

SOUTH AFRICA / JUDGMENT

Ngqeleni v Outsurance (Pty) Ltd (933/2022) [2023] ZAECELLC 9 (4 May 2023) [2023] ZAECELLC 9

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

933/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, EAST LONDON CIRCUIT COURT)****CASE****NO. 933/2022****NOT****REPORTABLE****In****the matter between:**

MBUYISELI

NGQELENI

Applicant/Plaintiff

and

OUTSURANCE

(PTY) LTD (SIC)

Respondent/Defendant

JUDGMENT

IN RESPECT OF INTERLOCUTORY APPLICATION

FOR LEAVE TO AMEND

HARTLE J

[1] The defendant objected to the plaintiff's proposed notice of intention to amend in which he seeks the leave of this court to delete the word "OUTSURANCE" where it appears "in" the face of the summons and to replace it with the moniker "OUTsurance Insurance Company Limited with Registration Number 1[...]"

[2] He further wishes in the paragraph below, also "in" the face of the summons, to record the following description of the

entity he alleges he contracted with for purposes of placing short term insurance and who is at the receiving end of his claim for breach of contract in the main action:

"INFORM OUTsurance Company Limited, an insurance company with Registration Numbers 1[...] an insurance company registered in terms of the insurance and company laws of the Republic of South Africa with its registerd office at number 1[...] E[...] Rd, Zwartkop Extention [...], Centurion in the Gauteng Province and carrying on business at JRE House, C[...] Main Road 1[...] Avenue, Walmer, Gqeberha in the Eastern Cape Province." (Sic)[1]

[3] In similar vein he wishes to replace the wrong name of the entity allegedly liable to him for damages with the correct appellation where it is referred to in paragraph 2 of his particulars of claim and to add the same description that pertains on the face of

the summons in order to properly describe the entity being sued, as follows:

"The Defendant is OUTsurance Company Limited, an insurance company with Registration Numbers 1[...] an insurance company registered in terms of the insurance and company laws of the Republic of South Africa with its registerd office at number 1[...] E[...] Rd, Zwartkop Extention [...], Centurion in the Gauteng Province and carrying on business at JRE House, C[...] Main Road 1[...] Avenue, Walmer, Gqeberha in the Eastern Cape Province." (Sic)

[4] The appellation of the entity in the plaintiff's unamended pleadings is "OUTSURANCE (Pty) Ltd" loosely described on the face of the summons and in the existing particulars of claim as "an insurance company incorporated in terms of the

insurance and company laws of the Republic of South Africa" of the same addresses as referred to in the hoped for amendment, which could be a reference to both a public or a private company.

[5] As a starting point to ascertain where the plaintiff is headed with his process, one needs to consider his present pleadings (in unamended form) in their proper context. The crux of his claim is that he entered into a short-term insurance contract with

the cited defendant acting as “an insurance company” to indemnify him in respect of certain defined events. An event

contemplated in the policy insured against occurred, but the defendant failed to compensate him in terms thereof. He alleges that

this refusal constitutes a breach of contract and claims damages for the breach.

[6] The policy document itself that is attached to the plaintiff’s particulars of claim in its preface describes the policy as including the policy document together with a schedule, any written correspondence and verbal agreements which it states forms the basis of the contract between him as “the policyholder” and “us”, but the “us” is nowhere described therein. Indeed one has to read the covering letter, summary of the policy, and the defendant’s statutory Disclosure Notice to Policyholders, to gain an understanding of who the “OUTsurance” is whose logo is reflected on the face of the personal policy document and who claims to be the accredited entity doing business with the plaintiff, at least as is reflected in the documentation.

[7] That it is a licenced insurer and financial services provider, and what its registration particulars are, are only read in the ancillary documentation. It is also relevant to mention that the plaintiff in his particulars of claim relates about the entity it seeks to hold responsible that the contract it concluded was with an insurer that he contracted with over the telephone.

[8] All of this is relevant to point out that the plaintiff in my view intended to cite the entity with whom he contracted as a registered insurance provider but got the appellation wrong, more so in the heading, causing this whole unfortunate fiasco.

[9] Shortly after the summons was served on “OUTsurance” at its address in Gqeberha, Messrs Van Breda & Herbst Inc., attorneys of Pretoria, filed a notice of intention to defend on behalf of “the Defendant”, recording the latter’s address as being at 1[...] E[...] Rd, S[...], Centurion, Gauteng. This address corresponds to Outsurance’s official address referred to in its Disclosure Notice alluded to above.

[10] What followed next was an exception filed by “the defendant” in which it levelled numerous objections against the plaintiff’s summons and particulars of claim. As the plaintiff astutely observes in the present application, the defendant would have no interest in raising these concerns, except in the person of Outsurance Insurance Company Limited.

[11] It is perhaps apposite to set out in full it's specific complaint in the exception regarding the issue of the appellation and description of the defendant as it bears upon the present application:

“2. The plaintiff has instituted action against a non-existent entity, alternatively instituted action against the incorrect Defendant,

based on the following:

2.1 In the header of the Summons and Particulars of Claim the Defendant is cited as “OUTSURANCE (Pty) Ltd”.

2.2 On the face of the Summons and in paragraph 2 of the Particulars of Claim the Defendant is cited as:

“Outsurance, an insurance company incorporated in terms of the insurance and company law of the Republic of South Africa [...].”

2.3 In the footer of the Particulars of Claim, same is addressed to “Outsurance”.

2.4 It is unclear whether the action is instituted against “Outsurance” or “Outsurance (Pty) Ltd.”

2.5 In addition and notwithstanding the above, the Companies and Intellectual Property Commission has records of the following companies which contain the words “Outsurance” in their names, but does not have record of any registered entity as cited by the plaintiff:

2.5.1 Outsurance Holdings Limited (1[...]);

2.5.2 Outsurance Insurance Company Limited (1[...]);

2.5.3 Outsurance International Holdings (Pty) Ltd (2[...]);

2.5.4 Outsurance Life Insurance Company Limited (2[...]);

2.5.5 Outsurance Properties (Pty) Ltd (2[...]);

2.5.6 Outsurance Shared Services (Pty) Ltd (2[...]).

2.6 The Plaintiff has instituted action against one of two entities- being “Outsurance (Pty) Ltd” or “Outsurance”- but not one such entity exists. In the alternative and in the event that one or both such entities exist, the Summons was served on the incorrect entity which has no nexus with the plaintiff.

2.7 The plaintiff cannot sue and obtain judgement against a non-existent, alternatively incorrect entity.

2.8 If it was the intention of the Plaintiff to join any of the entities as listed in paragraphs 2.5.1. to 2.5.6. above, then the Plaintiff must institute new proceedings against such entity or amend its papers in this action to reflect the correct defendant, as allowed for by law.

2.9 In the premise, the Plaintiffs allegations are insufficient to sustain a cause of action and are too vague and embarrassing and lacks sufficient particularity to enable the defendant to reply thereto.”

- [12] Prompted by the defendant's exception, the plaintiff says he filed the proposed notice of intention to amend as referred to above to "provide a consistent reference to the defendant" he had in mind, and indeed to clarify which of the listed companies in paragraph 2.5 of its exception he is in fact suing. There is no question that it is the second one listed in sub-paragraph 2.5, which has a clear and in my view obvious nexus to the plaintiff.
- [13] This was however met with an objection by the defendant going to both process and effect. From the point of view of process the defendant complained that the proposed amendment is tantamount to an irregular step. In its opinion the plaintiff seeks to circumvent the provisions of uniform Rule 10 and 41 respectively: the first rule because he purports by the proposed amendment to substitute the defendant with another party which it says cannot be countenanced under the auspices of rule 28,[2] and under the latter rule because the plaintiff ought to be, so it suggests, withdrawing the current action against the defendant as originally named and described, and instituting a fresh action against the "new" defendant.
- [14] As for the perceived prejudicial effect, the defendant submits in its notice of objection that the proposed amendment, if allowed, would render the summons and particulars of claim vague and embarrassing because the defendant's identity "will remain uncertain". In this regard the defendant recorded that:
- "2.1 The Defendant is cited as "OUTSURANCE (PTY) LTD" in header of the Summons and Particulars of Claim, which citation indicates that the defendant is a private company.*
- 2.2 The Plaintiff is not of the intention to amend the headers, but only intends amending the Defendant's citation on the face of the Summons and Particular of Claim to that of a public company.
- 2.3 In the event the Plaintiff's intended amendment succeeds, the Defendant will be cited in the headers as a private company, but in the body it will be cited as a public company.
- 2.4 The aforesaid will result in the Summons and Particulars of Claim being excipiable due to it being vague and embarrassing."
- [15] The plaintiff missed the defendant's slight directed at him about the disconnect between the headers and the intended allegation that the company he maintains is liable is a public company, but still the underlying objection to the effect that a non-existing or incorrect party had been sued loomed large and the plaintiff was thus obliged to bring the present application.[3]
- [16] The defendant heralded in its notice of intention to oppose that it intended to raise points of law at the hearing of the matter, this despite its elaborate premise for the supposed prejudice occasioned to it that would require some explanation on affidavit in my view, especially concerning which company is concerned with what business under its group, all obviously using the same essential moniker of "Outsurance".

[17] Be that as it may, in heads of argument filed on its behalf, its attorneys repeated their contention that their client would suffer

severe prejudice if the amendment were to be permitted, given that the plaintiff had purportedly sued the wrong party. According

to them the plaintiff could not succeed in his endeavour to amend as the current appealation could not be deemed a mere “misnomer”

of OUTsurance Insurance Company Ltd.[4]

[18] Ironically it was not disclosed from whose point of departure the objections to the original amendments were being raised, but if one reads the paragraph under the defendant’s heads of argument dealing with prejudice, it is clear that it is OUTsurance Insurance Company Limited whose prejudice is contended for on the back of the primary premise that the non-existing or wrong party was instead served. This is self-evident from the submission that:

“It is respectfully submitted that Outsurance Insurance Company Limited will be prejudiced by the amendment, as it will become a party to an action without proper service of a Summons and without any knowledge of the litigation history. Such prejudice cannot be cured by an appropriate costs order and offends procedural justice.”[5]

[19] When the matter was called Mr. Kemp placed on record that he was appearing on behalf of the wrong party, namely the imagined private company, despite the suggestion that such a party does not exist. I found this confusing especially having regard to the defendant’s submission in paragraph 11 of its heads of argument that:

“The contention of a misnomer can only succeed if the intended party was either Outsurance Properties (Pty) Limited or Outsurance Shared Services (Pty) Ltd, as the latter are the same type of entity as the cited Respondent, to wit, a private company and their names are strikingly similar.”

(Emphasis added.)

[20] Mr. Kemp was certain that it was “Outsurance (Pty) Ltd”, whose interests he intended to assert before me, which is neither one of the two private companies referenced in paragraph 11 of the defendant’s heads of argument. He further purported to persuade the court that it was this party that would be (or had been) prejudiced and that the proper course of action would have been for the plaintiff to withdraw the action against his client, that is the wrong entity, and to tender its costs.

[21] To my mind the objection to the proposed amendment is nothing more than an opportunistic attempt to frustrate the plaintiff’s claim and should not be countenanced. What appears is that OUTsurance Insurance Company Limited has been spearheading the opposition to the present application under the guise of one or other of Outsurance’s similar monikers (or in between the two private companies forming part of its group) as suits its convenience and changing the basis for its objection as the tide goes.

[22] This is however a classic case of a misnomer due to less than fastidious pleading, which to my mind must be corrected to do proper justice between the parties.

[23] In my opinion the proposed amendment causes Outsurance Insurance Company Limited no prejudice. The company was served, and although the header may have momentarily occasioned some doubt as to which “Outsurance” the action is concerned with, any person reading the particulars of claim in context would have understood exactly who the real McCoy is. Further and in any event, the absence in the unamended particulars of claim of a reference one way or the other to a public or a private company was not going to deflect attention away from the fact that the plaintiff clearly on the face of it contracted for his insurance

requirements with Outsurance Insurance Company Limited and intended to cite it as the responsible defendant in the main action.

[24] Even though the plaintiff should have taken more care when drafting his founding pleadings, the objection by the defendant to the proposed amendment was entirely unnecessary and in my view a waste of this court’s resources as well. I am therefore inclined to make a punitive costs award against Outsurance Insurance Company Limited to mark this court’s displeasure at the manner in which it has conducted itself in the proceedings.

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

1. The plaintiff is granted leave to amend his particulars of claim on the basis proposed in his notice of intention to amend dated 7 June 2022, provided that the obvious grammatical, typographical and punctuation errors must be properly reflected in the pleadings as finally amended.
2. Every reference in the pleadings to the “defendant” henceforth shall be a reference to OUTsurance Insurance Company Limited with Registration Number 1[...].
3. OUTsurance Insurance Company Limited with Registration Number 1[...] is liable to pay the costs of the application on the scale of attorney and client.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF APPLICATION: 26 April 2023

DATE OF JUDGMENT : 4 May 2023

Appearances:

For the Plaintiff/Applicant: Ms Zito instructed by Mgweshe Ngqeleni Inc. East London (ref. Mr. Ngqeleni) For the Defendant/Respondent: Mr. L Kemp of Van Breda & Van Herbst Inc. c/o Andre Schoombee Attorneys, East London (ref. Mr. Kemp)

[1] The plaintiff has not been fastidious in amending. I have reflected above the proposed amendment exactly as it was framed in his notice of intention to amend. In the header even, a reader is referred to his “NOTICE OF INTENTION TO AMMEND”

(sic). Careful punctuation and attention to detail, especially for a litigant on the back foot trying to amend, should not be

compromised. One would have expected the plaintiff to be more careful the second time around. He ought to have been aware as well that the biggest sting concerned his mistaken labelling of the defendant as a private company, yet he only asked for the appellation “OUTSURANCE” to be substituted on the face of the summons.

[2] Instead, so says the defendant, he has to follow the procedure provided for in rule 10 to join another defendant to the action.

[3] This again goes to the sloppiness with which the notice of intention to amend was prepared. To my mind it is obvious that an amendment of a name must be carried through on all the pleadings. It hardly needs asking for, in my view, but a litigant already on the back foot with an opponent taking a technical objection needs to be especially vigilant when he is trying to make a clean sweep of his mess.

[4] A court would be more inclined to grant an amendment which seeks to correct a misnomer, than in a case where it seeks to introduce a new party. *Devonia Shipping Ltd v MV Luis* (Yeoman Shipping Co Ltd intervening) 1994

(2) SA 363 (C).

[5] At par 13 of the defendant’s heads of argument.

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