

SOUTH AFRICA / JUDGMENT

Fourie v Vrystaat Munisipale Pensoenfonds (4184/2019; 879/2019) [2023] ZAFSHC 229 (29 May 2023)

[2023] ZAFSHC 229

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

4184/2019; 879/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No:4184/2019

Case

No: 879/2019

Reportable:

NO

Of

Interest to other Judges: NO

Circulate

to Magistrates: NO

In

the matter between: FRITZ
FOURIE Applicant
and
VRYSTAAT
MUNSIPALE PENSOENFONDS
Respondent
IN

RE: Case No:4184/2019
MALCOLM
NEIL CAMPBELL N.O. 1st
Plaintiff
VRYSTAAT
MUNICIPALE PENSIOENFONDS 2nd
Plaintiff
[Registration
Number: 12[....]2]
And
FRITZ
FOURIE
1st
Defendant
HB
RAUTENBACH 2nd
Defendant
PH
MOTSOENENG 3rd
Defendant
L
RABULANA
4th
Defendant
PW
DE BRUIN 5th
Defendant
R
COETZEE
6th
Defendant
WJ
BOTES
7th
Defendant
ELLOIS
SLABBERT 8th
Defendant
HEARD
ON: 23 MAY 2023

JUDGMENT

BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 16h00 on 29 May 2023.

- [1] The applicant filed an interlocutory application on 23 May 2023 consisting of Parts A and B seeking leave to amend his plea in case number 4184/2019 and urgent interdictory relief for the payment of interest on his pension benefit and the payment of legal costs. Part B was set down for argument on Friday 26 May 2023. The application was postponed to 26 May 2023 after the applicant's argument on Part A was presented with directions that the respondent should file its opposing affidavits by 15h00 on Wednesday, 23 May, and the applicant to file his replying affidavit, if so inclined, by 15h00 on Thursday 24 May 2023. The parties obliged and the respondent filed its written argument titled the respondent's Note on Argument in Interlocutory Application just before the commencement of the hearing.
- [2] At the start of the hearing of the application, Mr Snellenburg, who acted on behalf of the applicant, informed the court that he retracted some of his earlier submissions as it had come to his attention that a similar amendment sought in case number 879/2019, which he thought had been effected, was not effected at all. He sought the same amendment in both cases and launched an application for the substantive amendment in cases 879/2019 and 4184/2019 for the inclusion of the sixth special plea. I shall deal separately with the reliefs sought in Parts A and B.
- [3] The relief sought in Part A reads as follows:

"2. Leave be granted to the applicant to amend his plea (as first defendant) in case number: 4184/2019 by including paragraph 5A after the existing paragraph 5 and before paragraph 6 which reads as follows:

"5A Sixth Special Plea

5A1 The First Plaintiff instituted the action, in his nominal capacity, as Curator of the Second Plaintiff [Die Vrystaatse Munisipale Pensioen Fonds- henceforth referred to as "the Free State Pension" where convenient] by virtue of an appointment purportedly made in terms of section 5(10) of the Financial Institutions (Protection of Funds) Act, Act 28 of 2001 [the Financial Institution Act].

5A.2 The First Plaintiff's appointment provided that he had, amongst others, the following powers and duties:

5A.2.1 Paragraph 14 states that:

“subject to what is stated in paragraph 15, the First Plaintiff is empowered to take control and manage the fund, and any other person- including but not limited to the Board of Management and Officer involved with the fund’s administration, now vested with the management of the business- is hereby divested thereof, subjected to paragraph 15 below”

5A.2.2 Paragraph 14.1 of the Letter of Appointment provides that the First Plaintiff is authorised to take control of, manage and investigate the business and operations of and concerning the Fund, together with all assets and interests relating to the Fund, the authority to be exercised subject to control of the register in accordance with the provisions of section 5(6) of the Financial Institution Act, and with all rights as may be pertaining thereto.

5A.2.3 Paragraph 14.2 provides that First Plaintiff is vested with all executive powers, which ordinarily be vested in, and exercised by, the Board and Principal Officer of the Fund (Second Plaintiff) whether by law or in terms of the Rules of the Fund.

5A.2.4 Paragraph 14.9 provides that the First Plaintiff is permitted to engage, after consultation with the Registrar, such assistance of legal, accounting, administrative or other professional service of a technical nature, as the First plaintiff may reasonably deem necessary for the performance of his duties and to defray reasonable charges and expenses thus incurred from the assets held under control of the Fund.

5A.2.5 Paragraph 14.10 provides that the First Plaintiff is empowered to institute and prosecute any legal proceedings on behalf of the Fund (Second Plaintiff) and to defend any litigation against the fund.

5A.2.6 Paragraph 15 provides that the First Plaintiff’s duties and powers set out in paragraph 14 of the Terms of Appointment are subject to the following:

5A.2.6.1 That notwithstanding the Curatorship, the Board will retain control over [and continue to have all the powers granted to it under the PFA (Pension Fund Act) and its rules] in respect of the following:

5A.2.6.1.1 The High Court litigation presently pending under case number 67954/2015 regarding the validity or otherwise of Regulation 34(4) issued under the PVA, in which application the Registrar is a party; and-

5A.2.6.1.2 The SALGA Nation Treasury Pension Fund rationalization dispute; and-

5A.2.6.1.3 Any alteration or change in the investment of the Fund’s assets, excluding the regular payments of benefits and/or pensions to members and payments to the staff and services providers to the Fund in terms of their respective contracts.

5A.3 The appointment letter is dated 8 September 2017, the action under consideration was issued on/about 22 February 2019.

5A.4 The Second Plaintiff was represented by the First Plaintiff and the action is instituted by the First Plaintiff on behalf of the Second Plaintiff. Its Principal Officer, Board and any other person was effectively divested of control, save for the powers expressly excluded in paragraph 15, which have been dealt with and Curator is the only person who has authority to institute and prosecute an action.

5A.5 The Second Plaintiff did not, nor could it, take any decision to institute and prosecute the action.

5A.6 The Second Plaintiff did not have any locus standi when the action was instituted, and did not, and could not pursue the claim.

5A.7 The First Plaintiff's appointment was withdrawn, and he is no longer capable to pursue the claims.

5A.8 The claims were not prosecuted to finality, by the First Plaintiff, in terms of section 15(2) of the Prescription Act, and as a result, all the claims have prescribed.

5A.9 Alternatively, it is denied that the second plaintiff was validly and lawfully appointed, or could be appointed as independent trustee.

WHEREFORE the First Defendant prays that the Plaintiff's claims be dismissed with costs.

2. Costs pertaining to the application for leave amend only in the event of opposing the application.

3. Further and/or alternative relief."

[4] The respondent opposed the application stating that it was sent to the respondent's attorneys per email at 20h17 on Monday 22 May 2023 and issued on the morning of 23 May 2023 and set down for hearing before the commencement of the consolidated cases which were to commence on the latter day. In the main, the argument was that the urgency on which the applicant relied was self-created and the respondent stood to suffer prejudice as the respondent had not prepared for the trial on the basis that an amendment had been effected in case number 879/2019 as required by the applicable Uniform Rule. Inherent in the amendment, it was contended, was the withdrawal of the admission of the respondent's locus standi as paragraph 4 of the Particulars of claim containing the description of the respondent, was and remained admitted by the applicant.

[5] It is indeed so that a fact that is admitted is eliminated from the issues to be tried and the plaintiff is relieved of the duty of bringing evidence to establish it. [1]The withdrawal of the admission of the respondent's locus standi, it was contended, would cause irreparable prejudice to the respondent since the decision to withdraw Mr Campbell's curatorship was informed at that stage by the admission of the respondent's locus standi. On the contrary, the applicant argued that the termination of the curatorship was that it had come to an end and the curator was duly relieved of his duties as evidenced by the correspondence to that effect.

- [6] Uniform Rule 28 regulates the amendments of pleadings and documents. Rule 28(10) provides that the court may, notwithstanding anything to the contrary in this rule, at any stage before judgment, grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit. In *Moolman v Estate Moolman*,^[2] it was stated that:

“[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.”

- [7] Where a party would be no worse off if the amendment were granted with a suitable order as to costs than if his adversary’s application or summons were dismissed unamended and proceedings were commenced afresh, there is no prejudice in granting the amendment: the mere loss of the opportunity of gaining time is not in law prejudice or injustice^[3].

- [8] In *Vinpro NPC v President of the Republic of South Africa and Others*,^[4] the full bench of the Western Cape Court summarised the principles relating to amendments as follows:

“[25] On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously,

some reason must be given for the delay: that that party seeking the amendment must show prima facie that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause of an injustice to the other side which cannot be compensated by costs: that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application.”

- [9] A court is not obliged to consider prejudice to the other side where an amendment to a pleading retracting an incorrectly admitted legal consequence is being sought, for only the law would be prejudiced if cases were to be decided on what parties might in ignorance have agreed the law to be. The discretion of the court to relieve a party from the consequences of an admission made in error in a pleading should not be exercised in any other way than by granting an amendment of that pleading.

- [10] In *POTTERS MILL INVESTMENTS 14 (PTY) LTD v ABE SWERSKY & ASSOCIATES AND OTHERS*^[5] it was held that “A court was not obliged to consider prejudice to the other side where an amendment retracting an incorrectly admitted legal consequence was being sought, for only the law would be prejudiced if cases were to be decided on what parties might in ignorance have agreed the law to be.”

- [11] The applicant has to prove that he did not delay the application after he became aware of the material upon which he proposes to rely. He must explain the reason for the amendment and show prima facie that he has something deserving of consideration: a triable issue. Three cases are currently pending between the parties under case numbers 879/2019, 8414/2019 and 2972/2019. The first two have been consolidated and were set down for hearing on 23 May 2023. The third was set down for trial on 11 April 2023 but had to be postponed to October 2023 as the applicant filed an intention to amend two days before the start of the trial. That amendment sought to introduce the same special plea as is sought in the present cases. The tardiness on the papers is inescapable but the delay in bringing forward an amendment is, in itself, in the absence of prejudice, no ground for refusing an amendment. In the absence of prejudice to the other party, leave to amend may be granted at any stage, however careless the mistake or omission may have been, and however late the application for amendment may be.[6]
- [12] Having looked at the long history of the “thrust and parry” between the parties in the various cases, I find that the applicant does have a triable issue which is deserved of consideration and full ventilation. The respondent sought the dismissal of the application with a punitive costs order. The applicant conceded that he was liable for the payment of the wasted costs brought about by the late filling of the application.
- [13] The relief sought in Part B reads as follows:
- “1. Condonation be granted for non-compliance with process, form and time periods for service, insofar as relevant.*
2. The respondent immediately makes payment to the applicant, in casu, of the monthly interest earned on the investment of the applicant’s pension benefit, the amount of such investment being R 19, 739, 733.41, at the Money Market rate of return applicable to the relevant Money Market account, maintained by the Fund’s administrators from time to time for purpose of holding the investment of the applicant’s pension benefit, for the months of November 2022, December 2022, January 2023, February 2023, March 2023, April 2023.
 3. In the event of the respondent failing or refusing to immediately make payment of the amounts in terms of paragraph 2 above, the trial stands down until payment of the aforesaid amounts have been made.
 4. The respondent be ordered to pay the aforesaid monthly interest in terms of the court order punctually to the applicant.
 5. That the respondent pays the applicant’s legal costs (as first defendant) until date, upon presentation of the invoices by my legal practitioners in terms of the decision of the executive committee of the respondent, taken on 28 February 2017, and specifically item 2 thereof as well as such fees and expenses as may become payable in future with regards to the proceedings.

6. Costs regarding the relief for payment of the monthly interests, such costs to include the costs occasioned by the employment of 2 counsel.
 7. Further and/or alternative relief.”
- [14] The question that arises in this Part is whether the applicant should have approached the court in the manner that he did. Mr Joubert, on behalf of the respondent, did not think so and contended that the applicant had ample time and opportunity to pursue by other means the two reliefs sought in this Part. The applicant’s reliance on the resolution that his legal fees were to be paid by the respondent, he argued, had long been rescinded by the curator on assuming his duties, a fact of which the applicant was fully aware.
- [15] The claim for the pension interest is ensconced in the agreement between the parties which was made an order of the court on 06 February 2020. The order provided that the payment of any pension benefits to which the applicant was entitled, was suspended pending the final determination of the actions instituted by the respondents under case numbers 879/2019, 2927/2019 and 4184/2019. The amount of R 2 000 000.00, which included all interest on the investment of the applicant’s pension benefit from December 2018 until 31 January 2020 was paid to the applicant. The monthly interest on the investment of the applicant’s pension benefit was payable monthly in arrears. These monthly payments were effected until 7 December 2022 when the respondent began to set off the monthly interest payments against the taxed bill of costs in the amount of R 667 000.00 incurred in case number 879/2019. According to the respondent, the remainder of the monthly interest in the amount R 62 593.31 was paid to the applicant on 07 May 2023.
- [16] According to the respondent, the applicant was invited on 11 October 2022 and November 2022 to effect payment in respect of the taxed bill of costs but to no avail. On 13 December 2022, the applicant’s attorneys requested payment of the monthly interest for the month of December from the respondent’s attorneys. On 14 December 2022 a demand was made to the respondent’s attorneys to pay the monthly interest failing which a warrant of execution would be issued.
- [17] The applicant stated that the service of the warrant of execution was a futile exercise as the respondent was no longer at its Kroonstad offices. The forwarding address that was furnished by the respondent’s employee yielded no results with the consequence that the applicant had no other remedy but to approach the court in the manner that he did. The respondent stated in its affidavit that the warrant which was issued on 20 January 2023 could not be served on 20 April 2023 due to the respondent’s service address not being in the jurisdiction of the sheriff of the court. Since 20 April 2023, the applicant did nothing to pursue obvious, quick, and cost-effective recourse such as sending to warrant to the respondent’s legal representative despite being invited to do so.
- [18] The respondent contended that the substantial redress available to the applicant since 07 December 2022 included:

- (i) Writing to the respondent to demand payment;
 - (ii) Serving a writ of execution on the respondent's legal representatives, as requested; and
 - (iii) Instituting urgent mandatory relief to compel the respondent to pay his monthly interest.
- The applicant failed to do so.

[19] The applicant's urgency was self-created as he was aware that he would not be receiving the monthly interest as early as 11 October 2022 and the set off against his monthly interest payment commenced as early as 07 December 2022. Since these dates, the applicant had in his position all of the necessary information and documents to institute proceedings to enforce the payment of the interest claim. Instead, he only launched this application on an urgent basis on the eve of the hearing of this matter.

[20] The difficulty that the applicant has in this application is urgency. During argument, when this question was posed to Mr Snellenburg, the latter's response was that the urgency lay in the ongoing wrong of the monthly payments not being paid to the respondent. Looking at the facts of this case and the applicant's own version, any urgency in the matter is entirely self-created. Since December 2022, the applicant knew about the payments which were withheld and the half-hearted attempts at the execution of the warrant are not convincing. The applicant failed to show the urgency which would entitle him to the relief sought in the application on an urgent basis. This part of the application must fail.

[22] It is trite that the successful party is entitled to an order for costs.

[23] Accordingly, I make the following orders:

Order:

1. Part A

1.1 The applicant (as the defendant) is hereby granted leave to amend the pleas in accordance with the notice given by him on 22 May 2023.

1.2 The applicant is to pay the respondent's wasted costs which shall include the employment of two counsel.

2. Part B

The urgent application contained in Part B is struck from the roll with costs for lack of urgency.

MHLAMBI, J

On behalf of the Applicant: Adv N Snellenbug SC,

Adv Van Rensburg/ Adv L Moeng

Instructed by: EG

Cooper Majiedt

77 Kellner Street

Westdene

Bloemfontein

On behalf of the respondent: Adv. DC Joubert SC, Adv N Mauritz

Instructed by: Symington

& De Kok Attorneys

169B Nelson Mandela Drive

BLOEMFONTEIN

[1] Erasmus: Superior Court Practice: RS 20, 2022, D1-331.

[2] 1927 CPD 27 at 29.

[3] Erasmus: Superior Court Practice: RS 20, D1-332.

[4] (1741/2021)

[2021] ZAWCHC 261 (3 December 2021); Nala Local Municipality v LFC Meule (Pty) Ltd
(Unreported, FB Case No 617/2018 dated 14 March 2022.

[5] 2016

(5) SA 202 (WCC)

[6] Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty)
Ltd and another 1967 (3) SA 632 (D).

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