

SOUTH AFRICA / JUDGMENT

## Simon Says Advertising (Pty) Ltd v KG Family Holdings (Pty) Ltd (2085/2019) [2024] ZAECQBHC 71 (29 November 2024) [2024] ZAECQBHC 71

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Beyleveld

CASE / FILE NUMBER

2085/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION

– GQEBERHA)

Case No: 2085/2019

Reportable

In the matter between:-

SIMON

SAYS ADVERTISING (PTY) LTD

Applicant/Plaintiff

and

KG

FAMILY HOLDINGS (PTY)

LTD

Respondent/Defendant

Date

heard: 28 November 2024

Date Delivered: 29 November 2024

## JUDGMENT

Beyleveld AJ:

- [1] The phrase “Stalingrad tactic” has in recent years become widely used in the litigious matters.
- [2] The Applicant[1] seeks an order that the Respondent’s[2] Plea be struck out on the grounds that the Defendant has failed to provide trial particulars requested by the Plaintiff and in respect of which an order was granted by Noncembu J on the 7th November 2023 that the Defendant respond to the Plaintiff’s request for trial particulars within 10 days of the service of the order[3].
- [3] This application is accordingly to seek such further relief, namely the striking out of the Plea. [4]
- [4] Trial particulars perform a useful function in the adversarial litigation process:
- “The Request for Further and Better Particulars (or Request for Further & BP as it is invariably called), is one of the most misunderstood, abused, over-exploited and generally mishandled of all pleadings. It is also capable of being possibly the most satisfying, ruthless, vicious and successful means of exploiting the weaknesses in your opponent’s case, that you have at your command. As in so many other instances of pleading, the converse is also true. A badly drafted Request can lead to all sorts of faintly (!) concealed rudery in reply, and can leave your case if not in tatters, certainly smelling of something less socially acceptable than attar of Roses!”[5]*
- [5] The cause of action formulated in the Particulars of Claim broadly speaking is based on an initial agreement between the Plaintiff and Defendant in terms of which the Defendant would, from time to time, request Plaintiff to supply goods and render services.
- [6] It is then thereafter pleaded that an additional contract came into existence between the parties[6].
- [7] Relying on various breaches by the Defendant[7] it is pleaded that Defendant has failed to pay an amount of R196 487.00 which, it is alleged, is due and payable.[8]
- [8] Further alternative claims are formulated for damages and cancellation and damages. These alternatives are formulated on the basis that in the event of the Defendant failing to pay the aforesaid amount, these alternative claims arise.[9]
- [9] The Plea on the other hand[10] contains an averment that the Plaintiff itself has not complied with its obligations under the agreements and there is also a claim of an overpayment with a Counterclaim for repayment. Needless to say there is the general denial that any amount is due and payable by the Defendant to the Plaintiff.

- [10] After the filing of the Plea summary judgment was averted by the Defendant filing a bond of security.
- [11] A Notice in Terms of Rule 23(1) was served and filed by the Plaintiff which resulted in the Defendant delivering a notice of intention to amend its Plea and Counterclaim.
- [12] The amendment was not perfected and the Exception was set down for hearing in November 2020.
- [13] At the hearing of the Exception the Defendant withdrew the Counterclaim and in addition Beshe J made an order by agreement which reads as follows:
- “1. That the Defendant’s Counterclaim is withdrawn with the Defendant to pay the costs.*
2. That leave is hereby granted to the Defendant/Respondent to amend its Plea, if so advised, within ten(10) days of the date of this order.
3. That the Exception is removed from the roll with the Defendant/Respondent to pay the costs of the Exception.”
- [14] As the Exception was removed from the roll it is not apparent from the order why it was necessary to make an order that leave to amend be granted within a specified time; the Defendant had the right at any time to effect an amendment provided the provisions of Rule 28 had been complied with.
- [15] After various procedural interludes[11] the Plaintiff served and filed a Request for Trial Particulars pursuant to Rule 21.
- [16] As there was once again inaction on the part of the Defendant, the Plaintiff initiated an application to compel compliance with the request.
- [17] As alluded to above, Noncembu J granted the order as set out above.
- [18] There has not been compliance with last-mentioned order; hence the present application to strike out the Plea.
- [19] The Defendant raises a multitude of spurious defences to the application[12].
- [20] There exists no acceptable reason nor has any been advanced why the Defendant has failed to furnish the trial particulars or formulated more correctly, why the Defendant has not responded to the request by furnishing an answer or contending that certain answers are not necessary or required for the purpose of preparing for trial.
- [21] Although the Defendant contends that there has not been any reckless disregard of the rules, plainly this suggestion is far-fetched and can be rejected out of hand. The Defendant’s conduct in the matter and its disregard of an existing court order is wilful and contumacious.

- [22] It is trite law that in motion proceedings affidavits constitute both the pleadings and the evidence.[13]
- [23] Applying such principles, there exists no primary facts or underlying legal principle why the Defendant's failure[14] to furnish trial particulars should be overlooked, particularly where there is an existing court order.
- [24] It is indisputable that a court order stands until set aside.
- [25] In *Municipal Manager, OR Tambo Municipality and Another v Ndabeni*[15] the Constitutional Court reaffirmed the principle as enunciated below:
- "[24] This Court in State Capture reaffirmed that irrespective of their validity, under s165(5) of the Constitution, court orders are binding until set aside. Similarly,*
- Tasima held that wrongly issued judicial orders are not nullities. They are not void or nothingness, but exist in fact with possible legal consequences. If the Judges had the authority to make the decision at the time that they made them, then those orders would be enforceable."[16]
- [26] As indicated above, no explanation, or at the very least satisfactory explain is proffered by the Defendant why it has failed to comply with the order to compel. Certainly there is no suggestion that the particulars sought cannot be furnished or that the particulars sought are not necessary for the purpose of preparing for trial.[17]
- [27] In the Plaintiff's heads of argument, the question is posed whether the Defendant's Plea can only be struck out where specific provision is made for such a step in terms of the rules.
- [28] Based on certain authorities it is submitted on behalf of the Plaintiff that the Court has an inherent power to do so.[18]
- [29] The Plaintiff must in its application to compel trial particulars, set out sufficient information to enable a Court to consider whether or not to exercise its discretion in its favour. Each case must be judged on its own

## **facts.**

- [30] It is not, in seeking such an order, simply to state that particulars have not been furnished, but facts must be set out why the trial particulars are required.
- [31] In *Szedlacsek v Szedlacsek; Van der Walt v Van der Walt; Warner v Warner*[19] the principles relating to trial particulars to prepare for trial were restated and in particular it was held that a Court retains a discretion to grant or refuse an order for delivery of trial particulars in terms of Rule 21(4).
- [32] It is further pointed out that an applicant is not entitled to an order as of a right but must set out sufficient information to enable a Court to decide whether or not to exercise its discretion.

[33] In the present instance more than sufficient facts were set out in the founding affidavit to Plaintiff's Application to Compel such particulars.[20]

[34] Rule 21(4) reads as follows:

*"(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to Court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the Court may make such order as it seems meet."*

[35] Rule 21(4) provides a specific remedy for non-compliance with that rule. Rule 30A deals with non-compliance with rules and court orders.

[36] It has been held that a party need only follow the provisions of the rule which provides a specific remedy.[21]

[37] On the other hand it has been held that it is sound practice that the provisions of Rule 30A must firstly be complied with.[22]

[38] In *Gropaul v Subbamah*[23] the following was stated:

*"In my view, a court should also have regard to the reasons for the Defendant's inactivity in the matter, when an application for dismissal is brought. There are, during the course of an action, many procedural devices open to a Defendant to force a dilatory Plaintiff to bring his action to finality. Thus, if he fails to deliver a declaration in a simple summons timeously, he may be barred. If he fails to set the matter down for trial, the Defendant may do so. Should the Plaintiff fail to respond timeously to a request for particulars for trial, or to make discovery, the Defendant may apply for an order to compel, with the sanction of the Plaintiff's claim being dismissed for non-compliance. If a Defendant has failed to avail himself of these remedies when he might reasonably have been expected to do so, a court will look askance at an application by him to dismiss the Plaintiff's action merely because of a delay in his prosecution. Justice, after all, holds a two-edged sword; the scales comprise two pans, not one."*

[39] In exercising my discretion as to order the striking out of the Defendant's Plea all of the above factors must[24] been taken into account. A further aspect which requires serious consideration is the manner in which the Plaintiff's

Particulars of Claim are formulated and in particular the formulation of the alternative claims as referred to above.

[40] No doubt, the draughtsperson of the Particulars of Claim had in mind the so-called "double-barrelled approach" when formulating the alternative claims. Such double-barrelled approach is a procedural practice which for many years was followed in our law.[25]

[41] From the prayers to the Particulars[26] it is clear that the Plaintiff relies on the so-called double-barrel approach.

[42] Having regard to prayer (3), a further legal issue which potentially could arise would be prescription of the claim for damages.[27]

[43] The Constitutional Court in Rademeyer[28] stated as follows:[29]

*“[66] Of cardinal importance is the fact that when the matter came before Pickering J, Mr Ferreira had plainly not suffered any damages as yet and he therefore had no extant damages claim at that time. It follows that Mr Ferreira could not obtain an order at that time relating to the liability for damages which had not yet been sustained...”*

[44] Further on in the judgment[30] it is held that prescription in respect of a damages claim for breach of contract commences to run at the earliest at the time of breach.

[45] In addition, and although obiter, the whole practice of utilizing the double-barrelled approach is now in serious doubt as in Rademeyer it was argued that the double-barrelled approach should be discarded.

[46] In this regard the Constitutional Court held as follows:[31]

*“[71] ... While the argument is, on the face of it, rather attractive, I do not adopt any position in that regard, as the matter can in my view be disposed of within the purview of the double barrelled approach.”*

[47] At the very least therefore such contentious issues would have to be addressed should the Plaintiff seek judgment.

[48] Taking all the above factors into consideration I am of the view that I should exercise my discretion by crafting an order which serves as a sufficient deterrent and penalty for the Defendant's protracted failure to comply with the court order whilst at the same time ameliorating the effects of an order finally striking out the Defendant's defence.

[49] I am inclined to follow a procedure which was adopted in Commercial Motors v Caledonian Motors[32] where the Court granted an order directing the Respondent in that matter to furnish particulars before a certain date and to show cause on a later date why the action should not be dismissed in the event of its failing to do so. In Erasmus[33] it is opined that the preferable order is that particulars be furnished with the time fixed and to grant leave in the event of this not being done for an applicant to apply on the same papers for appropriate relief, as was the order granted in the present instance.

[50] Notwithstanding the foregoing, and, as indicated above, in the exercise of my discretion, I intend to make such an order. If the Defendant intends amending the Plea the response to the Request for Trial Particulars can of course be formulated with reference to the proposed amendment to the Plea. Insofar as the costs of this application is concerned, the Defendant's conduct throughout has been nothing short of reprehensible and the Defendant, in effect, has been granted a further indulgence by the order as set out below.

[51] I can see no reason, in the exercise of my discretion, why the Defendant should not be mulcted with an adverse costs award on the scale as between attorney and client.

[52] In the premises I make the following order:

- (a) The Defendant is directed to furnish a response to Plaintiff's Request for Trial Particulars dated 23rd August 2023 (a response pursuant to Rule 21) on or before the 3rd December 2024.
- (b) In the event of the Defendant failing to comply with the order in (a) above, the Defendant is called upon to show cause on Thursday the 5th December 2024 why the Defendant's Plea should not be struck out with costs on the scale as between attorney and client on the Magistrates Court scale and why judgment should not be granted in favour of the Plaintiff.
- (c) The costs of this application on the scale as between attorney and client is to be paid by the Defendant.

A BEYLEVELD

Acting Judge of the High Court of South Africa

Appearances:

For the Applicant: Adv. LR Kroon, instructed by Pieter Sellner Erasmus TRM Tax Attorneys.

For the Respondent: Adv. N Karsan, instructed by D Gouws Incorporated.

- [1] The Plaintiff in the action – for the sake of convenience hereinafter referred to as “the Plaintiff”
- [2] The Defendant in the action – for the sake of convenience hereinafter referred to as “the Defendant”
- [3] There is the usual adverse cost award made against the Defendant and a further ancillary order is to the effect that in the event of the Defendant failing to comply with such order the Plaintiff is granted leave to approach court on the same papers, duly amplified, for further relief
- [4] Defence
- [5] William M Rose Pleadings Without Tears A Guide to Legal Drafting Second Edition at 154
- [6] A so-called Retainer Agreement. A rectification of the Retainer Agreement was also sought
- [7] For non-payment or inadequate payment
- [8] It is not understood why the action was instituted in the High Court and not the Magistrate's Court
- [9] In paragraph 50 of the particulars of claim the first alternative is for instance formulated as follows: “In the event of the Defendant failing to pay the amount mentioned in paragraph 48 above the Plaintiff will then as a result suffer

damages in lieu of such performance in the amount of R196,487.00, being damages which flow naturally and generally from such breaches of the initial contract and the retainer agreement.”

- [10] Certainly not a model of clarity
- [11] Caused mainly by the Defendant
- [12] Such as that the Plea was excipiable and that the Defendant wishes to amend its Plea and Counterclaim and that it has not yet done so and that the order of Noncembu J should be set aside. It is further baldly stated that the refusal to answer the request for trial particulars was not willful and contumacious because the Defendant's own pleadings are excipiable and it was always the Defendant's intention to defend the matter
- [13] Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA at [28] and Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others (Centre for Environmental Rights and Others as amici curiae) [2021] 2 All SA 1 (SCA) at [95]. Ancillary to such principle, Courts are not allowed to have recourse to issues falling outside the pleadings (or in motion proceedings affidavits) – Malusi and Others v Voges and Others 2016 (3) SA 370 (CC) at [27]
- [14] Over a lengthy period of time
- [15] 2023
- (4) SA 421 (CC) at [24]
- [16] Footnotes omitted
- [17] See for instance Leask v East Cape Forest Products CC t/a Highbury Treated Timbers
- [2008] ZAECHC 171. In this decision it was also held that contumacy is equated with the willful refusal to comply with a court order.
- [18] For instance the Leask decision. Two further decisions are referred to namely Twins Professional Communications CC v Goldbrands Investments Ltd 2020 JDR 1245 GP at para [34] and Selero (Pty) Ltd and Another v Chauvier and Another 1982 (3) SA 519 (T) at 522 B to C. There is also a reference to Excelsior Meubels Beperk v Trans Unie Ontwikkelings Korporasie Beperk 1957
- (1) SA 74 (T) at 77D. The decisions of Selero and Excelsior were of course handed down prior to the substitution of Rule 21 in
1987. GN R2164 of 2 October 1987 and by GN R2642 of 27 November
- 1987
- [19] 2000
- (4) SA 147 (ECD)
- [20] More importantly, and as indicated above, an order was granted and stands

- [21] ABSA Bank Ltd v The Farm Klippin 49 CC 2000 (2) SA 211 (W) at 215 A to B. See also the authorities listed in footnote 3 on D1 RULE 30A – 1 Van Loggerenberg Erasmus Superior Court Practice 2nd Edition
- [22] See Szedlacsek v Szedlacsek; Van der Walt v Van der Walt; Warner v Warner and the other authorities in the same footnote 3 in footnote 21 above
- [23] 2002
- (6) SA 551 (D&CLD) at 558 G to I
- [24] And have
- [25] See the leading case in this regard Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A). See also Amlers Pleadings 10th Edition at 97
- [26] And in particular prayer (3)
- [27] Rademeyer v Ferreira (2024) ZACC 24
- [28] Majority
- [29] At [66]
- [30] At [69]
- [31] At [71]
- [32] 1960
- (1) SA 366 (SR)
- [33] supra Volume 2 at D1 RULE 21-4

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