

SOUTH AFRICA / JUDGMENT

Panagiotopoulos v Liberty Group Ltd (3955/2011) [2014] ZAGPPHC 229 (25 April 2014) [2014] ZAGPPHC 229

COURT

North Gauteng High Court, Pretoria

BEFORE

Mali

CASE / FILE NUMBER

3955/2011

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 3955/2011

DATE OF HEARING: 10 FEBRUARY 2014

DELIVERED: 25/4/2014

In the matter between:

NICHOLAS PANAGIOTOPOULOS APPLICANT

and

LIBERTY GROUP LIMITED RESPONDENT

J U D G M E N T

MALI, AJ

INTRODUCTION

- [1] This is an application to compel the respondent to provide further and better particulars in response to the applicant's request for further particulars for the purposes of trial.
- [2] The respondent is an insurance company which formerly employed the applicant as an insurance broker whose remuneration was in the form of commission.

BACKGROUND

[3] In the main action, the respondent (plaintiff) instituted action against the applicant (defendant) for payment of the sum of R249, 736,05 in respect of inter alia:

3.1 advances in respect of commissions, alternatively;

3.2 commissions paid in respect of contracts which were changed, surrendered, cancelled, made paid up, lapsed or went out of force subsequent to such payments.

[4] The essence of the respondent's claim is found in paragraphs 8.1, 8.2 and paragraph 9 of its particulars of claim. Paragraphs 8.1, 8.2 and 9 of the respondent's particulars of claim articulates the crux of the claim as follows:

"8. During the period for which the agreement was in force:

8.1. In accordance with its obligations aforesaid, the Plaintiff made payment of commissions to the Defendant and the Defendant accepted such payments.

8.2 Certain commissions paid as aforesaid were in respect of inter alia advances in respect of Commissions to be paid, premiums unpaid and/or premiums returned to policyholders and commissions paid in respect of Contracts which were changed, surrendered, cancelled, made paid up or lapsed or went out of force subsequent to such payment.

In accordance with the provisions of the Agreement, the Plaintiff is entitled to reclaim all monies comprising inter alia advances in respect of Commissions to be paid alternatively commissions paid in respect of Contracts which were changed, surrendered, cancelled, made paid -up or lapsed or went out of force subsequent to such payments."

[5] The applicant in its heads of arguments makes the following submissions:

5.1 Commissions paid:

Detail of commissions paid to the defendant which would form the subject-matter of claw back claimed by the plaintiff which detail is to include the date of payment, the amount of each payment and the detail of the policyholder and the commencement date of each policy;

5.2 Detail with reference to the allegation of "commissions paid as aforesaid" detailing the basis for the payment of commission

aforesaid to include:

5.3 whether it relates to advances in respect of commissions to be paid, premiums unpaid, premiums returned to policyholders; and

5.4 whether or not commission payments were in respect of contracts that were changed, surrendered, cancelled , were made paid up and/or lapsed;

5.5 Claw backs:

Details of the name of the policyholder, policy number, date, amount of advances, details of when unpaid premiums returned, the date on which the premium was paid and the date upon which the premium was returned and the same in respect of a changed contract, a surrendered contract, a cancelled contract, a paid up contract, a lapsed contract or a contract that went out of force;

5.6 Detail of how the amount reclaimed is made up consisting inter alia of advances, change contracts, surrendered contracts, cancelled contracts, contracts made paid , contracts that lapsed or contracts

that went out of force with details in respect of the policy the policyholder, the commencement date of the policy and whether the policy was terminated.

ARGUMENTS

[6] The respondent in its heads of arguments submits that in respect of paragraph 8.1, “the payments referred to in paragraph 8.1 were made while the agreement was in force and the defendant is referred to the bundles annexed being the Plaintiff’s summary of transactions 2003-2012 and Policies details – NR Panagiotopoulos 2003-2012 (“The plaintiff’s Summary of Transactions 2003-2012 and Policy Detail 2003- 2012”

[7] The Respondent submits further in respect of 8.2 and 9 that “Insofar as the defendant is entitled to the information sought, the defendant is referred to the plaintiff’s summary of Transactions

2003-2012 and Policy Detail- N R Panagiotopoulos 2003-2012 which was served upon the defendant’s attorney of record on 9 May 2012.The further information requested constitute a matter for evidence to which the defendant is not entitled”.

[8] It became apparent during the hearing that all the particulars required by the applicant are to be found in the respondent’s summary of Transactions 2003-2012 and Policy Detail 2003-2012 consisting of 673 (six hundred and seventy three) pages.

[9] The respondent’s answering affidavit was deposed to by its attorney of record, Mr Christie. The respondent in his answering affidavit stated that the applicant is a duly qualified Insurance Intermediary with noteworthy industry experience and therefore it is not prudent for the applicant to describe the information supplied by the respondent as “a voluminous, indecipherable document”.

[10] In the main the respondent submitted in its papers that the applicant is in possession of the information sought in its request for further particulars.

[11] The applicant in his response to the above submits that he was contractually bound to delete all the information relating to the

respondent’s business upon termination of the contract in 2009. The respondent does not dispute the submission.

- [12] The applicant contends that the respondent's particulars are not informative enough and the commission statements provided by the respondent are of no assistance as they comprise of repetitive entries which require clarity. In a nutshell the particulars further provided by the respondent did not inform the applicant with greater precision what the respondent sought to prove in order for the defendant to prepare his case. It is because of the above reasons that the applicant launched this application.
- [13] The applicant submits that the respondent did not provide the applicant with the schedule of commission, an agreement governing the payment of commission, which is crucial in assisting the applicant to plead and adequately prepare for the trial. The applicant's counsel further argues that it is not clear in the absence of the schedule of commission whether the commission is calculated over a two year period or not.
- [14] The essence of the applicant's submission is the request for clear particulars in respect of the exact policies which lapsed, changed, reduced and which policies were taken over by another broker or were taken over by Discovery. Furthermore in respect of the commission statements the respondent discovered statements for the period of 16 June 2009 to 24 August 2009, a period after the termination of the agreement. The agreement was terminated in June 2009.
- [15] Counsel for the applicant further submitted that it was not clear how the claw backs were calculated. The applicant contends that the respondent's attorney of record, Mr Christie is neither a broker nor someone who worked in the insurance industry. The applicant further contends that Mr Christie is acting on hearsay evidence and is misguided when he directs the applicant to a summary of schedule referred to as "a complete set of documents". Mr Christie in the answering affidavit went as far as to say "I do not deal with the basis of such claw back and refer the honourable court to the Respondent's summons and particulars of claim in which the cause of action is detailed."
- [16] The applicant's counsel also submitted that the contents of paragraphs 27 to 29 of the answering affidavit do not make sense and or assist the applicant to plead. He made an example that the claw backs referred to are for the periods 2007 and 2008 and that the applicant left the employ of the respondent in 2009. From the ensuing paragraphs it is not clear why the commission is being clawed back. He further submitted that the onus is on the respondent to show what was clawed back.
- [17] The applicant's counsel submitted further that the respondent realised that Mr Christie, the attorney for the respondent and the deponent to the answering affidavit was ignorant of the correct facts hence the respondent later filed a supplementary affidavit on 20 January 2014.

[18] He further submitted that on 20 January 2014 the respondent discovered further documents in excess of 1000 (one thousand) pages. These documents are in addition to all the information necessary to prepare for the trial and a complete bundle of Commission statements referred to in the answering affidavit.

[19] The applicant submits that the supplementary discovery by the respondent still does not provide a schedule of commission, a crucial

contractual document in this matter. In respect of the request for particularity on commission to be repaid based on claw backs, the respondent raised the defence of privacy and or confidentiality between the respondent and its clients. In response thereof, the applicant contends that public privilege or privacy is not found in common law. Having regard to the facts of this matter, this court does not understand how the policies which were written by the applicant are now subject of litigation and all of a sudden become confidential.

[20] During the hearing the respondent repeatedly submitted that it did not matter for the applicant to obtain further and better particulars of the formulation of the claims. The reason advanced by the respondent is that the information required by the applicant is for evidentiary purposes. I find this response reckless. This is so considering that the respondent has pleaded its claims on the same particulars which the applicant is called upon to answer in his defence.

[21] The respondent's counsel sought to demonstrate the ease of obtaining the requested information by the applicant. This was done by taking the court through the bundle marked annexure C and other corresponding documents consisting of between 673 (six hundred and seventy three) pages and 1000 (one thousand) pages. In order for the court to get the detail of each and every transaction as requested by the applicant; this court had to hold three separate pages at the same time trying to link the transactions to the entries in the previous pages and or subsequent pages. In the process this court found that commission payments in respect of contract that were changed, surrendered, cancelled, were made paid up and/or and lapsed were all identified by the minus signs next to the name of the policyholder, date amount, etc. without specifically referring to a category of transaction.

[22] The respondent's counsel confirmed my findings above. Of importance is that different categories of commission payments which are claimed by the plaintiff are all identified by the minus sign and nothing else. To the above, he submitted that the applicant is an expert and is not supposed to find any difficulty in identifying commission payments.

[23] As indicated above, the bundle contains commission statements with entries showing dates, names of policyholders, amounts and some

minus signs with no clear explanation on what is meant by the minus signs or exactly to which category the transaction falls. The

respondent when probed by this court indicated that minus signs also related to reversed policies, a concept which the applicant should easily understand as he is an industry expert and furthermore that some of the policies he wrote for himself were reversed. Based on his experience as an industry expert who has written policies before, he should be in a position to reconcile (my emphasis) and understand the particulars of claim.

- [24] During the hearing the respondent's counsel repeatedly emphasised that the applicant is an expert who understands the insurance industry and could therefore easily reconcile and decipher the information irrespective of the volumes.
- [25] The respondent's counsel admitted to the voluminous nature of the document save to say that the particulars are not indecipherable as the document clearly shows month by month, week by week transactions. The respondent argues that the applicant should know because he took policies for himself which lapsed and hence he could have used those policies as examples to get to his answers. Furthermore his experience in the insurance industry puts him in a better position to understand the documentation.
- [26] The respondent's counsel further submitted that a careful reading of the policy details supplied will indicate if there is a reversal. It will indicate whether the policy has lapsed. If there is no reversal, the policy remains in existence or at least exists longer than the two year period and in respect of which nothing is claimed.
- [27] I find the respondent's argument wanting and not assisting the defendant at all. The voluminous element of the documents utilised to unravel the details could not assist the court in determining the ease with which the applicant is expected to grasp and/or obtain better understanding of the particulars.

THE LAW

- [28] Rule 21 (2) of the Superior Court Practice states that a party is entitled to call for such further particulars as are "strictly

necessary" to enable him or her to prepare for the trial. In general, the purpose of particulars for trial is not to elicit

evidence or information which will emerge on cross-examination. The purpose of permitting a party to call for the particulars for trial is to prevent surprise.

- [29] The party should be told with greater precision what the other party is going to prove in order to enable his or her opponent to prepare his case to combat counter allegations. However, having regard to the foregoing the further particulars are not intended to tie the other party down and limit his or her case unfairly at the trial.[1]

- [30] In the case of *Thompson v Barclays Bank DCO 1965*

- (1) SA 365 (W) at 369F-G, the court correctly states that "even if a question relates to a matter for evidence, this would not preclude a party from being ordered to provide the particularity

sought, if the particulars are required for the proper preparation of a party's case."

[31] In the case of *Annandale v Bates* 1956(3) SA 549 it was held that

"...the object of particulars at this stage is to enable a party properly to prepare for trial and to prevent him being taken by surprise by evidence of a nature he could not reasonably anticipate".

[32] In the present case, the response to the particulars provided to the applicant is not straight forward. The applicant is still required to look at the minus signs and reconcile the details, an exercise which the respondent seems to be well conversant with. This court

anticipates a surprise during the trial which might prejudice the applicant.

[33] The issue to be determined in this application is whether the particulars and or further particulars provided by the respondent are sufficient to enable the applicant to prepare for trial. This court has regard to the fact that the particulars required follow the respondent's precision in its particulars of claim. This court finds that the respondent is very specific in paragraphs 8.2 and paragraph 9 of its particulars of claim in respect to the categories of policies. However when called upon to clarify the categories the respondent gives a blanket answer requiring the applicant to conduct further reconciliations.

[34] In the case of *Lipschitz and Schwartz NNO v Markowitz* 1976

(3) SA 772 (W) at 775H-776A. "A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the Court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it. If this were permissible, the essence of our established practice which is designed and which still evolves as a means of accurately identifying issues and conflicts so that the Court and the litigants should be properly apprised of the relevant conflicts, would be destroyed."

[35] It is clear that the respondent relies, inter alia, on the applicant's expertise to identify and obtain the detailed information pleaded by the plaintiff to prepare for his

trial. The respondent by emphasising the applicant's expertise of the industry conveniently forgets that the applicant is a litigant.

[36] In *Independent Newspapers* 2008 (5) SA P31 paragraph 25, Moseneke DCJ, held

"Ordinarily courts would look favourably on a claim of a litigant to gain access documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because the courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial."

- [37] This court has to decide whether better and further particulars requested by the applicant as a litigant (my emphasis) are reasonable and valid in assisting the applicant to plead and prepare for trial.
- [38] This court finds that the respondent failed to provide further and better particulars addressing the specifics required in respect of premiums unpaid and/or premiums returned to policyholders and commissions paid in respect of Contracts which were changed, surrendered, cancelled, made paid up or lapsed or went out of force subsequent to such payment in terms of paragraph 8.2 of its particulars of claim.
- [39] The respondent further failed to provide further and better particulars in respect of all monies comprising inter alia advances in respect of Commissions to be paid alternatively commissions paid in respect of Contracts which were changed, surrendered, cancelled, made paid-up or lapsed or went out of force subsequent to such payments.
- [40] The respondent's bold and repeated implied submission that the applicant must be treated as an insurance expert and not as a litigant is incorrect. The respondent's submission seeks to differentiate the applicant from other litigants, because of his expertise.
- [41] The respondent opportunistically abuses the applicant's expertise. In the event that this is a valid argument, the same is applicable to the respondent. The court is of the view that if it is this easy to reconcile and get to the particularity requested by the applicant, the respondent as an insurance company itself which might be better resourced than the applicant would have simply provided the information to the applicant. I reiterate that applicant is not before this court as an insurance expert but as a litigant and therefore the respondent's submission is misplaced. In my view if it were the case in general, lawyers would be prohibited to be legally represented; and the same would apply to doctors in diagnosing other doctors when it matters.
- [42] It is my view that the defence of privacy or public privilege is also misplaced considering that the applicant once worked on the details of the policy transactions requested. In the case of *Independent Newspapers v Minister for Intelligence Services* above at paragraph 27, Moseneke DCJ sets the law clearly that even before the advent of the Constitution, courts often, and correctly

recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. It is my view that in the present case there is no reasonable confidentiality or privilege sought to be protected except to frustrate the applicant in formulating its defence and or preparing for trial.

THE ORDER

Having regard to the foregoing, the following is order is made:

1. The respondent is ordered to furnish the applicant with further and better particulars within 10 (ten) days of the service of this order.

2. The respondent is ordered to pay the costs of this application.

MALI, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

REPRESENTATION FOR THE APPLICANT:

Counsel: Riaan Booysen

Instructed by: KEITH SUTCLIFFE & ASSOCIATES

REPRESENTATION FOR RESPONDENT

Counsel: Charles Roux

Instructed by: RC CHRISTIE INCORPORATED

[1] Van Loggerenberg and Farlam: Erasmus Superior Court Practice at B1-38

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