



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

CASE NO: 56219/2021

CASE NO: 49156/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 17 July 2023

In the matter between:

COMPENSATION SOLUTIONS (PTY) LTD

APPLICANT

and

COMPENSATION COMMISSIONER

FIRST RESPONDENT

DIRECTOR-GENERAL OF THE DEPARTMENT

SECOND RESPONDENT

OF EMPLOYMENT AND LABOUR OF THE

NATIONAL GOVERNMENT OF THE REPUBLIC

OF SOUTH AFRICA

THE MINISTER OF THE DEPARTMENT OF

THIRD RESPONDENT

EMPLOYMENT AND LABOUR OF THE NATIONAL

GOVERNMENT OF THE REPUBLIC OF

SOUTH AFRICA

JUDGEMENT

ALLY AJ**INTRODUCTION**

[1] Two matters served before this Court as opposed applications for summary judgment and the parties agreed that they be heard jointly for the reason that both matters deal with similar issues and the parties remain the same in both cases. On that basis, Counsel for both parties were allowed to argue both matters.

[2] However, before hearing submissions on the summary judgment applications, the Court heard argument on a condonation application in respect of both matters by the Respondents for the late filing of the Answering affidavits which applications were opposed.

[3] For the sake of convenience and the fact that the issues raised are the same in both cases, one judgement is provided in respect of both matters.

CONDONATION

[4] The parties in the condonation application shall be referred to, for convenience sake, as in the main application.

[5] In order to succeed with the condonation application, the Respondents must comply with the following requirements which have become trite¹:

5.1. the nature of the relief sought;

¹ Van Wyk v Unitas Hospital 2008 (2) SA 472 @ 477A-B

5.2. the extent and cause of the delay;

5.3. the effect of the delay on the administration of justice and other litigants;

5.4. the importance of the issue raised and the prospects of success.

[6] The Court considered the Respondents' explanation for the delay, the cause of such delay, the extent of the delay, the Applicant's opposition to the application for condonation as well as the prejudice to the Applicant and found no such prejudice. Accordingly, it is in the interest of justice that condonation be granted and for the parties to ventilate the issues in respect of both matters.

FACTUAL BACKGROUND

[7] These matters form part of a long line of litigation between the parties which relates to the provision of services by the Applicant to certain customers and the claims against the Respondents relating to medical services rendered.

[8] The Applicant has claimed the amounts in the summonses and notices of motion based on a cession entered into with the medical service provider and accordingly obtained the rights of the cedent to claim for the sums owed.

[9] The Applicant indicates that since the summonses were issued, certain sums of money were paid by the First Respondent and maintains that the First Respondent continues to make payments on invoices issued.

ANALYSIS AND EVALUATION

[10] The Respondents allege that they have a *bona fide* defence against the claims for summary judgment.

[11] It is apt to outline at this point, that in order for the Applicant to succeed with these summary judgment applications the following requirements need to be met²:

11.1. the claims must be -

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment; together with any claim for interest and costs.

[12] With regard to the circumstances of these particular cases, the Applicant alleges that the claims are for liquidated amounts in money and do not allege that the claims fall within the ambit of the other bases for summary judgment mentioned above.

[13] It is now trite that when adjudicating upon a summary judgement application, the Court must consider the plea that has been filed in response to the combined summons as further set out in the answering affidavit resisting the summary judgement application to determine whether the Respondent in the summary judgement application has disclosed a *bona fide* defence³.

[14] Should the Respondents show a *bona fide* defence then such summary judgement applications must be refused.

² Rule 32 (1) of the Uniform Rules of the Supreme Court, as amended

³ *Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 at 426A-E

[15] As indicated hereinbefore, the parties have a history of litigation. Applicant mentions that the defences raised by the Respondents are the same as in earlier cases wherein judgment has already been granted in their favour.

[16] It is thus necessary to consider whether, indeed, the defences raised by the Respondents, have been considered by this Division.

[17] Should it be so that on the facts and where judgments have already been granted in similar circumstances as the present, then it is my view that I may only differ from such judgments in circumstances where I am convinced that the said judgments are wrong.

[18] The first defence raised by the Respondents is that the Applicant has not complied with the provisions of Uniform Rule 32 (1) in that the Applicant's claims are based neither on a liquid document nor are they a liquidated amount of money.

[19] This defence was raised and rejected in a similar matter between the parties under Case number 76034/2018 dated 13 December 2018 in this Division by Swanepoel AJ⁴. The present applications being similar and based on the same facts with the same parties, I may only differ from such judgement by Swanepoel AJ if I am of the view that it is clearly wrong. I am of the view that I cannot hold that Swanepoel AJ was clearly wrong and therefore the defences as proffered by the Respondents and dealt in previous judgements cannot be sustained.

⁴ Case No: 76034/2018: at para 10.

[20] The Respondents, for the first time, however, in their affidavit resisting summary judgement in both applications, raise the defence of prescription and indicate that prescription would form part of their amended plea.

[21] Two issues need to be dealt with regarding this 'plea'. Firstly, is a Respondent permitted to raise a defence not raised in the plea and secondly, whether this defence has been decided upon by any other Court within this Division and the said Court's decision with regard thereto.

[22] Rule 32 (3) in its amended form does not make specific provision for the laying out of a defence in the affidavit resisting summary judgement which does not appear from the plea nor does it prohibit such a course of action. It is appropriate to quote the Rule at this time:

"The defendant may—

(a)...

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[23] The Applicant raises the point that it is unfair of the Respondents to raise defences in the opposing affidavits as an Applicant has no right of reply. This issue, 'the right of reply' or the amendment of the founding affidavit was dealt with in the

case of **City Square Trading 522 Pty Ltd v Gunzenhauser Attorneys Pty Ltd & Another⁵**.

[24] I align myself with the view expressed in the said judgement that an Applicant would be allowed through the use of Rule 28⁶ to amend its founding affidavit after a respondent has raised further defences not contained in the plea. The reason for mentioning this case is that the Applicant's submission of unfairness can be addressed by the Applicant amending its founding affidavit. In any event the Applicant has dealt with the defences in their replying affidavit.

[25] In my view, in a given situation, a Respondent would be allowed to raise a point or defence not mentioned in its plea. In these circumstances, a Respondent would have to mention in such opposing affidavit the intention to amend the plea.

[26] The plea to be amended must raise a *bona fide* defence and therefore if a defence has been dealt with previously by our Courts where the same parties are involved, then the issue of *res iudicata* arises and will have to be adjudicated upon accordingly and furthermore such Court will have to determine whether it agrees with the decision of a previous Court dealing with the same issues.

[27] In circumstances such as the present, a Court, in my view, is entitled to adjudicate the merits of such defence which is not common to summary judgement proceedings⁷ in that the issues have been dealt with previously by another Court in the same Division.

⁵ Fisher J: 2022 GPJHC

⁶ Uniform Rules of Court

⁷ Maharaj case supra

[28] However, where the defences raised in the pleas to be amended have already been dealt with by other Courts in this Division and have been dismissed then this Court, as stated hereinabove, can only deviate from such decision where the decision is clearly wrong. I have had regard to the other cases and I am of the view that the previous decisions regarding the defences to be raised in these particular cases are not 'clearly wrong' and must be followed.

[29] In respect of the Respondents' specific defence relating to prescription is concerned, it is important to give same further consideration. The reason for this, is that this defence has not previously been dealt with by this Division involving these two parties.

[30] The Respondents raise the defence of prescription in respect of two different and distinct pieces of legislation. The first defence of prescription is raised with reliance being placed on Section 43 of COIDA⁸. The second defence of prescription is raised with reliance being placed on Section 11 of the Prescription Act⁹.

[31] For the reason that the prescription defences have only been raised *vis a vis* these parties for the first time, this Court needs to evaluate same in respect of the requirements of Rule 32 as amended.

[32] It is not incumbent on this Court to go into depth in determining the merits of the defence but only to determine whether the defence is *bona fide* and raises a triable issue¹⁰.

⁸ Compensation for Occupational Injuries and Diseases Act 130 of 1993

⁹ Prescription Act 68 of 1969

¹⁰ Maharaj case *supra*

[33] In respect of the intended special pleas of prescription relying on Section 43 of COIDA¹¹, the Plaintiff/Applicant contends that the plea is bad in law and does not raise a triable issue for the following reasons:

19.1. Section 43 of COIDA does not apply to the invoices of medical service providers;

[34] The response to such special plea by the Plaintiff/Applicant enjoins this Court to evaluate and adjudicate such special plea. Such evaluation and adjudication must, in my view, only take place within the confines of determining whether the defence is *bona fide* and not raised only as a delaying tactic.

[35] In my view the special pleas in respect of Section 43 of COIDA raises issues which depend on certain facts which need to be placed before a trial court and as such, I am of the view that this defence raises a triable issue to be adjudicated upon at trial.

[36] The special pleas to be raised in respect of Section 11 of the Prescription Act, similarly, in my view, raise issues which would depend on facts pleaded and placed before a trial court.

[37] Insofar as the defence relating to Section 32 of and 33 of COIDA raised by the Respondents in their answering affidavits. This defence holds no water which also has been definitively dealt with by the Supreme Court of Appeal¹² relating to the same parties.

¹¹ Supra

¹² The Compensation Commissioner & Others v Compensation Solutions (Pty) Ltd 2022 ZASCA 165

CONCLUSION

[38] In conclusion therefore, I am of the view that summary judgement in both matters fall to be refused and that the defendants be granted leave to defend in respect only of the special pleas of prescription to be pleaded in an amended plea and within the conditions contained in the Order hereunder.

COSTS

[39] The Applicant has requested that this Court, in the event of success, grant costs against the Respondents on a punitive scale, being on a scale as between Attorney and own Client. This position of the Applicant relates both to the applications for condonation and summary judgement in both cases.

[40] The Respondents have requested the Court to also grant punitive costs against the Applicant should the applications for condonation be granted and in the event of this Court refusing summary judgement.

[41] Now it is trite law that the issue of costs rests within the discretion of the Court and such discretion, however, must be exercised judicially.

[42] Insofar the applications for condonation are concerned, it is my view that the Respondents, being the Applicants in the applications for condonation must pay for the costs of these applications on a party and party scale.

[43] Insofar as the merits of the summary judgement application is concerned, whilst the outcome of the cases is that summary judgement in both matters are refused, such refusal is limited only to the special pleas of prescription and not the other defences raised by the Respondents and furthermore, the Respondents have been placed on terms.

[44] Accordingly, in exercising my discretion, each party is to pay their own costs in respect of the applications for summary judgement.

Accordingly, the following Order shall issue:

- a). Summary Judgement in case numbers 56219/2021 and 49156/2021 is refused;
- b). The defendant is granted leave to defend in respect of case numbers 56219/2021 and 49156/2021 only insofar as a plea of prescription is to be raised;
- c). The defendant is to file a notice of intention to amend its pleas in respect of the case numbers mentioned in paragraph (b) within 10 days of this order failing which the Plaintiff may approach this Court on papers duly supplemented for orders for summary judgement;
- d). The Defendant is to pay the costs of the applications for condonation on a party and party scale;
- e). Each party is to pay their own costs in respect of the applications for summary judgment.



ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 July 2023.

Date of virtual hearing: 15 August 2022

Date of judgment: 18 July 2023

Appearances:

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