

SOUTH AFRICA / JUDGMENT

Bouwer Collins Insurance Brokers (Pty) Ltd v Hopgood and Another (2012/12) [2014] ZAECPEHC 9 (18 February 2014) [2014] ZAECPEHC 9

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

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CASE / FILE NUMBER

2012/12

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – PORT ELIZABETH

Case No: 2012/12

Date: 18 February 2014

In the matter between

BOUWER COLLINS INSURANCE

BROKERS (PTY) LTD Applicant

and

SANDRA ALICE MARGARET HOPGOOD 1st

Respondent

KEITH BOROUGH HOPGOOD 2nd

Respondent

JUDGMENT

REVELAS J

- [1] There are two applications before me. The first is an application to dismiss an action instituted by the respondents (the plaintiffs) against the present applicant (the defendant), on the grounds that the plaintiffs failed to comply with an order granted by Nepgen J on 7

March 2013. In terms of the order in which an exception raised by the defendant was upheld, the plaintiffs were required to remedy certain deficiencies in their particulars of claim within 15 days. The application was set down to be heard by Chetty J on 6 February 2014, on which day it was postponed for reasons pertaining to Chetty J's. It was health to be heard by me on 11 February 2014.

- [2] The second application was brought by the plaintiffs on 5 February 2014, seeking an extension of the time period stipulated in the order of Nepgen J in terms of Rule 27(1) or (2) of the Uniform Rules of Court and seeking condonation of the plaintiffs' failure to deliver their notice of intention to amend timeously, "upon the basis that the interests of justice so dictate". The plaintiff's application is brought on a day's notice and is in effect an urgent application but the usual condonation

application time periods prescribed by the Uniform Rule 6(12), are not contained in the plaintiffs' notice of motion. It is therefore not properly before me. I considered postponing the matter in order to provide the plaintiffs with an opportunity to seek such condonation, but decided against it. In the circumstances of this case, and the approach I have to the matter, no purpose would be served by a further postponement. I therefore dealt with both applications simultaneously.

- [3] The factual background of the two applications are the following:

On 22 June 2012, the two plaintiffs issued summons out of this court against the defendant, their insurance broker. The plaintiff's

case as pleaded in their summons is briefly that the defendant, without first obtaining their permission, as it was obliged to do in terms of an agreement with them, had cancelled their insurance contract with Mutual and Federal Insurance Company (Mutual and Federal) on 1 April 2000. Subsequently, when their home and all its contents was allegedly destroyed in a fire on 16 June 2009, the claim submitted by them for payment of compensation of their insured loss was rejected by Mutual and Federal on 9 June 2009. The plaintiffs contend in their particulars of claim that had their movable property been insured as agreed upon with the defendant, they would have been paid out an amount of R770 00.00, being the amount for which their property was insured. As a direct result of the defendant's alleged breach of their agreement (by cancelling their insurance policy) the plaintiffs aver that they have suffered damages in the aforesaid sum, which is the sum thus claim from the defendant.

- [4] On 24 July 2012, the defendant served a notice in terms of Rule 23(1) on the plaintiffs, advising that their particulars of claim were vague and embarrassing. Certain complaints pertaining to the plaintiffs' particulars of claim were raised. These were that the plaintiff's particulars of claim did not comply with Uniform Rules 18(6) and 18(10) respectively, because:

[4.1] The document purporting to be the agreement relied upon by the plaintiff was not attached to their particulars of claim (instead a renewal agreement in a letter from their insurer was attached).

[4.2] The plaintiffs did not set out with any particularity which immovable items were destroyed in the fire and what their value was, so that it could be established how the figure of R770 000.00 for damages was computed.

[5] The plaintiffs did not make use of the opportunity provided in the aforesaid notices served on them in terms of Uniform Rule 23(1) to rectify their particulars of claim. The defendant subsequently noted an exception to the plaintiffs particulars of claim contending that the deficiencies in the particulars of claim prevented a proper assessment of the quantum of damages claimed and it was unable to plead to the plaintiffs' claim as it stood.

[6] On 7 March 2013, pursuant to an agreement between the parties, Nepgen J made the order referred to above, upholding the exception and ordering the plaintiffs to remedy the defects in their particulars of claim within the period now sought to be extended by the plaintiffs. Costs were also ordered against the plaintiffs.

[7] Two months later, on 7 May 2013, Mr Somyalo of the defendant's attorneys of record, wrote to the plaintiffs' attorneys and raised the question of the plaintiffs' non-compliance with the court order of 7 March 2013. Two days later the plaintiffs' attorneys sought an indulgence on their clients' behalf, but took no further steps despite being requested to do so.

[8] On 21 October 2013, five months later, the present application was brought to set aside the plaintiff's particulars of claim and to dismiss the plaintiffs' action. In a letter dated 28 October 2013, the plaintiffs sought a postponement of the matter which the defendant refused. The matter was set down to be heard the following day, 29 October 2013. Once again, the plaintiffs' tardiness (their late opposition) was the reason for the matter being postponed to 6 February

2014. Then, only on 5 February 2014, the day prior to the hearing before Chetty J, the plaintiffs filed their application in terms of Uniform Rule 27(1) to extend the time limit set in the order of Nepgen J of 7 March the previous year. The plaintiffs had also filed a notice of intention to amend their particulars of claim on 3 February 2014, in which they introduced a copy of the correct insurance contract. In an earlier notice of intention to amend, dated 24 January 2014, the plaintiffs introduced a list with the items allegedly lost in the fire. Both these notices are very late attempts to comply with the court order granted almost a year ago.

[9] There is no proper explanation as to why the plaintiffs did not apply for an extension to comply with the time periods prescribed in Nepgen J's order, prior to correcting the deficiencies in their particulars of claim by filing the two notices of intention to amend in the piece-meal fashion they did.

- [10] The plaintiffs' delay in virtually every step they took in this matter, if overlooked and condoned, will have the result that the matter will only go to trial almost five years (at the very least) after the event which gave rise to the claim. Even their summons against the defendant was only issued when prescription was looming, almost three years after Mutual and Federal rejected their claim. It should be noted here that litigation emanating from a fire, for obvious reasons, require expedition.
- [11] The plaintiffs explain in their application for the extension of the time limit, that the main delay in complying with the court order in question, was because of "logistical issues", these being "the times and effort from various parties to obtain peruse, verify, collate and itemise the information and documentation required to compile and effect the amendments, which included an inventory of all the possessions in [their] house at the time". An apology regretting the delay is also tendered.
- [12] Here I must make the observation that one would have expected that the aforesaid logistical issues to have been dealt with or their extent realized, when the claim was first lodged in 2009 with Mutual and Federal, or at the very least when summons was issued in 2012. In any event, the "logistical issues" provide no excuse for not seeking an extension for the time period set in the order (bringing an application in terms Uniform of Rule 27(1) much sooner. The plaintiffs and their attorneys must have realized what the extent of the logistical difficulties were long before October last year when the defendant applied to have their claim dismissed.
- [13] It is trite that a party seeking condonation, an indulgence, or an extension of a time period ordered by a court (as in the present case), must satisfy the court that it has a reasonable explanation for failing to comply with the time limits applicable.
- [14] In *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA) it was said that the phrase "if the court is satisfied" in relation to an explanation for not adhering to a time limit, has long been recognised as setting a standard which is not proof on a balance of probability. Heher JA put it thus in para 8 at 316 E-F:
- "Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties".*
- [15] In *Silber v Ozen Wholesalers (PTY) Ltd* 1954 (2) SA Schreiner JA said the following about good cause at 352H-353A:
- "It is enough that for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives".*
- [16] The two main considerations at play in considering whether good cause has been shown in the circumstances referred to above, are the plaintiffs' right to have the merits of their case tried in open court and the defendant's right not to be unduly prejudiced by the delay. In determining the aforesaid, a court must take into account the nature of the relief sought, the

extent and cause for the delay, the prejudice or effect of the delay or on the other litigants and the administration of justice, the reasonableness of the explanation for the delay and prospects of success of the matter. (See: *Brummer v Gorfil Brothers Investments (Pty) (Ltd) and Orthers* [2000] ZACC 3; 2000 (2) SA 837 (CC) at para [3] and *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37 at para [22]).

- [17] The plaintiffs' attorneys of record were at all relevant times fully aware that the plaintiffs were obliged to bring an application to seek an extension of the fifteen day period in terms of Rule 27(1) before remedying the defects in their particulars of claim, to enable the defendant to plead.
- [18] In the matter of *Gift of Dignity Funeral Services CC and Others v Prudence Gillespie*, Case No 1322/2013 dated 13 June 2013 (ECDP) the two plaintiffs, Mr and Mrs Abader, were also represented by the attorney of record for the plaintiffs in the present matter. In the *Gift of Dignity* matter the two plaintiffs had been given leave in a court order dated 13 December 2012, to amend their particulars of claim within one month from date of the order, failing which the defendant was granted leave to bring an application for dismissal of the plaintiffs' claim. On 11 February 2013, two months after the time limit contained in the order had lapsed, the plaintiffs served their notice of intention to amend their particulars of claim on the defendant. The defendant brought a two-fold application before Roberson J, firstly to set aside the plaintiffs' notice of intention to amend their particulars of claim, and secondly, to dismiss the plaintiffs' claim. The plaintiffs' resistance to the defendant's application was based on the argument that a procedural irregularity can be overlooked if the other party was not prejudiced by the irregularity.
- [19] Roberson J at para [4] of her judgment stated that:
- "The difficulty which the plaintiffs face is that they have not applied for an extension of the time limit within to amend their particulars of claim, in which such application they are required to show good cause. In this application they have not even filed an affidavit explaining why the notice of intention to amend was not delivered within the time limit".*
- [20] Roberson J set aside the notice of intention to amend as an irregular step in terms of Uniform Rule 30, but declined to dismiss the plaintiffs' action and granted the plaintiffs an opportunity to explain why the notice of intention to amend was not delivered in time "rather than have the doors close on them" (at para [9]).
- [21] Since the aforesaid judgment of Roberson J was handed down in June 2013, three months after Nepgen J made the order in the present matter, the plaintiffs' attorneys must have been fully appraised of what was required from their clients in the present

matter. They nonetheless brought the application for the extension of time in terms of Rule 27(1), as an urgent application at the eleventh hour, without even seeking condonation for the non-compliance with Rule 6(12). Moreover, the application was only brought after the two notices of intention to amend were served and filed. The Gift of Dignity matter strengthens the overall impression that the attorneys in question have scant regard for the Rules of Court and the orders given by judges.

[22] In *Caledon Street Restaurants CC v Monica D'Aviera* [1998] JOL 1832 (SE) at p 11, a party who brought an urgent application which was argued on the merits was non-suited for not according the other party and its lawyers proper respect by adhering to the time periods stipulated in Uniform Rule 6(12). In the present matter

the plaintiffs, at this late stage, almost a year after Nepgen J's order, bring their application as an urgent one the day before the defendant's application to enforce its rights in terms of that order, without seeking condonation.

[23] The first plaintiff, in her founding affidavit in support of the second application, lauds the plaintiffs for having provided "full and cogent reasons for the delay" in filing their notices to amend and blamed the defendant for causing part of the delay because it did not protest against the inconvenience caused. In my opinion, the reasons in the first plaintiff's founding affidavit are not cogent and the defendant's prejudice in defending a four-year old claim, to which it was not able to plead until now, is evident.

[24] Each plaintiff is *dominis litis* in this matter and it is therefore not open to them to blame the defendant for any part of the delays in this matter. In October last year the plaintiffs were aware that the defendant was bringing the present application, but waited another three months before attempting to comply with the order of Nepgen J. They did so by filing two different notices to amend their particulars of claim without first seeking an extension of the time period stipulated in the order. The plaintiffs' attorneys must have learnt that much from the judgment in the Gift of Dignity case, but rather rested on their laurels until the day before the defendant's application was to be heard on February 2014.

[25] It is also significant that the notices to amend and the (defective) application in terms of Rule 27, were filed on three separate dates in three separate documents which were respectively filed nine, ten and eleven months after the court order which the plaintiffs now attempt to belatedly comply with. The inconvenience caused for both litigants and the court's administrative staff by this protracted and haphazard manner of litigating is obvious.

[26] The first plaintiff submitted in her affidavit that the plaintiffs have good prospects of success. That is not evident from the papers before me. The many consecutive delays and laxity in pursuing their claim suggest the contrary.

[27] Counsel for the plaintiffs referred me to the following words of Scheiner JA in *Trans-African Insurance Co Ltd v Maluleka* 1956

(2) SA 273 (A) 278F-G:

“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits”.

[28] This is not the kind of matter where the defendant’s prejudice can be labelled as purely technical and capable of being addressed by a costs order against the plaintiffs. The plaintiffs dragged their feet at every turn. The need to deal with the matter expeditiously already existed when the summons was issued thirty five months after the alleged cause of action arose and is a factor which compounds the defendant’s prejudice.

[29] Generally, judges are reluctant (as they should be), to close the doors of court to a litigant purely for reasons relating to non-compliance with court procedures. However, if litigants and their attorneys are permitted to litigate in the fashion evidenced in this case, the rulings of judges and the court rules would become superfluous.

[30] In the result I make the following order:

The plaintiffs’ application to extend the time period prescribed in the order of 7 March 2013 dismissed.

The plaintiffs’ claim against the defendant is dismissed.

The plaintiffs are ordered to pay the costs of both applications including (by agreement) the costs occasioned by the postponement of before Chetty J.

E REVELAS

JUDGE OF THE HIGH COURT

Counsel for the applicant: Adv P Marais

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Instructed by: Michael

Randall Attorneys

Date Heard: 13

February 2014

Date of Order: 18

February 2014

Judgment:

20 February 2014

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