IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

SIGNATURE DATE: 27 June 2023

Case No. 11323/2022

In the matter between:

THE BIOLOGICALS AND VACCINES INSTITUTE OF SOUTHERN AFRICA (PTY) LTD Plaintiff

and

GUARDRISK INSURANCE COMPANY LIMITED Defendant

JUDGMENT

WILSON J:

1 The defendant, Guardrisk, insured the Plaintiff, the Institute, against, amongst other things, damage to its property and premises caused by fire. There was a fire at the Institute, which then made a claim on the policy it had with Guardrisk. Guardrisk repudiated the claim, and the Institute now sues

challenging that repudiation, and seeking what it says is due to it under the policy.

2 The Institute issued its combined summons on 5 August 2022, and served the combined summons on Guardrisk on 10 August 2023. On 23 August 2022, Guardrisk gave notice of its intention to defend the action. Guardrisk also issued a notice under Rule 30 (2) (b), complaining that the combined summons was not signed in the manner set out in Rule 18 (1). Rule 18 (1) requires that a combined summons "shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party". A combined summons consists of a summons to appear to defend a claim and a separate document setting out the particulars of that claim. The summons to appear was signed by the Institute's attorney, but the copy of the particulars of claim issued and served on Guardrisk was not signed at all. This rendered the combined summons an irregular step. Guardrisk asked the Institute to remove the cause of its complaint, failing which Guardrisk would apply to set the combined summons aside.

3 It turns out that the particulars of claim had in fact been prepared and signed by two counsel and by the Institute's attorney. But, as a result of a series of mishaps, the signatures the Institute's attorney and counsel supplied did not make their way onto the document that was actually issued by the Registrar and served on Guardrisk.

4 It seems to me that, had the Institute's attorney simply delivered a copy of the signed particulars of claim to Guardrisk's attorney when he received the Rule 30 (2) (b) notice, that should have been the end of the matter. Rule 18 (12) states that "if a party fails to comply with [Rule 18 (1)] such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30". That is what Guardrisk did. Rule 30 does no more than entitle a party to complain about the form of a pleading and require that the cause of the complaint be removed. In this case, that meant that a signed version of the particulars had to be provided. The scheme set up in Rule 18 (12) is at least in part designed to avoid the excessive formality and point-taking that can mar condonation proceedings, and to enable to parties to get on with the litigation by curing between themselves any prejudice caused by formally defective pleading.

The condonation application

5 However, the Institute's attorney instead took the more cautious step of applying for condonation for the Institute's non-compliance with Rule 18 (1). That is the application presently before me.

6 The application for condonation was also cursed. In his founding affidavit, the Institute's attorney did not explicitly address the Institute's prospects of success in the main action. This omission formed a major plank of Guardrisk's opposition to the application. In an effort to cure the omission, the Institute's attorney deposed to a supplementary affidavit and an application for leave to file it. That application was also opposed, and is also now before me for determination.

7 The test applicable to applications for condonation is so well-known it barely needs repeating. A court considers the nature and degree of non-compliance with a rule, the explanation for that non-compliance, any prejudice caused by the non-compliance, and the applicant's prospects of success in the main case. Each of these considerations is weighed with the aim of promoting the interests of justice on the facts of each matter, which is a court's fundamental pre-occupation (*Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) paragraph 22).

8 The degree of non-compliance in this case is miniscule. The Institute's attorney and counsel signed the combined summons, but the signed version did not make its way to the Registrar or to Guardrisk. What Guardrisk received was a summons signed by the Institute's attorney, and a set of particulars of claim that were not signed by anyone. There is no dispute, however, that the Institute's attorneys and counsel prepared the particulars and that electronic versions of the pages bearing each relevant person's signature were assembled and ready to be issued as part of the combined summons. However, because of what appears to have been a very minor administrative oversight, the document went out without the signature pages attached to it. What I am asked to condone is, therefore, not the failure of the Institute to ensure that the combined summons was signed, but its failure to send the signed version of the particulars of claim to the Registrar and to Guardrisk.

9 The explanation for the non-compliance was effectively that the combined summons comprised a number of different documents produced by different people. These were assembled by the Institute's attorney's personal assistant to be uploaded to this court's electronic registry, Court Online. It seems that the attorney's signature page was missed by a scanner, and that counsel's signatures do not appear on the particulars of claim because the signatures were included in the electronic version of the document as "mark-ups". The printer that produced the document was, however, set only to print the document without its "mark-ups". Either the Institute's attorney, or his personal assistant, apparently did not check the final scanned version of the combined summons which was then issued by being uploaded to Court Online, and served on Guardrisk by the Sheriff.

10 Anyone who has ever spent hours standing over a photocopying machine or labouring over the formatting settings of a word processing or digital document formatting programme can readily understand what went wrong. Guardrisk's challenge to the adequacy of this explanation was ultimately limited to berating the Institute's attorney for his oversight. That approach was uncharitable. It was also beside the point. Explanations for non-compliance need only be honest. They do not have to be impressive. As long as it is frank, and sufficiently detailed, an explanation for non-compliance need not present those in default as faultless heroes, thwarted by the vicissitudes of life. An explanation for non-compliance that involves ineptness, a degree of slovenliness, or even downright stupidity may nonetheless be acceptable so long as the degree of negligence involved does not suggest that the non-compliance was reckless, or that an absence

of diligence was so gross as to border on malicious dereliction. None of that is in evidence here.

11 Much of the oral hearing of this matter was taken up with a debate about the prejudice, if any, that Guardrisk has suffered as a result of the Institute's failure to issue and serve a signed set of particulars. It was suggested in the papers that the combined summons as served was somehow so defective as not to constitute the kind of "legal process" necessary to interrupt prescription or to comply with the time-bar clause in the insurance policy. That seemed to be setting up an argument either that the unsigned combined summons was a nullity incapable of condonation, or that condoning the failure to deliver a signed combined summons would deprive Guardrisk of a defence available to it under the Prescription Act 68 of 1969, or under the time-bar clause of the insurance policy.

12 However, Mr. Ferreira, who appeared for Guardrisk, accepted that an unsigned combined summons is not a nullity, and that the Institute's service of the unsigned combined summons interrupted prescription. But Mr. Ferreira did not accept that the service of an unsigned combined summons satisfied the time-bar clause in the insurance policy. He argued that condoning the service of an unsigned combined summons would prejudice Guardrisk, because it would mean that Guardrisk cannot rely on a putative breach of the time-bar clause embodied in the failure to serve a signed set of particulars within the period the clause prescribes.

13 However, I do not think the needle can be threaded in that way. Section 15 (1) of the Prescription Act states that the running of prescription is

interrupted “by the service on the debtor of any process whereby the creditor claims payment of the debt”. Section 15 (6) of the Act defines “process” as including “a petition, a notice of motion, a *rule nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced”. Mr. Ferreira accepted, in my view correctly, that the unsigned particulars were “process” in this sense.

14 The time-bar clause in the insurance policy states that “[n]o claim shall be payable unless [the Institute] claims payment by serving legal process on [Guardrisk] within [180 days] of the rejection of the claim in writing and pursues such proceedings to finality”. Mr. Ferreira argued that an unsigned set of particulars in a combined summons is not “legal process” for the purposes of this clause. He suggested that what is meant in the policy is legal process that is correctly drafted in every respect.

15 Mr. Ferreira could offer no authority for that proposition, and I do not think that it is correct. The time-bar clause in the contract must be read purposively and in context. The purpose of the clause is to give timeous notice to Guardrisk that the insured person is suing it. That requires two things: first that the process is served within the required period, and second that the process effectively institutes the claim. It seems to me that, if it is accepted, as it must be, that the Institute’s combined summons interrupted the running of prescription, then it must also be accepted that the combined summons constituted “legal process” within the meaning of time-bar clause in the insurance policy.

16 It follows from all of this that condoning the failure to deliver the signed particulars of claim to the Registrar and to Guardrisk would not deprive Guardrisk of a contractual defence based on the time-bar clause, because Guardrisk did not have such a defence in the first place, or at least not a defence of the nature that was argued before me. Guardrisk has therefore not identified any appreciable prejudice it will suffer from the grant of condonation. I remain agnostic on any other point that may in future be raised in reliance on the policy or its time-bar provisions.

17 It is of course virtually impossible to make a meaningful assessment of the Institute's prospects of success at this stage. The most that can be said is that the claim is good on its face. But we know that the claim will be defended, that the facts alleged may be disputed, that new facts that would defeat the claim may be pleaded and proved, and that Guardrisk may well advance legal contentions in the face of which the claim cannot succeed. Given that I have no idea what these factual disputes and averments or legal contentions will be, I am bound to find that the Institute has reasonable prospects of success unless its particulars of claim are obviously excipiable. Nobody suggests that they are.

The supplementary affidavit

18 That conclusion renders the Institute's supplementary affidavit superfluous, because there is nothing relevant in that affidavit that I cannot glean from the particulars of claim themselves. I will nonetheless admit the supplementary affidavit, not least because there was no meaningful opposition to it. Guardrisk did file a notice raising what it called questions of law in terms of

Rule 6 (5) (d) (iii). But the notice amounted to no more than an attack on the apparent failure of the deponent to the supplementary affidavit to address specifically a wide range of factors that have been held relevant to the exercise of my discretion to admit further affidavits. The failure to rehearse the ten factors listed in the Rule 6 (5) (d) (iii) notice does not render the application defective. They can be (and were) addressed in written argument to the extent that they are relevant – and they will not, in any event, be relevant in every case. There is accordingly no merit in Guardrisk's attempt to elevate the recital of those factors to a rule of pleading.

19 In all these circumstances, the interests of justice in this case cry out for condonation to be granted, and for the claim to proceed and be adjudicated on the real issues between the parties.

Costs

20 Mr. Green, who appeared with Mr. Ainslie, for the Institute, asked for condonation to be granted with costs on the scale as between attorney and client. He argued that Guardrisk's approach throughout has been to delay the progress of the claim by taking minor technical points that have no merit. For his part, Mr. Ferreira emphasised that the Institute seeks an indulgence and in those circumstances it should pay Guardrisk's costs, even if it is successful.

21 Finding myself at the end of a judgment which is far longer than any written decision granting condonation on these facts should ever have to be, I am sympathetic to the gloss Mr. Green places on the facts. However, I do not

think a punitive costs order is justified, reserved as that sanction is for forms of litigious misconduct which are not evident in this case.

22 That does not mean that Guardrisk's opposition was reasonable. On the facts, its opposition to the condonation application was plainly unreasonable, and Guardrisk should pay the costs of the application on the ordinary scale. The application should never have been opposed. Nor did the application justify the appointment of senior counsel by either party. My costs order will reflect that.

23 For all these reasons –

23.1 The plaintiff's failure to issue and serve a set of particulars of claim signed in the manner required by Rule 18 (1) is condoned.

23.2 The plaintiff must lodge with the Registrar of this Court, and deliver to the defendant's attorneys, the signature pages of its particulars of claim, as signed by the plaintiff's counsel and attorney on 4 August 2022, and annexed as "DWB7" and DWB4" to the plaintiff's founding affidavit, by no later than 30 June 2023.

23.3 The time period prescribed in Rule 22 (1) will commence on the first court day following the plaintiff's compliance with the order in paragraph 23.2.

23.4 The defendant is to pay the costs of this application.

S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 27 June 2023.

HEARD ON:	20 June 2023
DECIDED ON:	27 June 2023
For the Plaintiff:	IP Green SC D Ainslie Instructed by David Bayliss Attorneys
For the Defendant:	E Ferreira SC Instructed by Engelbrecht Attorneys Inc