

SOUTH AFRICA / JUDGMENT

Instant Life (Pty) Ltd and Others v Tshukudu (5512/2018) [2024] ZAGPPHC 448 (2 May 2024)

[2024] ZAGPPHC 448

COURT

North Gauteng High Court, Pretoria

BEFORE

Chabedi

CASE / FILE NUMBER

5512/2018

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case number: 5512/2018

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE: 2 May 2024

SIGNATURE

In the matter between:

INSTANT LIFE (PTY)

LTD

First applicant

GUARDRISK

LIFE

Second applicant

GUARDRISK INSURANCE

COMPANY LIMITED

Third applicant

and

MELLICENT THANDIWE

TSHUKUDU

Respondent

In re
MELLICENT THANDIWE
TSHUKUDU
Plaintiff
INSTANT LIFE (PTY)
LTD
First defendant
GUARDRISK
LIFE
Second defendant
GUARDRISK INSURANCE
COMPANY LIMITED
Third defendant

JUDGMENT

Chabedi AJ

Introduction

- [1] This is an application in terms of rule 30(1) for an order to set aside the filing of amended particulars of claim dated 3 June 2021 delivered by the respondent in terms of rule 28(7) of the uniform rules.
- [2] The history of this case is important. For purposes of this judgment, I will refer to the parties as cited by the applicant in this application as the issue whether the second and the third applicant are parties to the main action is still subject to debate.

Background

- [3] On 25 January 2018 the respondent instituted action against the first applicant in which she claimed certain insurance benefits (the “main action”). The second and the third applicant were not cited
- [5] On 4 May 2018 the first applicant filed an exception to the respondent’s particulars of claim on the basis that the particulars of claim cited the first applicant as the insurer whereas the contract attached reveals that the third applicant is the insurer, therefore the particulars of claim did not disclose a proper cause of action. On 31 October 2018 Baqwa J upheld the first applicant’s exception, struck out the respondent’s particulars of claim, and ordered the respondent to amend her particulars of claim within fifteen (15) days of the order.
- [6] On 3 November 2018 the respondent filed a notice of intention to amend her particulars of claim in terms of rule 28(1) of the uniform rules. The proposed amendment was effectively the rephrasing of the entire claim and in addition, sought to join the second and the third defendant to the main action. It is this amendment that is the subject matter of dispute in this application.

- [7] On 30 November 2018 the second and third applicants, respectively, filed separate notices in terms of rule 28(3) objecting to the proposed amendment on the basis, among others, that if allowed, the amendments would render the particulars of claim excipiable. The second and third applicants also filed separate notices in terms of rule 30(2)(b) complaining that the proposed amendments seek to introduce causes of action against them, under circumstances where they have not been joined as parties to the main action thereby circumventing compliance with the provisions of rule 10. The second and third applicants also complained that the proposed amendment sought to enforce a debt and consequently interrupting prescription against them jointly and severally, without compliance with the requirements for the commencement and service of process, and thus, the interruption of prescription.
- [8] On 6 December 2018 the respondent delivered an application for leave to amend her particulars of claim in terms of rule 28(4). On 13 June 2019 the first applicant brought an application for an order in terms of which judgment is entered in its favour and the main action is dismissed on the basis that the respondent has as at that date failed to enrol her application for leave to amend, the amendments were therefore not effected and as a result there was no claim against the first applicant. The respondent opposed the application to dismiss the main action.
- [9] The respondent's application for leave to amend in terms of rule 28(4) and the first applicant's application to dismiss the main action were heard simultaneously before Skosana AJ. On 13 May 2021 the following order was granted by Skosana AJ:
- "1. The application for amendment in terms of rule 28(4) is dismissed.*
2. The applicant may amend its particulars of claims within 15 days of this order.
 3. The application to dismiss the applicant's main claim is dismissed.
 4. There is no order as to costs."

The notice in terms of rule 28(7)

- [10] On 3 June 2021 the respondent filed a notice entitled "notice of amendment in terms of rule 28(7)".
- [11] This application is to set aside the rule 28(7) notice on the basis, among others, that it does not comply with the rules of Court because leave to amend was never granted and therefore the respondent is not entitled to effect the amendments. The same complaint regarding the attempted joinder of the second and third respondent is repeated here. The application is brought jointly by the first, second and third applicants.

[12] The respondent filed a notice opposing the application and argued that she does not agree with the applicants' interpretation of Skosana AJ's order of 13 May 2021 in that by serving the amendment in terms of rule 28(7) the respondent was in fact acting in terms of order 2 thereof which reads "the applicant may amend its particulars of claim within 15 days of this order", which is what the respondent seeks to do.

[13] The introductory part of the purported rule 28(7) notice reads as follows:

"KINDLY TAKE NOTICE THAT the plaintiff having obtained leave from the above honourable court on 13 May 2021, hereby amends her particulars of claim dated 25 January 2018 by substituting same with the following particulars of claim:"

[14] The respondent also argues that if it was the court's intention for the amendment to be effected otherwise than through rule 28(7), the court would have specifically spelled this out. As support for its contention that leave was indeed granted, the respondent states that paragraph 14 of the judgment specifically gives the respondent, in the interest of justice, leave to add the second and third applicants through the amendment where a basis is laid for including them.

[15] It is important to point out that Skosana AJ's judgment dealt with two applications, one, by the respondent for leave to amend her particulars of claim (which at the time had been struck by the order of Baqwa J) in the respects proposed in the respondent's notice of intention to amend of 3 November 2018; and the other, by the first applicant to dismiss that claim and enter judgment in its favour. The issue in the application for dismissal was whether the respondent was entitled to a further opportunity to amend its particulars of claim, given that the number of days within which she was ordered by Baqwa J to do so have lapsed.

[16] I quote the excerpts of the Skosana AJ's judgment relevant to this application:

"[13] [...] It follows therefore that the only sensible interpretation of that order is that the applicant was granted an opportunity to deliver the notice of intention to amend within 15 days of the order."

[14] Furthermore, when regard is had to the interchangeable manner in which the first and second respondents are mentioned in the written insurance agreement, it becomes clear that substitution could be effected by adding the second respondent through the amendment. I do not mention the third respondent because there is no basis laid for including it. This however fortifies my view that the defects in the particulars of claim may still be cured and it is the interest of justice that the applicant be granted that the applicant be granted an opportunity to do so, in a new proposed amendment."

[17] The respondent's argument is confronted with some difficulties. First, the order by Skosana AJ of 13 May 2021 did not grant the respondent leave to amend her particulars of claim. The order dismissed the respondent's application for leave to amend her particulars of claim.

[18] Second, paragraph 14 of Skosana AJ's judgment does not mention, or grant, any leave to amend the particulars of claim in order to achieve the substitution of any party. Paragraph 14 patently postulates that such substitution may be possible through an amendment if, as stated in the quoted excerpt of paragraph [13] of the judgment, a notice to amend is delivered by the respondent. The respondent admittedly did not deliver any notice of intention to amend following the judgment.

[19] Third, the proposed amendments in the rule 28(7) are not verbatim those contained in the notice of intention to amend of 3 November

2018. Sentences or phrases have been added to some of the originally proposed paragraphs; whole new paragraphs have been inserted and paragraphs have been generally renumbered. Therefore, even if the respondent believed that the order of 13 May 2021 granted her leave to amend, what is proposed in the rule 28(7) notice cannot be the amendments the court allowed.

[20] The respondent's interpretation is belied by her own conduct and therefore cannot be accepted. The filing of the rule 28(7) notice was clearly not to enforce the amendments in respect of which she believed leave was granted, but a clear intention to correct what Skosana AJ found to be problematic with the proposed amendments in the notice of 3 November

2018. The argument that the rule 28(7) notice is with leave of court fails on this basis alone.

Order 2 of Skosana AJ's judgment

[21] To the extent that it is still necessary, the question that remains to be answered is what does order 2 of Skosana AJ's judgment, namely "the applicant may amend its particulars of claims within 15 days of this order" mean.

[22] In the matter of Natal Joint Municipal Pension Fund v Endumeni Municipality 2012

(4) SA 593 (SCA) the set out the following principles of interpretation of documents:

"[18] Over the last century there have been significant developments in the law. Relating to the interpretation of documents, both in this country and in others that follow similar rules to our own... the relevant authorities are collected and summarized in Bastian Financial Services (Pty) Limited v General Hendric Schoeman Primary School. The present state of the law can be expressed as follows:

interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regards to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent pathos to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors the process

is objective, not subjective.”

[23] In the case of *Eke v Parsons* 2016 (3) SA 37 (CC) (p.50B-C) the court restated the principles established by our courts relating to the interpretation of court orders, that:

“[29] [...] Here is the well-established test on the interpretation of court orders:

‘The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.’

[24] Rule 28 provides for amendments to pleadings and documents and states that:

“(1) Any party desiring to amend any 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 subrule (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 subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
- (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.
- (7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- (8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.
- (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

- (10) 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.”
- [25] It is clear from the above that rule 28 provides a step by step procedure how pleadings and documents are to be amended. In this regard Erasmus: Superior Court Practice commentary (at RS 22, 2023, D1 Rule 28-1) states that:
- “This rule makes provision for the following distinct situations*
- (a) the amendment of any pleading or document other than a sworn statement filed in connection with any proceedings consequent upon a party who intends such pleading or document having given notice of such intention to amend (subrules (1) to (9));
 - (b) the court, other than in circumstances contemplated in subrules (1) to (9), at any stage before judgment granting leave to amend any pleading or document (subrule (10)).”
- [26] Therefore, amendments may only be achieved through a notice process initiated by the intention of a party to do so in terms of sub-rules
- (1) and (2), subject to the objection procedures in sub-rules (3) and (4), or no objection in sub-rule (5), following which the amendment may be effected as contemplated in sub-rules (6) and (7). Sub-rules (9) and
 - (8) are subject to the procedures in sub-rules
 - (1) to (7).
- [27] It is not in dispute that the judgment of Skosana AJ followed the procedure initiated by the respondent in terms of sub-rule (1), to which the applicant objected. The application for leave to amend following the objection was dismissed. The fact that the basis for the contended amendments as argued by the respondent is that leave was granted makes the issues in this case firmly within the procedures in sub-rules (1) to (9). Sub-rule (10) finds no application and the interpretation of order 2 therefore should have no regard to the provisions of this subsection.
- [28] Having dismissed the respondent’s application for leave to appeal, I agree with the submissions made by Mr Boot SC on behalf of the applicants that order 2 must be interpreted in the context of the judgment itself, in particular paragraph [14] thereof, and I would venture, also the last part of paragraph [13] on which the conclusions in paragraph [14] were based.
- [29] The language used by Skosana AJ is simple. Having recognised that Baqwa J granted the respondent an opportunity to deliver the notice of intention to amend within 15 days of the order, he then went on to state that a substitution of parties could be effected by adding the second respondent through the amendment. He then opined that there was no basis laid for including the third applicant. This is significant because the proposed amendments which

are supposedly with leave of this judgment, also purport to join third applicant. That being said, Skosana AJ went on to state in this regard that this latter aspect fortifies his view that the defects in the particulars of claim may still be cured, and it was in the interest of justice that the applicant be granted an opportunity to do so, in a new proposed amendment.

- [30] A “new proposed amendment” is a fairly unambiguous phrase and in the context of the judgment, not capable of any other construction. It fits in with the order then subsequently granted, which is that the applicant may amend its particulars of claim within 15 days of this order. This order is worded in the same terms as the order of Baqwa J of 3 October 2018.
- [31] The only manner in which a party seeking to amend its pleadings is by giving notice of its intention to do so and particularise such proposed amendments, so the other party may object, if so minded, and the court may exercise its discretion whether or not to allow the amendments. This is what the respondent did following the Baqwa J order. It makes no sense why the respondent now seeks to put a different interpretation to the Skosana AJ’s order.
- [32] Rule 28(7) provides that “unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form”. Erasmus in his commentary (at RS 22, 2023, DA Rule 28- 21) provides guidance as to what it is meant by a party may be entitled to amend. In this regard the Commentary states that a party is entitled to amend (i) by reason of no objection being raised to his proposed amendment (subrule (5)), or – in the event of an objection and the court having exercised its discretion thereto
- (ii) by an order of court authorizing the amendment (subrule (6)).
- [33] The respondent’s purported notice in terms of rule 28(7) dated 3 June 2021 therefore does not comply with the rules. As stated above, the purported notice fails at its own construction because it purports to have been filed with the leave of court, which is incorrect because as a matter of fact, leave to amend was never granted by the court.
- [34] The respondent’s notice in terms of rule 28(7), including the purported joinder in that notice of the second and third applicants, does not comply with the rules of court and therefore constitutes an irregular step and must be set aside.
- [35] The issues whether the respondent, in that notice, was entitled to (i) join or substitute parties, (ii) raise a new cause of action and (iii) whether prescription, if it has occurred, has been interrupted, do not arise at this stage as these are issues that implicate the merits of the proposed amendments and thus the court’s discretion whether or not they may be allowed. In light of the fact that the notice itself is irregular, it is not necessary to pronounce on these issues.

Conclusion

[36] The respondent's particulars of claim were struck out by the order of Baqwa J and therefore, there are no particulars of claim. The clear misreading by the respondent of the Skosana AJ judgment and order means the respondent has not meaningfully engaged herself with the difficulties in the manner in which her claim was pleaded and the parties therein were cited. I deem it reasonable and to be in the interest of justice to allow the respondent a further opportunity to follow proper procedure in terms of the rules and propose amendments should it still be so minded.

[37] If the respondent does not amend her particulars of claim, in light of the fact that Baqwa J's order has already struck out the particulars of claim, in my view there is no justifiable reason for the applicant to bring another application to motivate for the dismissal of the claim. I also take into account the prejudice suffered by the applicants in opposing each of the above irregular procedures and the length of time it has taken to do, three years later, with the matter not having advanced beyond the summons which were issued six years ago. In my view therefore, the applicants are in addition entitled to recover the costs of this application.

[38] In the premises, I make the following order:

1. The application in terms of rule 30(1) is granted.
2. The respondent's notice in terms of rule 28(7), including the notice to join the second and third applicants, constitutes an irregular step and is set aside.
3. The respondent is ordered to file a notice of intention to amend her particulars of claim in terms of rule 28(1) within fifteen
(15) days of this order, failing which the respondent's claim is dismissed, with costs.
4. The respondent is ordered to pay the costs of this application on a party and party scale, including the costs for the employment of senior counsel.

MPD Chabedi

Acting Judge of the High Court

Gauteng Division, Pretoria

APPEARANCES

For the applicant: Adv B Boot SC Clyde & Co Inc For the applicant: Adv I Kealotswe-Matlou Victor Mabe Inc Date of hearing: 1 February 2024 Date of Judgment: 2 May 2024

This judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by email to the attorneys of record of the parties. The date of the delivery of the judgment is deemed to be 2 May 2024.

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