

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:
.....
DATE 23 September 2023
SIGNATURE

CASE NO: 25410/2021

IN THE MATTER BETWEEN

**GOVERNMENT EMPLOYEES
MEDICAL SCHEME**

APPLICANT

and

LILIBA PHARMACY

RESPONDENT

JUDGMENT

BENSON AJ

Introduction

1. [1] This is an application for leave to amend in terms of Rule 28(4) of the Uniform Rules of Court. The applicant (being the plaintiff in the main action), seeks leave to amend the citation and description of the respondent (being the defendant in the main action) from “Liliba Pharmacy” to “Crossy Suppliers (Pty) Ltd t/a Liliba Pharmacy”, as per its notice of intention to amend dated the 22nd of August 2022. I shall refer to the parties herein as in the main action for the avoidance of confusion.

- [2] On the 5th of September 2022, the defendant filed a notice of objection, which was followed by the present application for leave to amend on the 19th of September 2022.

PARTICULARS OF CLAIM AND TRIABLE ISSUES

- [3] The plaintiff's claim as against the defendant can be summarised as follows:
 - [3.1.] The defendant is presently cited as Liliba Pharmacy. Liliba Pharmacy was licensed and registered in terms of section 22 of the Pharmacy Act, No. 53 of 1974 (“the Act”). The plaintiff further pleads that the defendant is a pharmacy registered with the Health Professions Council of South Africa with practice number: 793191, and trading as such at the 4794 Liliba Section, Tembisa, Johannesburg, and “whose further particulars are unknown to the plaintiff”.

 - [3.2] The plaintiff further pleads that for the period 1 January 2019 to December 2020, the defendant submitted various accounts and

invoices to the plaintiff for the payment of services allegedly rendered to the plaintiff's members and/or their beneficiaries.

[3.3.] The plaintiff was at all relevant times, under the *bona fide* and reasonable, but mistaken belief, that the defendant was entitled to the amounts claimed by it. The plaintiff accordingly paid the sum total of R 2 990 143.68 to the defendant, when the defendant was not entitled to lawfully render the services it claimed it had rendered, or where it had not in fact, rendered the services as alleged.

[3.4.] In the circumstances, the plaintiff claims that the defendant has been unjustly enriched, and that it is impoverished in the sum of R 2 990 143.68.

[3.5.] In its plea, the defendant (whilst entering its defence of the action) denies that its identity or description is correct, but admits that Liliba Pharmacy traded as a pharmacy as alleged, and submitted invoices for services allegedly rendered. The remainder of the plea constitutes a bare denial of the pleaded case of the plaintiff.

[3.6.] It is common cause that Liliba Pharmacy's license which was issued in accordance with sections 22 and 22A of the Act, was withdrawn in or about April 2021, under cover letter of the South African Pharmacy to the Director-General, National Department of Health.

THE PLAINTIFF'S PROPOSED AMENDMENT

[4] The plaintiff asserts that "Liliba Pharmacy" is a trading title as envisaged in Rule 2.31.3. of the Rules Relating to Good Pharmacy Practice, read together

with section 35A(c) of the Act, and that the trading entity of Liliba Pharmacy is owned by Crossy Suppliers (Pty) Limited. Crossy Suppliers (Pty) Limited, is the registered name of the defendant as recorded at the Companies and Intellectual Property Commission. Obviously, and at the time of the preparation of the particulars of claim herein, this was unknown to the plaintiff, who in fact pleaded that the full and further particulars of the defendant were unknown.

- [5] Accordingly, the citation and reference to “Liliba Pharmacy” in the action is a misdescription of the defendant, and the misdescription is sought to be rectified by way of an amendment in terms of Rule 28. It would, if granted, reflect the actual identity of the defendant. Since the defendant has in any event defended the action, and pleaded thereto, one would assume that this is a simple amendment. Despite this, the defendant objects thereto.

THE DEFENDANT’S OBJECTION TO THE AMENDMENT

- [6] The defendant opposes the proposed amendment, briefly on the following grounds:

[6.1.] Grossy (*sic*) Suppliers (Pty) Limited has never traded as “Liliba Pharmacy” and cannot trade under this name. Oddly, it is however conceded by the defendant that Crossy Suppliers is an incorporated entity that is registered and licensed to operate Liliba Pharmacy. It is further conceded that Crossy Suppliers (Pty) Limited is the owner of Liliba Pharmacy;

[6.2.] It is impermissible for the plaintiff to use Uniform Rule 28 to correct the name of the defendant, as “Liliba Pharmacy” does not have a legal *persona* to be sued and Rule 28 cannot be invoked in the manner in which it has by the plaintiff; and

[6.3.] Liliba Pharmacy was deregistered prior to the issuing of summons herein, and so, as this Court understand the argument, the summons is a nullity.

ANALYSIS OF ARGUMENT

[7] Having regard to the concessions made on the papers by the defendant, it is clear that at some stage the defendant (who is defending this matter and identifies itself as “Crossy Suppliers (Pty) Limited” and/or “Liliba Pharmacy”), traded under the name and style of “Liliba Pharmacy”, and that this trading name had been approved in accordance with the provisions of the Act. Accordingly, and having regard to the provisions of the Act, this first ground of objection by the defendant must fail.

[8] In so far as the second ground of objection is concerned, it appears that “Liliba Pharmacy” was utilised by the defendant as its trading name. Indeed, the fact that Liliba Pharmacy traded as a pharmacy, is admitted. The fact that the defendant wishes to distance itself from its trading name, is of no assistance. The correct identity of the defendant before this Court is now known. To argue that the trading name was a fictitious entity, and yet to admit that it traded as such, is with respect, absurd.

[9] Be that as it may, it was held by Galgut DJP (as he then was) in *Four Tower Investments (Pty) Ltd v Andre's Motors*¹ that:

“Whether a process is a nullity or not will depend on the facts of the case, and on the authorities, it seems that it may be a question of the degree to which the given process is deficient. As I see it however, the fact on its own that the citation or description of a party happens to be of a non-existent entity should not render the summons a nullity....

As I have already said, however, if the citation of a party is nothing more than a misdescription, it should not matter whether the incorrect citation happens on the face of it to refer to a non-existing entity or indeed to an existing entity but uninvolved entity.”

[10] This issue was recently dealt with again in the matter of *Essence Lading CC v Infiniti Insurance Ltd/Mediterranean Shipping Company (Pty) Ltd*², where it was held that:

“[15] Where there is an error in the citation of the defendant and the correct defendant entered an appearance to defend, or intervened, there would be no prejudice if the amendment is effected by way of an amendment in terms of rule 28.”

[11] Accordingly and in instances such as the present, where the defendant is before the Court, has defended the action, and actively participated in the opposition of the proposed amendment, Rule 28 finds application. No prejudice is occasioned to the defendant in such circumstances. That being

¹ 2005 (3) SA 39 (NPD) at pp. 45 to 47

² Case No: 2022/4024 [2023] ZAGPJHC (June 2023)

said, the distinctions raised in the *Essence Lading CC judgment*, are to be noted.

[12] In so far as the third objection is concerned, the fact that the defendant caused Liliba Pharmacy to be deregistered, prior to issuing of the summons herein, is, as argued by Adv. Peterson on behalf of the plaintiff, a fallacy. The defendant itself has not been deregistered, and concedes that it has traded under the name and style of Liliba Pharmacy. By whatever name the defendant seeks to identify itself, and as stated above, the defendant cannot wish away the fact that it traded as Liliba Pharmacy and, as per the plea, admits that Liliba Pharmacy submitted invoices as alleged.

[13] I am accordingly satisfied that the application for leave to amend is *bona fide*, and will not cause prejudice to the defendant as contemplated in Rule 28. Rule 28 creates a mechanism to amend pleadings in a cost-effective manner without the intervention of the court. The rule is not designed to allow a party to obstruct the granting of innocuous amendments³.

[14] In the result I make the following order:

- 1.) The plaintiff is granted leave to amend its particulars of claim in accordance with its notice of amendment in terms of Rule 28(1) dated the 22nd of August 2022.

- 2.) The plaintiff is to effect the amendment within 10 days from the date of this Order by service of its amended pages.

³ *Sentrachem Ltd v Terreblanche* (47159/2011) [2015] ZAGPPHC 206 (25 February 2015)

3.) The defendant is ordered to pay the costs of this application.

G.Y. BENSON

ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances:

Date of hearing : 24 May 2023
Date of Judgment : 23 September 2023
Date Judgment Delivered : As per date uploaded to CaseLines

For the Applicant/Plaintiff : Adv. R. Peterson
Instructed by : L Mbangi Incorporated

For the Respondent/Defendant : Mr. D.J. Sibuyi
Instructed by :DMS Attorneys