

SOUTH AFRICA / JUDGMENT

Nkosi v Sanlam Indie (4925/2023)

[2024] ZAMPMHC 45 (20 August 2024)

[2024] ZAMPMHC 45**COURT**

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

4925/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION (MIDDELBURG LOCAL SEAT)****CASE NO: 4925/2023****(1) REPORTABLE: YES/NO****(2) OF INTEREST TO OTHER JUDGES:****NO****(3) REVISED****DATE:** 20/8/2024**SIGNATURE:** In

the matter between: GODFREY
NKOSI
PLAINTIFF
And
SANLAM
INDIE
DEFENDANT

JUDGMENT**LANGA J:****Introduction and Concise Facts**

- [1] This is an application for summary judgment by Mr Nkosi, who is in person, against the Defendant/Respondent, Sanlam. The claim is based on an insurance policy concluded by the Plaintiff with Sanlam. In the action, the Plaintiff avers that he has suffered an occupational disability which is covered by the Policy. In the summary judgment the Plaintiff prays for an order that the Respondent pays the Plaintiff R714 609.60 together with interest, security for costs in the amount of R300 000,00 as well as costs on attorney and client scale. I will refer to the parties as Applicant and Respondent cited in the summary judgment application.
- [2] It is common cause that the Applicant and the Respondent concluded an agreement in respect of a Total Disability Insurance Cover. In the summons the Applicant avers that at the time he applied for the cover he was involved in construction work. He then suffered crippling joint pains and swollen lump on his groin in late 2022. He was diagnosed with “myalgia” and “arthralgia” and was booked off by his doctor. In January 2023 he was diagnosed with “hernias” and “osteoarthritis”. As result he lodges a claim for occupational disability which had led to loss of income.
- [3] He further avers in the summons that the Respondent rejected his claim and directed that he should wait for at least 6 months in order to determine if the condition was permanent. He further confirms that the Respondent referred him to a specialist whereafter he consulted an orthopaedic surgeon, pathologist and a radiologist who all confirmed his diagnosis. He further consulted an Occupational Therapist at the instance of the Respondent and the Occupational Therapist concluded that he will not be able to cope with construction work. He further alleged that his premiums on the cover are up to date and that he qualifies for the payment of R600 000.00 for occupational disability.
- [4] In its plea, the Respondent has essentially raised two defences to the action. The first is that the Applicant does not have a cause of action under the Policy since his claim has been made prematurely. The Respondent therefore pleaded that at this stage no permanent and irreversible disability condition can be accepted as having been proven by the Applicant as required by the Policy based on the information furnished by the Applicant. On this basis the Respondent denies that the Applicant has proven that this claim under the Policy is covered by its terms therefore denies that he has a cause of action as pleaded.

- [5] The second is that that in light of an annexure attached to the Applicant's particulars of claim, the Applicant may have made false and/or incorrect representations when answering health questions, when he applied for and concluded the Policy with Sanlam. The Respondent therefore pleads that if the falsity and/or incorrectness of the representation is established, it would be of such a nature that it would not have issued the policy to the Applicant and would instead have declined the application for disability cover.
- [6] The Respondent therefore argues that from a cursory reading of the particulars of claim, plea and affidavit in support of summary judgment, it is evident that there are numerous disputes about these issues between the parties. The Respondent therefore contends that it has demonstrated two bona fide defences, which if proved at trial would absolve it of liability under the Policy. It therefore contends that in light of these disputed issues, it is appropriate that these issues and defences be determined at trial.
- [7] In addition the Respondent argues that it has not yet rejected the claim and will review the claim after a period of 6 to 12 months once the Applicant has gone through maximum medical improvement, and that the review of the claim will only be considered with an updated medical report by a treating specialist with confirmation of the diagnosis, radiology and treatment. The Respondent argues therefore that the action proceedings and consequently, the application for summary judgment are premature.
- [8] The Respondent further raises procedural objections to the summary judgment application. It states inter alia that in the summary judgment application the Applicant traverses even matters which are not pleaded in his cause of action and also seeks relief in his affidavit summary judgment which is not prayed for or pleaded in his particulars of claim, and which does not fall within the scope of Rule 32(1).
- [9] In addition it argues that the Applicant also seeks an order for a different amount and interest rate than what is claimed in his particulars. The Respondent further avers that the Applicant has misunderstood the policy's projected increases of cover and also chosen the wrong projected year. It argued therefore that on the basis of the above, the summary judgment should be dismissed.

Discussion and Analysis

- [10] It is well established principle that if a plaintiff is entitled to summary judgement, it can only be in respect of claims pleaded in their summons and particulars of claim, and only when the defendant is unable to demonstrate a bona fide defence to the action. I will first deal with the procedural objections raised by the Respondent and thereafter the question of whether the Respondent has raised bona fide defence.

Procedural Objections

- [11] On the procedural front the Respondent contends first that the Applicant introduced a new cause of action in the summary judgment application which is not pleaded in the summons. The Respondent further avers that in the summary judgment the Respondent claims payment of a new and different amount and interest.

New cause of action

- [12] It is trite that a plaintiff seeking summary judgment is confined to the claim pleaded in their particulars of claim or declaration as well as the relief sought in the prayers. It is clear from the papers as well as his heads of argument and submissions in court that the Applicant has irregularly sought to advance a further cause of action and seek new relief in his summary judgment application.
- [13] For instance of his supporting affidavit he avers that the parties entered into a “settlement agreement” in proceedings before the Respondent’s internal Ombud and Arbitrator and prays for the “Enforcement of contract and settlement agreement before Ombudsmen and Arbitrator.”
- [14] It is however clear that the particulars of claim are not premised on a cause of action of enforcing an alleged settlement agreement between the parties. Although mention is made of a settlement in paragraph 29 of the particulars of claim it is however not alleged that this is the cause of action. However, in the summary judgment affidavit this is advanced as a separate cause of action which is not alleged in the summons. Furthermore, no prayer is sought in particulars of claim to enforce said settlement agreement now relied upon by the Applicant. It is trite that a party cannot obtain relief in a summary

judgment

application which he does not claim in his combined summons.

- [15] In addition, the enforcement of a settlement agreement is not one of the categories of instances contemplated by Rule 32 for purposes of obtaining summary judgment. The rule provides as follows:

“The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only –

- (a) on a liquid document;
 - (b) for a liquidated amount;
 - (c) for delivery of specified movable property; or
 - (d) For ejectment;
- together with costs”.

[16] The above categories do not include the enforcement of a settlement agreement. Thus, even if the Applicant was able to prove the settlement agreement and had pleaded it in the summons, such however does not fall under the ambit of the rule and therefore cannot be claimed under summary judgment. This is therefore also irregular and impermissible. In any event the settlement agreement is denied by the Respondent and there is no proof thereof provided by the Applicant.

Different amount and interest rate claimed in the summary judgment

[17] Concerning this objection it is apparent from the Particulars of Claim that the Applicant asks for payment of R 600 000. However, in his summary judgment application he is asking for R 714 509.60 which he apparently bases on the projection of cover contained in the Policy.

[18] It is impermissible and irregular for a party apply for summary judgment beyond and above that which is contained in the Particulars of Claim. Without the amendment of the Particulars of Claim, the Applicant is not entitled to claim the amount now claimed in the summary judgment. He also seeks a different rate of interest in his summary judgment application without explanation. This too is irregular and impermissible and, on the basis, thereof alone, the summary judgment application ought to be dismissed.

Whether the Respondent has raised bona fide defences

[19] One of the defences relied upon by the Respondent is that although the claim is based on the Applicant's alleged disability, the Applicant has failed to establish a permanent and irreversible disability condition. The defence is essentially that the Applicant has not at this stage provided evidence to demonstrate that his claim is covered by the Policy. The Respondent pleads in particular that the Applicant has not shown in terms of the Policy that he is totally, permanently and continuously unable to fulfil the occupational demands of this occupation that he engaged in for income immediately before the occupational disability.

[20] In paragraph 7.3 of its plea the Respondent pleaded that the terms of the Policy provide as follows:

20.1. That the disability benefit may be claimed if Mr Nkosi becomes disabled to the extent that he is totally, permanently and continuously unable to fulfil the occupational demands of the occupation that he engaged in for the income before the occupational disability;

20.2. That it will not admit a claim if the disability can be substantially removed or improved by surgery or other medical treatment which Sanlam can reasonably expect Mr Nkosi to undergo, taking into account the risks involved and the chances of success of such surgery or treatment; and

20.3. That Sanlam will admit a claim only if Sanlam is satisfied that various conditions are met including that:

(a) claim meets the description and requirement of the claim event;

- (b) Sanlam received all information it may reasonably require;
 - (c) all aspects of the claim are proved by medical and other evidence that Sanlam may reasonably require, the cost of which Mr Nkosi will be responsible.
- [21] Furthermore, in paragraph 7.4, 7.5 and 7.6 of its plea the Respondent pleads inter alia that it had not rejected the Applicants claim but advised him that no permanent and irreversible disability condition can be accepted as being proven with the information furnished by him so far. In addition, he was informed that the Respondent can only review his claim after a period of 6 (six) to 12 (twelve) months from the date of the aforesaid letter, once the Applicant undergone maximum

medical improvement, and that the review of the claim will only be considered with an updated medical report by a treating specialist

with confirmation of diagnosis, radiology and treatment. It is therefore clear that should the Respondent establish this defence on trial, it will constitute a complete defence to the cause of action as the Applicant only has cover that is provided for in the Policy. I am therefore satisfied that this constitutes a bona fide defence.

Representations made by the Applicant

- [22] The Respondent's second defence is that the representations made by the Applicant when taking out the Policy are either false or incorrect. In essence the Respondent avers that one of the documents relied on by the Applicant may be evidence of him making a false or incorrect representation about his health when taking out the Policy, which would entitle the Respondent to repudiate the Policy.
- [23] The Respondent pleaded in this respect that the Applicant answered all of the questions relating to his state of health in the negative, and thus represented to the Respondent that he was in good health. In particular that he indicated he had not suffered any injury to a joint or arthritis of joints.
- [24] The Respondent further pleaded that if the representations were known to be false to the Applicant and if he was suffering from multiple joint pains for the period of six months prior to 5 January 2023, as stated in a medical report by Dr MG Masemola dated 24 July 2023, then the falsity and/or incorrectness of the representations, if established, is of such a nature that it would have materially affected the assessment of the risk which the Respondent accepted under the Policy at the

time of its issue, or it was likely to have materially affected the assessment of the risk under the insurance policy. Further, the Respondent would not have issued the policy to the Applicant and would instead have declined the application for disability cover.

- [25] It is common cause that in his answers to health questions in support of his application for insurance cover, the Applicant warranted the completeness and correctness thereof relating to the assessment of the risk under the Policy. As the Respondent is entitled to accept and

rely on the correctness of the information provided by the Applicant, it is clear that should the warranty be breached by the Applicant, the Respondent would be entitled to repudiate the insurance policy in question which will mean that the Applicant would forfeit all monies payable in terms of said policy

- [26] It is important to mention that according to Dr Masemola's report, although the Applicant was diagnosed and referred to him on the 5th of January 2023 by a general practitioner with problem of polyarthrititis, he, however, experienced multiple joint pain 6 months prior to the referral. The Respondent therefore contends that as the representations were made on 26 September 2022 as appears from page 36 of the Policy, the Applicant's representations would have been materially false and incorrect.
- [27] It is clear from paragraph 27(e) of the summary judgment application that the Applicant suggests that the Respondent misinterpreted Dr Masemola report. There is clearly a dispute of fact on this issue. These issues clearly cannot be decided on the pleadings and affidavits in summary judgment proceedings and further evidence in a trial is therefore necessary.

Conclusion

- [28] In the light of the above I am satisfied that the application for summary judgment is not only premature, but it is also irregular. Contrary to the Applicant's contention he has "an unimpeachable case", it is clear on the merits that the Respondent has established more than one bona fide defences. Further, procedurally, the application is fatally defective for the reasons mentioned above. Consequently, the application for summary judgment should be dismissed, with costs.

Order

- [29] In the result I make the following order:

1. The application for summary judgment is dismissed with costs including the costs attendant to the employment of counsel on attorney and client scale.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Mr G Nkosi in person For the Respondent: Advocate S Mathiba Date heard: 26 July 2024 Date delivered: 20 August 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 20 August 2024 at 15h40.

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