IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Not reportable

Case no:922/2023

In the matter between:

THANDEKA BOBE Applicant

and

DR J D VAN DER WALT Respondent

Coram: Wessels AJ

Date of hearing: 26 February 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 17 March 2026.

Summary: **Pleading**— Amendment — Application for leave to amend particulars of claim — Changing cause of action from contract to delict — Prescription — Whether amendment introduces new debt.

Prescription — Debt — Contractual claim and delictual claim arising from same factual matrix constitute different debts — Prescription of delictual claim not interrupted by service of process claiming contractual debt.

Held, that a claim based on breach of contract and a claim based on breach of a legal duty are separate causes of action giving rise to different debts. An amendment introducing a delictual claim after the prescriptive period has run will not be allowed where the original summons did not claim payment of that debt.

JUDGMENT

Wessels AJ

Introduction

[1] This is an opposed interlocutory application for leave to amend the applicant's particulars of claim. The applicant, who is the plaintiff in the action, seeks to amend her particulars of claim to change the basis of her claim against the respondent (the defendant in the action) from contract to delict. The respondent opposes the amendment on the ground that it introduces a new cause of action which has prescribed.

Background Facts

[2] The material facts are largely common cause. On 24 April 2023, the applicant instituted action against the respondent by way of a combined summons, claiming damages for medical negligence arising from a breast reduction procedure performed by the respondent on 10 December 2020.

[3] The original particulars of claim alleged, pertinently, as follows:

'5... On or about the 25th of November 2020, the parties entered into a part oral, part written agreement wherein the material express, alternatively implied terms were as follows:

5.1. A breast reduction surgery would be performed on the Plaintiff by the Defendant on the 10th of December 2020.

5.2. An amount of R53 900 in cash would be paid by the Plaintiff for such service.

6.

It was a term of the contract that the Defendant would perform the surgery and any related activities thereto with such professional skill as is reasonable for a Practitioner operating on a patient and a cosmetic surgeon.'

[4] The original pleading then set out extensive allegations of negligence under the heading *'NEGLIGENCE'* and claimed damages in the sum of R852,000.00, comprising past medical expenses, future medical expenses, past loss of earnings, and general damages.

[5] The respondent delivered an exception to the particulars of claim. The exception was premised on the basis that the particulars of the claim failed to set out a cause of action in either contract or delict.

[6] This Court upheld the exception with costs, ordering the applicant to amend her particulars of claim within 15 days. On 5 July 2024, the applicant delivered a notice of intention to amend in terms of Uniform Rule 28(1). The proposed amendment seeks to delete all references to a contractual relationship and instead plead the claim solely on the basis of delict.

Summary of Arguments

[7] The applicant contends that a plaintiff is not precluded by prescription from amending her claim, provided that the debt claimed in the amendment is the same or substantially the same as the debt originally claimed. The applicant relies on the principle that an amendment will be granted unless it is mala fide or prejudicial to the other party. The applicant further argues that the original claim was always for medical negligence and that the same damages are claimed, but that only the legal basis has been clarified by the amendment. On this pretext, the applicant contends that prescription was interrupted by service of the combined summons in April 2023.

[8] The respondent contends that the proposed amendment seeks to introduce a new cause of action, a delictual claim, whereas the original claim was contractual. Counsel for the respondent pointed out that the applicant admitted during the exception proceedings that the applicant's claim was based on contract.

[9] The respondent submits that in paragraph 6 of the proposed amendment, the applicant confirms that the *'debt'* became due on 15 December 2020. In terms of s 11(d) of the Prescription Act[1] a debt prescribes within three years. The delictual claim, introduced only now by way of amendment, would have become prescribed on 15 December 2023 (before the filing of the applicant's notice of intention to amend).

[10] The respondent relies on the test set out in *Sentrachem Ltd v Prinsloo*[2] and contends that a debt premised on a contractual obligation and a debt premised on delictual liability cannot be said to be the same debt. The respondent relies strongly on *Imperial Bank Ltd v Barnard and Others NNO*[3] and the recent Constitutional Court decision in *Rademeyer v Ferreira*[4] to support this proposition. The respondent contends that allowing the amendment would introduce a prescribed claim, which would cause prejudice to the respondent, that costs cannot compensate for.

The Legal Principles

[11] The approach in allowing amendments, as governed by Uniform Rule 28, is trite. In *Imperial Bank Ltd v Barnard and Others* [5], the Supreme Court of Appeal stated:

---

[1] Prescription Act 68 of 1969.
[2] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A).
[3] *Imperial Bank Ltd v Barnard and Others NNO* 2013 (5) SA 612 (SCA).
[4] *Rademeyer v Ferreira* 2025 (2) SA 1 (CC).
[5] *Imperial Bank Ltd v Barnard and Others* NNO 2013 (5) SA 612 (SCA) para 8.

'An application for amendment will always be allowed unless it is made mala fide or would cause prejudice to the other party, which cannot be compensated for by an order for costs or by some other suitable order, such as a postponement.'

[12] However, an amendment will not be allowed where it would cause prejudice to the other party that cannot be compensated by costs. Prejudice in this context includes the deprivation of a good defence, such as prescription. Simpliciter, the relevant portion of the discussion under Rule 28 in Erasmus Superior Court Practice[6] reads:

'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.'

[13] The underlying tension between amendments and prescription was authoritatively dealt with in *Sentrachem Ltd v Prinsloo*[7] wherein the Supreme Court of Appeal ('SCA') set out the applicable test as a comparison between the original claim and the proposed amended claim to determine whether the same right of action, or substantially the same right, is being pursued. The focus is on whether the rights sought to be enforced are the same or substantially the same.

[14] The distinction between a claim in contract and a claim in delict is fundamental. They are separate and distinct causes of action, arising from different legal obligations. In *Lillicrap, Wassenaar and Partners v Pilkington Brothers*[8](SA) (Pty) Ltd 1985 (1) SA 475 (A) the SCA drew the critical distinction between cases based on delict *independently* of the contract (such

---

[6] DE van Loggerenberg Erasmus: *Superior Court Practice* 3rd ed (2025) RS 28, 2025, D1 Rule 28-11.
[7] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) 15J to 16D
[8] *Lillicrap, Wassenaar and Partners v Pilkington Brothers* (SA) (Pty) Ltd 1985 (1) SA 475 (A).

as the duty not to damage property or cause personal injury) and cases where the duty arises *solely* from the contract (such as the duty of a professional to perform with due skill). In the latter category, the court held that no delictual claim lies.

[15] In *CGU Insurance Ltd v Rumdel Construction*,[9] the SCA considered an amendment seeking to change the contract on which the claim was based from one insurance policy to another. The court held that the debt remained the same because the underlying obligation (to indemnify for a specified loss) and the factual basis were unchanged. However, the court was careful to distinguish cases where the amendment sought to change the nature of the legal obligation itself. , the Court quoted[10] with approval from *Evins v Shield Insurance Co Ltd*, where Trollip JA described '*cause of action*' as:

'...the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's 'debt'.'

[16] In *Evins v Shield Insurance Co Ltd*[11] itself, the court had to consider whether a claim for damages for bodily injuries and a claim for loss of support arising from the same event constituted the same debt. The court held that they are separate causes of action[12]. It stated:

'Where a plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the

---

[9] *CGU Insurance Ltd v Rumdel Construction* 2004 (2) SA SA 622 (SCA).
[10] *Op cit* fn9 at 628 B-C.
[11] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A).
[12] *Ibid* 836D–E.

original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages.'

[17] Recently, in *Rademeyer v Ferreira*[13] the Constitutional Court clarified the nature of a debt sounding in damages following the cancellation of a contract. The court held that such a debt is distinct from the original obligation to perform. It found that the right to claim damages arises only upon the cancellation of the contract. Consequently, a judicial interruption of prescription aimed at enforcing the original claim for specific performance does not operate to interrupt the prescription of the subsequent, separate debt for damages. The debt for damages only arises in fact and in law once the election to cancel has become effective.

[18] While the Court in *Rademeyer* dealt with specific performance and damages within the contractual sphere, the reasoning is instructive to the extent that different remedies, even arising from the same contract, can constitute different debts for prescription purposes. In particular, claims arising under different legal foundations, contract and delict, constitute different debts.

Evaluation

[19] The crisp issue for determination is whether the proposed amendment seeks to introduce a new cause of action (a delictual claim) that has prescribed, or whether it merely clarifies the same underlying debt originally claimed.

---

[13] *Rademeyer v Ferreira* 2025 (2) SA 1 (CC) para 92.

[20] The applicant pleaded the existence of an agreement, its terms, and a breach thereof. The fact that the applicant also pleaded negligence does not convert a contractual claim into a delictual claim; it merely pleads the manner of the breach. As was stated in *Lillicrap* [14], contract and delict are separate legal bases for liability.

[21] The proposed amendment seeks to delete all references to the agreement and instead plead a legal duty of care arising *ex lege*. This is a fundamentally different legal basis for liability. In contract, the duty arises from the agreement between the parties as opposed to delict which, as stated in *Minister van Polisie v Ewels*[15], the duty arises from the community's legal convictions and exists independently of any agreement.

[22] The question then is whether this change in legal basis constitutes a new debt for prescription purposes. In my view, it does. The debt in contract is the obligation to pay damages for breach of a voluntarily assumed obligation. The debt in delict is the obligation to pay damages for breach of a duty imposed by law. These are different legal obligations, even though they may arise from the same factual matrix and seek monetary compensation as the same outcome.

[23] In the present case, the delictual debt (the claim damages for breach of a legal duty) became due on 15 December 2020, as pleaded in the proposed amendment. Section 11(d) of the Prescription Act provides that the period of prescription for any debt other than those specified in paragraphs (a), (b), and

---

[14] *Op cit* fn 8.
[15] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596H–597A.

(c) shall be three years. The delictual claim therefore prescribed on 15 December 2023, unless prescription was interrupted.

[24] The applicant argues that prescription was interrupted by the service of the combined summons in April 2023. However, in terms of s 15(1) of the Prescription Act, prescription is interrupted by service on the debtor of any process whereby the creditor claims payment of the debt. It follows logically that the process must claim payment of the debt in question. The combined summons claimed payment of a contractual debt, not a delictual debt. It did not, and could not, interrupt the prescription of a debt that was not claimed.

[25] I am mindful that a court has a discretion whether to grant an amendment, and that this discretion must be exercised judicially. However, where the amendment would clearly introduce a prescribed claim, it would be unjust to allow it.

Order

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

1. The application for leave to amend is dismissed.

2. The applicant is ordered to pay the costs of the application on Scale B.

[redacted]

M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances

For applicant	:Mr SA Mtsweni
Instructed by	:S Tsotetsi Attorneys Inc
	:Middelburg
	:c/o Kgomo Attorneys
	:Mahikeng
For the respondent	:Adv NG Laubscher
Instructed by	:Lourens Bezuidenhout Inc
	:Klerksdorp
	:c/o Smit Neethling
	:Mahikeng