

SOUTH AFRICA / JUDGMENT

De Wet v BMW Financial Services (South Africa) (Pty) Ltd (21807/2020) [2024] ZAGPPHC 725 (31 July 2024) [2024] ZAGPPHC 725

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

21807/2020

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO.: 21807/2020

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 31 July 2024

E van der Schyff

In

the matter between:

CHRISTIAAN

RUDOLPH DE WET

APPLICANT

and

BMW

FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LTD

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] On 1 March 2023, Maritz AJ upheld an exception raised against the plaintiff's particulars of claim and set aside the amended particulars of claim. He ordered the respondent, the plaintiff in the action, to file further amended particulars of claim within a period of 20 days from the date of the order. The respondent delivered its amended particulars of claim on 13 April 2023. The applicant filed a Rule 30(2)(b) notice claiming that the delivery of the amended pages is irregular in that the plaintiff failed to deliver, prior to the delivery of the amended pages, its notice of intention to amend containing the particulars of the proposed amendment as contemplated in Rule 28(1). The applicant contends that the filing of the amended papers constitutes an irregular step. The applicant subsequently filed a Rule 30(1) notice, and this application ensued.
- [2] The question before the court is whether the filing of further amended particulars of claim without having followed the process set out in Rule 28 of the Uniform Rules of Court constitutes an irregular step. Counsel for the applicant submitted the issue at hand revolves around the procedure that should be followed when a party is granted leave to amend its pleadings after an exception was upheld. The question is more nuanced and should, contrary to what the applicant's counsel contended, be decided by having regard to the terms of Maritz AJ's order. The terms of the order cannot be ignored or overlooked because it is not favourable to the applicant.
- [3] Maritz AJ's order is clear and unambiguous – 'The plaintiff is afforded a period of 20 (twenty) days from the date of this order within which it may file further amended particulars of claim.' With this order, Maritz AJ granted the plaintiff leave to file amended particulars of claim. There is thus no need for the applicant to apply for leave to file amended particulars of claim, a process that generally commences with a Rule 28(1) notice when a party desires to amend a pleading or document.
- [4] In *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)*[1] Corbett CJ, referred to the invariable practice of our courts to include an order that a party may file amended pleadings within a certain period of time if so advised, after an exception is upheld and a pleading set aside. He explained:
- 'No doubt this was done in anticipation of the possibility that the plaintiff would wish to have leave to amend and in order to obviate the need for a specific application.'

[5] Where an exception is upheld and particulars of claim set aside, the existing particulars of claim are destroyed or erased. To use the words of James JP in *Santam Insurance Co Ltd v Manqele*,^[2] the effect of the order made upon the exception was to leave a summons in existence which was virtually an empty husk, and the court gave the plaintiff leave to fill the husk with amended particulars within a prescribed period. The learned judge continued:^[3]

‘His position was, therefore, substantially the same as that of a plaintiff who had commenced action by the issue of summons and had thereafter filed a declaration which was destroyed through a successful exception to it. In such a case if the plaintiff wishes to proceed he will have to file a new declaration setting out amended particulars of his claim and he will only be able to do so with the consent of the other party or with the leave of the Court. If he fails to obtain the necessary consent or leave, it would seem that the defendant would be entitled to apply for absolution from the instance. See *Berrange v Samuels (II)*, 1938 W. L. D. 189 at

p. 190. In my view the position would have been the same in the present case if the respondent had failed to obtain leave to amend. However, he did obtain such leave.’ (My emphasis.)

[6] The Supreme Court of Appeal explained the ratio of allowing a plaintiff to file amended particulars of claim once an exception is upheld in *Constantaras v BCE Foodservice Equipment (Pty) Ltd*:^[4]

‘Such an exception can never put an end to the dispute if a plaintiff has a viable alternative basis for its claim; even though the original claim is struck down without leave to amend, the plaintiff can always issue a new summons in which the alternative is pleaded. So refusing an amendment is merely a waste of costs.’

[7] Counsel for the applicant referred me to a recent decision by the Kwazulu-Natal High Court, Durban Division in *Pillay v Discovery Health (Pty) Ltd and Another*.^[5] This court is not bound by the decision of the Kwazulu-Natal High Court. However, I considered the judgment. The learned judge in the *Pillay*-matter did not refer to the caselaw I referred to above, or the effect it has when particulars of claim are set aside when an exception is upheld.

[8] In *casu*, an exception was upheld, and the plaintiff was granted leave to file amended particulars of claim within a prescribed period. Where the court has already granted a party leave to amend its pleadings, it does not make sense to require such a party to apply again for permission to amend the pleading in question. If the defendant is of the view that the amended particulars of claim are excipiable, an exception can be raised. If the defendant wants to raise prescription as a defence, nothing prevents it from doing so when pleading to the amended particulars of claim.

- [9] The general principle is that costs follow success. In light of the Pillay-judgment, albeit from another Division, it cannot be said that the applicant was frivolous in bringing this application. A case has not been made out for a punitive costs order to be granted. Having regard to the nature of the application and the complexity of the argument, it is justified that counsel's costs be determined on Scale B.

ORDER

In the result, the following order is granted:

1. The application is dismissed with costs, counsel's costs to be determined on Scale B.

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: Adv. H.P. West Instructed by: Peters Attorneys For the respondent: Adv. S.F. Fisher-Kleyn Instructed by: Velilo Tinto Inc. Date of the hearing: 29 July 2024 Date of judgment: 31 July 2024

[1]

[1993] ZASCA 4; 1993

(2) SA 593 (A) at 602D-E.

[2] 1975

(1) SA 607 (D) 609G-H

[3] 909H-610B.

[4] 2007

(6) SA 338 (SCA) ad para [31].

[5] (8926/2018) [2023 ZAKZDHC 44 (19 July 2023.

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