

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:56511/2012

DOH: 08 MAY 2023

1. REPORTABLE: **NO/YES**

2. OF INTEREST TO OTHER JUDGES: **NO/YES**

3. REVISED.

SIGNATURE

DATE 05 July 2023

In the matter of:

MOMENTUM GROUP LIMITED

Applicant/Defendant

and

KATHIGASEN MOOTHSAMY

Respondent/ Plaintiff

JUDGEMENT

**THIS JUDGEMENT WAS HANDED DOWN REMOTELY BY UPLOADING ON
CASELINES. ITS DATE OF DELIVERY SHALL BE DEEMED TO BE 05
JULY 2023.**

Bam J

A. Introduction

1. This is an opposed application in terms of Rule 28 (4) of the Uniform Rules. The application is brought against the background of an action in which the applicant is the defendant. For ease of reference, I refer to the parties as in the action proceedings. The plaintiff's objection, broadly stated, is that the

proposed amendments seek to withdraw an admission or admissions with the objective of introducing new evidence. The plaintiff further accuses the defendant of not being *bona fides*. In his heads of argument, the plaintiff deals with each of the proposed amendments to paragraphs 6, 8 and 10. He says that the amendments are a direct response to his letter of 13 September 2022 wherein he objected to the defendant's introduction of new evidence which had not been pleaded.

B. Background

2. The plaintiff's claim is based on a life assurance policy over the life of the late Mr Ebrahim Asmal, at the latter's instance. The policy inceptioned on 1 November 2008 with a premium of R11 810, per month, with the sum at risk being R15 million. At the end of April 2009, the policy lapsed as a result of the life assured's failure to pay the agreed monthly premiums. On or about May 2009, the policy was re-instated pursuant to a written application purportedly, by the life assured. The re-instatement was followed by a cession of the policy to the plaintiff, purportedly executed by the life assured on 11 August 2009 and on 30 September 2009, the life assured purportedly appointed the plaintiff as beneficiary for proceeds. Mr Asmal died on 11 April 2011. Following his death, the plaintiff lodged a claim for payment of the death benefit, which the defendant declined and further repudiated the contract. As may already be apparent from the background three records are at the centre of the dispute between the parties. They are, (i) the application for re-instatement; (ii) the cession documents; and (iii) the beneficiary appointment records.

C. The law

3. The general rule pertaining to amendment of pleadings is that the court has a discretion, which must be exercised judiciously. In *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another*, the rule was articulated thus:

'Although the decision whether to grant or refuse an application to amend

a pleading rests in the discretion of the court, this discretion must be exercised with due regard to certain basic principles. These principles are well summed up in... *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D), at 640 H - 641 C...:

"Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."¹ (the underline is mine)

4. In *Whittaker v Roos and Another*, *Morant v Roos and Another*:

'This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts.'²

5. In *Affordable Medicines Trust and Others v Minister of Health and Another*, it was said that:

'...The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad

¹ (393/88) [1990] ZASCA 47; 1990 (3) SA 547 (AD); [1990] 2 All SA 300 (A) (17 May 1990).

² 1911 TPD 1092 at 1102-1103.

faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.” These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand.’³

The defendant’s case

6. It will be recalled that one of the plaintiff’s objections is premised on the fact that the defendant seeks to introduce new information with the amendments. In order to demonstrate that the information sought to be introduced is not new and was always known the plaintiff, the defendant refers in the first instance to its letter of rejection of the plaintiff’s claim. In the letter dated 12 September 2011, the defendant informed the plaintiff that it had declined his claim because it had received forensic confirmation that the life assured had not completed the documents submitted to it in connection with the policy re-instatement. It further informed the plaintiff of its stance that had it known of the true facts, it would not have re-instated the policy.
7. The second piece of information deals with an email dated 15 September 2011, addressed to one Toshani Panday. Panday, it is said, functioned as an insurance broker for both the late Mr Asmal and the plaintiff. The email followed a meeting held with Panday in which he had made available certain documents relating to the cession of the life policy in question. The cession documents, it transpired, had not been signed by the late Mr Asmal but by Panday himself. The defendant submits that Panday, who had no right to the policy, could not cede to the plaintiff any right without the express mandate from the life assured. No such evidence has ever been

³ (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005), paragraph 9.

presented, submits the defendant.

8. The third piece deals with a letter sent to the plaintiff on 19 October 2011, in which the defendant advised the plaintiff of its reasons for refusing to reconsider his claim. In this regard, the defendant informed the plaintiff that the documentation pertaining to the reinstatement was flawed and that it, Momentum, considered the documents to be fabricated. In a letter responding to a complaint filed by the plaintiff with the Long Term Insurance Ombudsman, the defendant raised, amongst others, Mr Asmal's attendance at the defendant's offices on 24 February 2011 to discuss the status of his policy. In the course of the discussion, Mr Asmal pertinently denied ever re-instating the policy. The final piece of evidence relied upon by the defendant arises from a meeting with Mr Panday and his attorney, which took place on 11 February 2012, wherein Panday had apparently confirmed that the signatures presented as Asmal's on the re-instatement documents were a 'cut and paste' performed by his office.

9. It was based on the foregoing background that the defendant, in the existing plea, ended up denying that:

9.1 it was the life assured who had made the written application for re-instatement of the policy after it had lapsed;

9.2 the life assured executed the purported session;

9.3 the life assured had nominated the plaintiff as the beneficiary to the proceeds of the insurance policy.

10. The defendant then addresses the issue of admissions relied upon by the plaintiff. It says that the plaintiff has not properly considered what is being admitted in its plea. As illustration, the defendant refers to the disputed documents as B1 - the re-instatement application; C1 - the purported

cession; and D1 - the purported beneficiary nomination forms. In paragraph 4.2 of the amended particulars of claim, the plaintiff pleaded:

Paragraph 4.2. During or about May 2009;

‘4.2.1 the life insured made a written re-instatement application to the defendant;

4.2.1.1 for the reinstatement of the policy;

4.2.1.2 within the six months reinstatement period;

4.2.1.3 of which B1 here is a copy (the reinstatement application of the life insured)

4.2.2 the defendant:

4.2.2.1 granted the reinstatement of the application of the life insured;

4.2.2.2 duly reinstated the policy evidenced by the confirmation of the reinstatement annexed hereto marked annexure B2.’

11. In response, the defendant pleaded:

‘5. Ad paragraph 4.2 - 4.2.1.3 - The allegations contained herein are denied.

6. Ad paragraphs 4.2.2 - 4.2.2.2 - The allegations herein are admitted as the defendant was under the impression that the life assured made written representation for the re-instatement of the policy.’

12. In paragraph 5.1 of the amended particulars of claim, the plaintiff pleaded:

'5.1: On or about 11 August 2009, the life assured:

5.1.1 executed the right to cede;

5.1.2 ceded the policy to the plaintiff; in writing (the written cession)'

13. In response the defendant pleaded:

'7. Ad paragraph 5.1 The allegations herein are denied

8.1 Ad paragraph 5.2 It is admitted that the written cession is annexure C.

8.2 The remaining allegations are denied'

The defendant's bona fides and the issue of delay

14. The defendant denies having delayed anything. It says that the plaintiff has not applied for a trial date as yet. It followed with a chronology of events from the date of service of summons on 8 October, followed after various objections to the particulars of claim by the defendant's plea on 23 April 2014. A change in the plaintiff's attorneys saw the defendant being called upon to plead only on 12 July 2017. Five years later on 7 July 2022, the plaintiff addressed a notice in terms of Rule 37 (4) and the Pre-Trial Conference ultimately took place in November 2022.

Reasons for the proposed amendments

15. The defendant deals with a request made by the plaintiff wherein the latter sought certain admissions from the defendant such as admission pertaining to the authenticity and content of the three disputed documents. In relation to each of the documents, the defendant replied that it had been materially induced to re-instate the policy by the submission to it of false or forged documents. It was following receipt of the defendant's answers that the

plaintiff directed a letter dated 13 September 2022, levelling criticism against the manner the defendant had pleaded its defence and the shortcomings therein that the defendant resorted to amend its plea for purposes of obviating unnecessary objection/s. The defendant says it seeks to clarify in detail and to inform the plaintiff with precision what documents it contends have been forged or are forgeries to enable him to know precisely the case he is being called upon to meet at trial. The defendant contends that the denials already exist.

16. I went into detail in illustrating what is contained in the pleadings. It is clear to me that what the defendant wishes to do is amplify or if one prefers, to sharpen the information already pleaded. There is certainly no question of withdrawing an admission or admissions. On this score, the plaintiff is incorrect. He is also incorrect in stating that the defendant seeks to delay the proceedings. It is not disputed that there is not even a trial date in site at present. I am further satisfied that the amendments sought to be introduced pertain to triable issues and are not merely aimed at harassing the plaintiff. The defendant has thoroughly explained the proposed amendments. Accordingly, I am persuaded that the application must succeed.

Discussion on costs

17. Each of the parties seek costs in the event of a successful outcome. Having recognised after the plaintiff's letter that its defence may come under severe attack, the defendant took the necessary steps to amend its plea by incorporating further details as set out in the correspondence exchanged between the parties. I am not persuaded, given the clear background that the defendant recognised, after the plaintiff's letter of September, that its defences required sharpening, that the defendant deserves costs in that case. After all, it is trite that costs are at the discretion of the court. In this regard, it is appropriate that each party pays its own costs.

18. In the circumstances, the following order shall issue:

(i) The application succeeds.

(ii) Each party pays his own costs.

N.N BAM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Date of Hearing: 08 May 2023

Date of Judgement: 05 July 2023

Appearances:

Applicant: **Adv A.R.G Mundell SC**

Instructed by: Keith Sutcliffe & Associates Inc
c/o Andrea Rae Attorneys
Colbyn, Pretoria

Respondent : **Adv R.R Kisten**

Instructed by: Pather and Pather Attorneys
Brooklyn, Pretoria