illustrating that the

quantum of the claim is the same amount of R624 117.88, this being the cost incurred in repairing the property to its liveable state.

[10] The plaintiffs further contend that, whilst the wording in the notice of amendment did not introduce the proposed Claim D as an alternative claim, and did not insert it as an alternative prayer, this was a mere oversight that does not detract from the fact that Claim D is essentially an alternative claim, and as such not a new claim. They further deny that the second defendant stands to be prejudiced by the amendment in that Mr Cowen passed away even before summons were issued and as such the situation will not be changed by the proposed amendment as the plaintiffs contend that the amendment is not *mala fide*.

[11] As mentioned above, the thrust of the second defendant's objection is that the plaintiffs are seeking to introduce a new delictual claim with a fresh cause of action that would resuscitate a claim that had already become prescribed. The defendant's further contention is that the proposed amendment would result in prejudice and injustice against the second defendant, in that the seller of the property, who would be a key witness in respect of Claim D, passed away on 1st January 2018. Further argument is that the plaintiffs had known about the possibility of the new claim as far back as on 13 September 2018 when the plaintiff set it out in their letter of demand but did not pursue it in their particulars of claim. On these bases second defendant submits that the application falls to be dismissed.

Applicable legal principles

[12] It is trite that any party desiring to amend any pleadings may do so at any stage before the judgment, on notice to all the parties of his/her intention to amend the pleadings.¹ Amendment of pleadings is governed by Rule 28 of the Uniform Rules of Court. This rule provides as follows:

“Amendment of Pleadings and Documents:

¹ Rule 28(1) of the Uniform Rules

- (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in sub rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with sub rule (3) is delivered within the period referred to in sub-rule 9(2). The party wishing to amend may, within 10 days, lodge an application for leave to amend.”

[13] The application is an interlocutory application as contemplated in rule 12(11) and need not be brought on notice of motion supported by an affidavit.² However, where there has been delay the applicant must explain the reason for the amendment and show *prima facie*, that it is something deserving consideration as a triable issue.³

[14] The primary object of allowing an amendment is to enable a proper regulation of dispute between the parties to determine the real issues between them so that justice may be done.⁴ Whether to grant or not the application for an amendment is a discretion of the court hearing the application, which discretion must be exercised judicially.⁵

[15] The practical rule is that the amendment will not be allowed if the application to amend is made *mala fide* or if the amendment will cause the other party such

² Van Loggerenberg, Erasmus Superior Court Practice, 2nd Edition, Vol 2, Service 25, 2024, D1 Rule 28-5

³ Erasmus, Vol 2, Service 20, 2022, D1-338, with decided cases cited therein

⁴ Erasmus, Vol 2, Service 25, 2024, D1 Rule 28-5

⁵ Erasmus, Vol 2, Service 25, 2024, D1 Rule 28-5

prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.⁶ The amendment would cause injustice to the other side that cannot be compensated by costs if the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to be amended was filed.⁷

[16] There is no objection in principle if a new cause of action is added by way of amendment even though it has the effect of changing the character of the action and necessitates the opening of the case for fresh evidence to be led.⁸

[17] However, an amendment which introduces a new cause of action will only be allowed if no prejudice will be occasioned thereby. Further, an amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory limitation as to time.⁹

Issues for determination

[18] On a proper conspectus of facts and application of the relevant legal principles outlined above, the view of the Court is that the real issues for determination in this case are whether the proposed amendment seeks to enforce a new claim that resuscitates a claim that had prescribed; and, whether the proposed amendment, if allowed, would result in prejudice and injustice to the other party.

Discussion

[19] In this case it is not in dispute that the amendment seeks to introduce a new cause of action, namely, misrepresentation based on fraudulent non-disclosure. It is also common cause that the claimed amount is the same and is predicated upon the amount of costs incurred by the plaintiffs to remedy the defects on the property. On

⁶ Erasmus, Vol 2, Service 25, 2024, D1 Rule 28-6

⁷ Moolman v Estate Moolman 1927 CPD 27 at 29

⁸ Myes v Abramson 1951(3) SA 438 (C) at 449H – 450A

⁹ Blaauw-berg Meat Wholesalers CC v Anglo Dutch Meat (Exports) Ltd [2004] 1 All SA 129 (SCA) at 133g-134h; and Malinga v Road Accident Fund 2012(5) SA 120 (GNP) at 124C -G

these facts, the plaintiffs submit is that all what they seek to do is to add the admittedly new cause of action as an alternative cause of action to an existing and same claim or debt. As such, so goes the argument, there is nothing impermissible in principle in adding a new cause of action by way of amendment on the same claim or debt.

[20] The defendant submits that the new cause of action is a separate claim from the original claim and is based on the new and different right of action. According to the second defendant, this is not a mere addition to the existing claim, and the notice to amend is at variance to the plaintiffs' contention.

[21] In light of the contrasting contentions, the real issue to determine is whether the proposed amendment seeks to introduce a new cause of action that is predicated on a new right of action or merely introduces fresh and alternative facts supporting the original right of action as set out in the cause of action. In *Sentrachem Ltd v Prinsloo* 1997(2) SA (A) at 15J to 16C, the court held that the true test is whether the plaintiff is still seeking to enforce the same or substantially the same debt or the right of action. The debt or the right of action must at least be discernible from the original summons, so that subsequent amendments would essentially amount to a clarification of the defective or incomplete pleading. Importantly, the amendment cannot introduce a new different right of action alongside the original one.

[22] On the facts, it is clear that the original cause of action was a right of action based on the enforcement of consumer protection rights in terms of the Consumer Protection Act. In my view, the new cause of action that is sought to be introduced by way of amendment in this case, though couched as an addition contended to as "alternative claim" in the notice of amendment, does not say so. It is a different right of action based on material averments of fraudulent misrepresentation which are quite different from the original right of action. This by no means can be viewed as a mere supplement to the original cause of action, for it is a new claim that is based on a distinctly new cause of action that rests on new right of action.

[23] Further, the fundamental principle is that the adding of the new cause of action must be *bona fide* and must not cause prejudice that would result in injustice to the

other party. *In casu*, the plaintiffs instituted action against the second defendant based on the consumer rights set out in the CPA. This action was pursuant to a letter of demand where the plaintiffs asserted, *inter alia*, fraudulent misrepresentation as a cause of action, but chose not to pursue that right of action in their particulars of claim even though they were aware of and asserted it. In my view, the proposed amendment is not made *bona fide*, and for the purposes of justice if the amendment were to be accepted, the parties cannot be put back in the same position as they were when the pleading which is sought to be amended was filed.

[24] Regarding an amendment seeking to introduce a prescribed claim the principle laid down in *Evins v Shield Insurance Company Ltd* 1980 (2) SA 814 (A) 836D-E is that where a plaintiff seeks by way of amendment to augment its claim for damages, the plaintiff would be precluded from doing so by prescription if the new claim is based upon a new right of action and the relevant prescriptive period has run. In this case, the plaintiff seeks to introduce a new cause of action by way of amendment that is premised on a new right of action of fraudulent misrepresentation. This new right of action existed at the time the summons was issued by the plaintiffs in 2018 but was not pursued by them. In *Rustenburg Mines v Industrial Maintenance Painting Services* (448/2007) [2008] ZASCA 108 (23 September 2008) at para 14, the SCA followed the above judgment and stated that “if the new cause of action, ie the material facts which must be proved for the plaintiff to succeed, sought to be introduced by the amendment, gives rise to a different ‘right of action’ or ‘debt’ to the one originally claimed, the plaintiff will be precluded from effecting the amendment if the relevant prescriptive period has run....”

[25] *In casu*, the relevant prescriptive period to the right of action sought to be introduced had run from the time the plaintiff became aware of it and asserted it in its letter of demand in 2018. The cause of action is now prescribed in terms of section 12(d) of the Prescription Act. In the Courts’ view, the plaintiffs are precluded from seeking to augment by amendment their damages claim by a prescribed cause of action. The court is disinclined to allow an amendment that seeks to resuscitate a prescribed claim. It then follows that it cannot be pursued so belatedly.

[26] In conclusion, having considered all the relevant facts in this matter, and the prejudice to be brought to bear against the other party, the court is averse to allow the proposed amendment in this matter.

Costs

[27] The issue of costs in application to amend pleadings is governed by Rule 28(9), which provides that a party giving notice of amendment shall be liable for costs occasioned thereby to the other party, unless the court directs otherwise. This principle applies regardless of the outcome of the application. I do not find any reason why this principle should not apply without exception in this case. The plaintiffs gave notice of their intention to amend the pleadings four days before the date of trial. The intention to amend was met with objection from the second defendant on what I consider to be valid grounds. It follows that the plaintiffs must bear the costs of this application.

[28] Regarding the wasted costs for the postponement of trial, I am mindful of the fact that this interlocutory application, which was set down for hearing on the date of trial, has resulted in the postponement of trial itself in this matter. This brought trial to inevitable postponement. It is inescapable that the plaintiff should bear the costs of postponement of trial.

Order

[29] In the result, the following order is made:

- 1 The application for leave to amend is dismissed.
- 2 The plaintiffs shall pay costs of the application for leave to amend on the High Court Scale B in favour of the second defendant.
- 3 The plaintiffs shall pay the wasted costs occasioned by the postponement of trial on the High Court Scale B in favour of the first defendant and second defendant.

ZL MAPOMA
Acting Judge of the High Court
Western Cape

Appearances:

Counsel for the Plaintiffs : Adv E Auret
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Town

Counsel for the First Defendant : Adv A Newton
Instructed by : Loedolff & Venter Attorneys, Cape Town

Counsel for the Second Defendant : Adv W Jonker
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Town