

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **8926/2018**

In the matter between:

PREVISHA PILLAY

PLAINTIFF

and

DISCOVERY HEALTH (PTY) LIMITED

FIRST DEFENDANT

ALPHA PHARM (KZN) (PTY) LIMITED

SECOND DEFENDANT

Coram: Mossop J
Heard: 19 July 2023
Delivered: 19 July 2023

ORDER

The following order is granted:

1. The plaintiff's claim against the second defendant is dismissed.
 2. The plaintiff is directed to pay the costs of the application.
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JUDGMENT

Mossop J:

[1] This is an ex tempore judgment.

[2] When the matter was called this morning, Mr Sookhay appeared for the plaintiff and Mr Harrison appeared for the second defendant. Both counsel are thanked for their assistance to the court. I shall continue to refer to the parties as they are cited in the action. The first defendant has played no part in this application and no further reference to it is therefore necessary insofar as the merits of the application are concerned.

[3] On 9 July 2020, Chetty J upheld an exception brought by the second defendant against the plaintiff's particulars of claim. The order granted reads as follows:

- '1. The exception taken by the Second Defendant to the Plaintiff's particulars of Claim is upheld with costs;
2. the Plaintiff is granted leave to supplement or amend its Particulars of Claim within 20 (twenty) days of date of this order;
3. In the event of the Plaintiff failing to do so, the Second Defendant is granted leave to apply to have the Plaintiff's cause of action dismissed.'

[4] On 6 August 2020, on the final day of the period prescribed by the order, the plaintiff delivered her amended particulars of claim. The second defendant found the amended particulars of claim to be objectionable and therefore delivered a notice in terms of Uniform Rule 28(3) on 19 August 2020 and objected to that amendment. The plaintiff did not respond to that notice at all. The second defendant now brings this application to strike out the plaintiff's particulars of claim on the grounds that the plaintiff has not complied with the order of Chetty J as the particulars of claim remain unamended, so it claims.

[5] This application, essentially, revolves around what the effect of Chetty J's order permitting leave to amend is. Does that order mean that no application is required in terms of Uniform Rule 28(1), or may the amendment simply be delivered? Does the second defendant have the right to object to the amendment in terms of Uniform Rule 28(3)? It appears to me to be implicit in the order of Chetty J that what was to be delivered by the plaintiff, in the event of her being advised to do so, was an unobjectionable, or exception resistant, amendment. The dispute between the parties is thus whether the correct procedure has been adopted by the second defendant to ventilate its dissatisfaction with the amended particulars of claim. The second defendant has chosen to employ Uniform Rule 28 whereas the plaintiff appears to contend that Uniform Rule 23 ought to have been utilised by the second defendant. In her answering affidavit, the plaintiff states:

'The fact that the amendment was effected by leave of this Honourable Court as per paragraph 2, the Second Defendant/Applicant is required to file an exception to the amended particulars of claim in terms of Rule 23 of the Uniform Rules of Court, and not an application to dismiss my claim.'

[6] I asked both Mr Harrison and Mr Sookhay to address me on this issue this morning. Mr Harrison submitted that the second defendant could have chosen to act in terms of either Uniform Rule 28 or Uniform Rule 23. He submitted that that the same allegations would have been made irrespective of which rule was used. He drew my attention to the second defendant's notice of objection in which allegations were made that the amended particulars of claim fail to disclose a cause of action. The notice, however, also states that the allegations are vague and embarrassing in certain instances. His submission was that the second defendant had Hobson's choice and chose to embrace Uniform Rule 28 and that there could be no prejudice to the plaintiff, who was fully apprised of the second defendant's objections.

[7] Mr Sookhay, to the contrary, submitted that it was important to follow the correct procedure. Had an exception been noted, the plaintiff would be in a position to argue it and defend the amended particulars of claim. I asked him what prohibited him from advancing such an argument in these proceedings. His answer was not that clear to me.

[8] The relevant portions of Uniform Rule 28 read as follows:

'Amendment of Pleadings and Documents

(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in sub rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with sub rule (3) is delivered within the period referred to in sub rule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.'

[9] *Cross v Ferreira*¹ was decided before the advent of the Uniform Rules of Court. In that matter, Van Winsen AJ considered the desirability of courts granting parties leave to amend without knowing what the proposed content of the pleading to be amended will be. Reference was made to English cases on point in that judgment. At page 452G of the judgment, the following appears:

'In *Derrick v Williams* (55 T.L.R. 676) the Master of the Rolls stressed the desirability of the formulation of an amendment before it is allowed:

“ . . . it is very inconvenient that leave to amend should be given before the actual amendment is formulated because the result may very well be, as it has been in this case, that when the amendment is formulated it is found to be objectionable.”

¹ *Cross v Ferreira* 1950 (3) SA 443 (C).

A *dictum* by LORD GREENE, M.R., in *J. Leavey & Co. Ltd v G. H. Hirst & Co. Ltd.* (1944, K.B.D. 24) is to the same effect.

Whatever the position might be in a case where the limits of an as-yet-unformulated amendment could be readily defined in a judgment, this is not a case in which such a definition could in my view be attempted. It remains open to the applicant, if so advised, to formulate some other amendment and to move for leave to incorporate it in the declaration.'

[10] From this it appears to me that the learned acting judge was stating that where leave to amend has been granted, the amending party must still give notice of the intended amendment because the proposed amendment may in some way be legally objectionable. This, in a fashion, dovetails with Mr Harrison's argument that the plaintiff had an election arising out of the order of Chetty J: to either supplement or to amend. Having chosen to amend, it brought itself under the terms of Uniform Rule 28. The reasoning of Van Winsen AJ appeals to me. In my view it is generally undesirable that leave to amend is granted without the nature and content of the proposed amendment being disclosed. If the proposed amendment is not disclosed to and known by the court, there may then conceivably be the difficulties that have arisen in this matter. It seems much more sensible to require the amending party to give notice of the proposed amendment, notwithstanding the general leave to amend being granted to it by the court, and to thereafter allow the provisions of Uniform Rule 28 to apply. The party receiving the proposed amendment would then retain the right to object to it enshrined in Uniform Rule 28(3). It very often happens that orders such as that granted in this matter are granted without further consideration as to how the amendment is to be effected. It would, perhaps, be of assistance in future, and would avoid any confusion such as has arisen in this matter, if these types of order were to specify that by virtue of the fact that the details of the proposed amendment not being known to the court, in exercising the right to amend, the provisions of Uniform Rule 28 shall continue to apply to the process of amendment.

[11] That the same result may be achieved by invoking the provisions of Uniform Rule 23 seems entirely likely. But that does not mean that Uniform Rule 28 should not be invoked. Irrespective of the procedure adopted, the fact of the matter is that the position of both parties, and the reasons for those positions, have been revealed and debated

[12] The plaintiff did not object to the delivery of the notice in terms of Uniform Rule 28(3) and did not suggest that it was an irregular step. In my view, the second defendant was entitled to take the view that Uniform Rule 28(3) was available to it. The second defendant's notice clearly and concisely stated the grounds upon which the proposed amendment was objected to by it. The objections raised by the second defendant were thus known to all and called for an appropriate response from the plaintiff. The plaintiff was, in the circumstances, obliged to act in terms of the provisions of Uniform Rule 28(4) and bring an application for permission to amend her particulars of claim within ten days of receiving the second defendant's notice in terms of Uniform Rule 28(3). She did not do so. And has never done so.

[13] As matters thus stand, the particulars of claim to which the exception was upheld have never been amended in the light of the second defendant's objection and certainly not within the twenty days prescribed by Chetty J's order. Indeed, a period of three years has elapsed since the date of that order, and the plaintiff's particulars of claim remain unamended. The order has thus not been complied with. In terms of paragraph 3 of that order, in the event of the plaintiff not complying with the order, the second defendant was entitled to seek the dismissal of the plaintiff's 'cause of action.' I assume that what was intended was a reference to the plaintiff's particulars of claim. And I further assume that what was intended was that the second defendant would be entitled to claim the striking out of the claim as against itself only.

[14] Before dealing with the plaintiff's explanation for this state of affairs, the issue of condonation must be considered. The application to strike out the plaintiff's particulars of claim was delivered by the second defendant on 25 November 2020, but the plaintiff only delivered her answering affidavit on 29 April 2021, some five

months later. It was thus hopelessly out of time. The plaintiff has accordingly brought an application for condonation.

[15] In *Grootboom v National Prosecuting Authority and Another*,² the Constitutional Court stated that:

'It is axiomatic that condoning a party's non-compliance with the rules or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.'

Later in that same judgment, the court stated further that:

'It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'³

And finally, the court stated:

'In this court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;

² *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) para [20].

³ *Grootboom*, supra, para 23.

- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.’⁴

[16] As already mentioned, the delay in delivering the answering affidavit is some five months. That is a considerable delay in my view and it will require a good explanation. The explanation advanced is that counsel was instructed:

‘during the course of early December 2020’.

No date in early December 2020 is mentioned. The counsel instructed, who I discovered today was Mr Sookhay, apparently resolved to draw the answering affidavit after the recess at the end of the judicial year. I find that a difficult proposition to accept because counsel would know that *dies non* do not apply to applications. The whole of the month of December 2020 could not simply be wished away as a period over which no work was needed to be done. There was a clamant need for the answering affidavit to be commenced and delivered during the prescribed time period but this appears not to have resonated with counsel. Thereafter, counsel unfortunately contracted Covid-19 and spent the month of January 2021 in hospital. Nothing whatsoever is said about when counsel was diagnosed and when hospitalisation occurred. It appears that having been discharged from hospital, counsel then spent a month at home doing no work because it appears that he only returned to work in March 2021. The plaintiff then experienced financial difficulties and lacked the funds to properly instruct counsel until 26 April 2021.

[17] It is simply not acceptable for litigants to remain supine and do nothing when faced with these types of circumstances. There are many counsel in practice in this city and where one counsel becomes unavailable, others should be considered and one, or more, briefed to take over the matter. The Supreme Court of Appeal has regularly indicated that the unavailability of specific counsel is not a valid reason to

⁴ *Grootboom*, supra, para 50.

delay the process of a matter through the courts.⁵ Nor is it a sufficient reason in this matter. The issue is, in any event, vaguely dealt with by the plaintiff with no specific dates mentioned in her narrative. Large chunks of time are simply not accounted for. I might add that it is also undesirable for counsel to deliver affidavits in a matter in which he is briefed to argue by a litigant.

[18] On the issue of a lack of funds, the court in *Du Plessis v Wits Health Consortium (Pty) Ltd*,⁶ held as follows:

'It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining when, not only that he or she finally raised funds to conduct the case, but also how and when did he or she raise those funds. The 'when' aspects of the explanation are important, as it provided the courts with information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay.'

No detail as called for in this extract appears in the application for condonation.

[19] On the issue of the plaintiff's prospects of success, she is also silent in her application for condonation. Not a word is mentioned about those prospects. I shall, nonetheless, consider them.

[20] The plaintiff's amended particulars of claim reveal that she claims an amount of R118 million from the two defendants. Of this amount, approximately R3 million is in respect of past loss of earnings and R115 million is in respect of future loss of earnings over the duration of her entire working life as a registered pharmacist, until she turns 60 in 23 years' time. No case is made out in the amended particulars of

⁵ *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* [2022] ZASCA 143 paras 9 and 10.

⁶ *Du Plessis v Wits Health Consortium (Pty) Ltd* [2013] JOL 30060 (LC) para 16.

claim as to why the plaintiff is incapable of working in her chosen career. She pleads that the first defendant is not prepared to have a business relationship with her, but does not explain why any other medical aid scheme would not work with her. She pleads that the second defendant colluded with the first defendant but does not provide any particularity of why this might have occurred or what such collusive conduct comprised. She mentions that an employee of the second defendant approached her and demanded that she sign an acknowledgment of debt but does not plead whether she signed it or in whose favour the acknowledgement of debt was. She finally claims that the same employee alleged that she owed an amount of R13,1 million and was guilty of fraudulent activities. She concludes that she has thus suffered a loss of past earnings and will suffer a loss of future earnings.

[21] The amended particulars of claim do not make for good or easy reading. They are fractured and do not logically flow or connect. It appears to me that there has been no attempt at mitigating the plaintiff's alleged losses. In all, the claim is speculative and appears to me to be bad in law. The plaintiff's prospects of success therefore appear bleak to me.

[22] While the matter may be important for the plaintiff, it is not a legally important action. No great legal principles are at play. Concerning the delay in the administration of justice, the plaintiff's action commenced on 2 August 2018. Nearly five years later, the second defendant has yet to plead. The delay in progressing the matter is intolerable. Part of that delay has been occasioned by the late delivery of the answering affidavit. It is this type of delay that gives a bad image to litigation generally.

[23] I have considered the factors identified by the constitutional court in *Grootboom*. None of the factors referred to in that matter are individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice. It has consistently been held by courts that: (i) where the delay is unacceptably excessive and there is no explanation for the delay or the explanation for the delay is unsatisfactory, there may be no need to consider the prospects of success, as this in itself justified a refusal to grant condonation; (ii) if the period of delay is short and there is an unsatisfactory explanation but there are reasonable

prospects of success, condonation should be granted; and (iii) despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. In my view the delay in this matter is unacceptably excessive, there is an unsatisfactory explanation for the delay and there are no real prospects of success. The condonation application is badly motivated, vague in its detail and sparse with its facts. Condonation is accordingly refused.

[24] In the event that I am incorrect in declining to grant condonation, I consider what the plaintiff has stated in her answering affidavit. She has identified several issues which she believes offers a defence to the second defendant's application.

[25] The plaintiff has raised by way of a point in limine an allegation that a firm of Johannesburg based attorneys who have communicated with her attorneys concerning the matter, have no standing to do so. The Johannesburg attorneys state that they are the second defendant's attorneys and have instructed the Durban based attorneys to act on behalf of the second defendant in defending the plaintiff's action and have been mandated to bring this application. The Durban based attorneys are therefore the Johannesburg based attorney's correspondents. This is a question of fact and should not attract any controversy. Quite what this point taken by the plaintiff has to do with the matter is not clear to me. Correspondent attorneys are a well-known feature of South African legal life and the point taken by the plaintiff in this regard lacks any substance. There is no reason to disbelieve the Johannesburg based attorney's assertion. It appears that the plaintiff is attempting to excite a controversy where none exists. In any event, the plaintiff has not acted in accordance with the provisions of Uniform Rule 7 and there is thus no formal challenge to the Johannesburg attorneys' involvement in, and participation in, this matter. The point in limine must fail.

[26] The plaintiff asserts that the amended particulars of claim:

'conforms to the directive issued by the Honourable Justice Chetty in terms of his judgment relating to the Second Defendant's/Applicant's exception.'

The order granted by Chetty J has been quoted in full at the beginning of this judgment. It contains no directive, other than that the plaintiff was given 20 days to supplement or amend her particulars of claim. If the directive being referred to is the 20-day period within which the amendment of her particulars of claim must be effected, the plaintiff is in no position to assert that this has occurred. The proposed amendment has been opposed and the plaintiff has taken no steps to overcome that objection. Rather than explain why the second defendant is not entitled to the order that it seeks, the plaintiff repeatedly asserts that her amended particulars of claim now disclose a viable cause of action. That, with respect, is not correct nor is it the issue. There is no application in terms of Uniform Rule 28(4) where those submissions would have been important. Instead, the issue before me is whether because of the non-compliance with the order of Chetty J, the plaintiff's claim should be dismissed. In my view, it should.

[27] I accordingly grant the following order:

1. The plaintiff's claim against the second defendant is dismissed.
2. The plaintiff is directed to pay the costs of the application.

MOSSOP J

APPEARANCES

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Date of argument: 19 July 2023

Date of Judgment : 19 July 2023