

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO
.....
DATE SIGNATURE

In the application between:

CASE NO: 56219/2021

COMPENSATION COMMISSIONER

1ST Applicant/Defendant

**DIRECTOR GENERAL, DEPARTMENT OF
LABOUR**

2ND Applicant/Defendant

THE MINISTER OF LABOUR

3RD Applicant/Defendant

And

COMPENSATION SOLUTIONS (PTY) LTD

Respondent/Plaintiff

JUDGMENT

POTGIETER AJ:

[1] The three Applicants are the three Defendants in the main action whilst the Respondent is the Plaintiff in same. I shall hereinafter refer to them as in the main action, i.e. the Applicants shall be referred to as the Defendants and the Respondent as the Plaintiff.

[2] The Defendants are applying for leave to amend their Plea, more particularly by substituting their existing Plea with, as the Defendants termed it in their Notice of Intention to Apply for Leave to Amend, "...a *completely new plea*" of which a copy was attached to the Notice of Intention to Amend. The present application arises from the Plaintiff's objections to the proposed new Plea. There are many grounds of objection but they are numerous only because there are numerous issues raised in the proposed new Plea. However, and for reasons which shall become apparent immediately below, the Defendants are only allowed to amend their Plea to raise two Special Pleas of different types of prescription¹ and consequently it is not necessary to list the other grounds of objection because the other grounds of amendment to the Defendant's Plea are

¹ The Plaintiff contends that, in fact, the Defendants are only allowed to plead one type of prescription viz prescription in terms of the Prescription Act. Whether this is correct or not is of no import in the light of my findings and orders herein later.

impermissible.

[3] When the Defendants originally pleaded the Plaintiff applied for summary judgment. The matter served before Ally, AJ who, on 17 July 2023, refused the Plaintiff's application for summary judgment and gave the Defendants leave to file a Notice of Amendment of the Defendants' Plea in order to raise alleged prescription of the Plaintiff's claims. The only conceivable Prescription Pleas are:

[3.1] prescription based upon sections 43 and 44 of the so-called COIDA, Act;

[3.2] prescription in terms of the 1969 Prescription Act.

[4] Ally, AJ furthermore ordered that in the event of Defendants' failing to file the said Notice of Intention to Amend within a prescribed period, the Plaintiff could re-enrol the application for summary judgment and apply for summary judgment.

[5] There can be no doubt that what Ally, AJ, had found was that had it not been for the possibility of properly pleaded Pleas of Prescription summary judgment would have been granted the Plaintiff. The deadline for filing a Notice of Intention to Amend to raise the said Prescription Pleas and the *sequelae* of failing to do so timeously *viz* that the Plaintiff could apply for summary judgment again, in my opinion, makes this conclusion inevitable.

[6] In the premises, when the Defendants' Counsel rose to address me I enquired from him on what basis the Defendants sought to raise new issues other than

merely the two Prescription Pleas aforementioned? I indicated that I was disinclined to hear argument pertaining to any other amendments because of my interpretation of Ally, AJ's aforementioned judgment.

[7] The Defendants' Counsel could not advance any argument to dispel my *prima facie* view of the matter and consequently, (and correctly so), indicated that the Defendants would pursue merely an amendment in respect of the two Pleas of Prescription.

[8] The fact that the Defendants attempted to amend their Plea in various respects not permitted in terms of Ally, AJ's judgment means that this is not an application to amend the Defendants' Plea in the terms permitted by Ally, AJ. The Defendants' application should, on this ground, be dismissed. However, it cannot be gainsaid that the abortive amendment also contains two types of prescription which was indeed something permitted to be raised in a Notice of Intention to Amend, by Ally, AJ. A dismissal of the Defendants' present application on the grounds that it did not comply with the permission granted by Ally, AJ, to apply to amend the Defendants' Plea to raise only Prescription, would, inevitably, lead to another round of an application to amend and objections thereto. Another Court would be burdened with the copious papers I have been burdened with in this application and that is obviously undesirable, especially in the light of the fact that I have considered the issues underlying the two Pleas for Prescription foreshadowed in Ally, AJ's order. I thus proceed to consider the objections to those two proposed amendments to the Defendants' Plea.

[9] The Plaintiff's objection to the proposed Special Plea in terms of sections 43 and 44 of COIDA is approximately four pages long and consists of three sub-paragraphs of which sub-paragraph 3.2 consists, in turn, of 10 sub-sub-paragraphs. I therefore do not intend repeating those grounds especially where some of the grounds consist of merely motivating the gravamen of the objection. The gravamen of the objection is that the Plaintiff's claims do not fall within the ambit of sections 43 and 44 of COIDA because the Plaintiff's claims are based on medical invoices in respect of medical services provided, albeit that same were ultimately in respect of services for the benefit of an employee. The following words in paragraph 3.2.3 of the Plaintiff's objection to the proposed amendment sum up the position of the Plaintiff:

"To interpret these sections as to include medical invoices would lead to an absurdity."

[10] The Plaintiff's grounds of objection to the Plea of Prescription in terms of the Prescription Act are that the Plea is bad in law for the following reasons:

[10.1] The Defendants fail to state why the claims have prescribed. The Defendants fail to contend when the liability arose in respect of each claim and consequently the Plea is excipiable.

[10.2] A variety of factual averments and what must be made from these averments, (*vide* paragraphs 4.2.2, 4.2.3 and 4.2.4 of the Notice of Objection). I deem it unnecessary to list these facts because the contention that the Prescription Plea based on the Prescription Act

is “*bad in law*” means that the principles applicable to the adjudication of Exceptions apply and that does not permit the introduction of extraneous evidence and/or documentation.

[10.3] Should the proposed amendment be permitted the amended Plea will disclose no defence and will, accordingly, be excipiable.

[11] The Defendants’ present application was supported by a Founding Affidavit to which the Plaintiff filed an Answering Affidavit and the Defendants thereupon filed a Reply. In my finding the Affidavits were largely either unnecessary or failed to take anything of any import any further given the principles applicable to exceptions and applications to amend pleadings. I thus do not intend dealing with the contents of the Affidavits to any material extent save to remark about the late Reply.

[12] The Reply was way out of time. The excuse proffered is that the more junior of the two Junior Counsels appearing for the Defendants became indisposed, (she was pregnant and apparently developments in her pregnancy led to the indisposition), and was not available for some months to attend to the Reply. *Non constat* that no cogent or plausible reason was advanced why the more senior of the two Juniors appearing for the Defendants could not settle the Reply which is, in any event, a document of no consequence as it does not really deal with what is contained in the Plaintiff’s Answering Affidavit. The proffered excuse that the more senior of the two Counsels appearing for the Defendants was busy with other matters in his practice is singularly without merit. No details of what was

being done and what time was absorbed that could have possibly been used to draft the Reply timeously, have been provided. A simple generic averment has been made and its lack of merit is, in the light of trite principles which are applicable when condonation is requested, dictate that the proffered excuse is meaningless.

[13] I have nevertheless decided to have regard to the contents of the Reply because to do otherwise opens the door to a potential lament and the potential *sequelae* thereof. It is precisely because of the meaninglessness of the Reply, with a corollary that it does not matter whether the Reply is considered or not, that has constrained me to have had regard to the reply.

[14] In the premises the application for condonation for the late filing of the Reply is granted and the Defendants are ordered to pay the costs of the application for condonation. The scale of costs are addressed herein later.

[15] The Plaintiff's objection to the Defendants' proposed Plea of Prescription, relying upon COIDA, does not object to the proposed amendment on the grounds that the issue is *res iudicata* yet the Plaintiff's Answering Affidavit and the Plaintiff's heads of argument *in casu* rely heavily on this issue. This gives rise to the interesting question whether the Plaintiff can rely on other grounds than those stipulated in the Plaintiff's Notice of Objection? My *prima facie* opinion is that the Plaintiff cannot do so but the fact is that both parties fully argued the question of *res iudicata* and the point I have mentioned as being an interesting one, was not argued at all. In the premises, and for present purposes only, I shall deal with the

res iudicata point and shall firstly do so because if there is merit therein, *cadit quaestio*.

[16] The Defendants do not dispute that there are other decisions in this Division in actions between the same parties as at present which have ruled that precisely the same Plea based on sections 43 and 44 of COIDA is unsustainable. The Defendants merely argue that all of those decisions are the subject matter of appeals or steps to ensure that appeals can occur, (i.e. pending applications for leave to appeal, one of which awaits an outcome from the Apex Court).

[17] The Defendants furthermore do not dispute that the Supreme Court of Appeal, (“SCA”), in an action between the same parties as *in casu*, found, (and here I am paraphrasing), that “*compensation*” and “*medical costs*” are not the same thing.² The SCA finding supports the Plaintiff’s contention that sections 43 and 44 of COIDA do not apply to the Plaintiff’s claims.

[18] The Defendants address the foregoing decisions on the basis that they are all decided wrong and have invited me to formulate my own opinion. As far as the SCA’s judgment is concerned, it would be fruitless of me to do so because I am in any event bound by whatever the SCA has ruled.

[19] Insofar as decisions by other Courts of the same stature as this Court are concerned I can only depart from same if I am convinced that they are clearly wrong. Besides the fact that no argument was advanced in support of a contention that the previous decisions of Courts of equal stature to this one, are

² **Compensation Commissioner v Compensation Solutions (Pty) Ltd (997/2021) ZASCA 165 (29 November 2023) at par. [26].**

wrong, I am in any event not convinced that any of the previous decisions dismissing a Special Plea such as the present Special Plea relying upon sections 43 and 44 of COIDA are wrong. Some of those decisions rejecting such a Plea either rely upon the aforementioned SCA case or analyses of COIDA which result in the same conclusion as the SCA made. Rather than there being any grounds to conclude that the previous decisions are clearly wrong, there appears to me to be grounds to the contrary.

[20] In the premises the application to amend the Defendants' Plea to raise a Plea of Prescription based upon sections 43 and 44 of COIDA is dismissed with costs. (The Scale will be addressed herein later).

[21] I turn now to deal with the objections to the Special Plea based on prescription in terms of the Prescription Act.

[22] In my finding the only ground of objection to the proposed Plea of Prescription based on the Prescription Act which is worthy of consideration in proceedings of this nature is the objection that the Special Plea falls foul of **Gericke v Sack 1978 (1) SA 821 (SCA)**, i.e. a Plea of Prescription which does not contain certain details is excipiable and does not disclose a defence.³

[23] The other grounds of objection to the Prescription Act Plea are, largely, if not completely, reliant upon facts and interpretations to be made of those facts. It has long been the practice in this Division that the question of prescription is something best dealt with at trial. Only in the clearest of cases, where it is not

³ *Vide* par. 25 of the Plaintiff's heads of argument at p. 016-12. The reference of the **Gericke** decision appears to be incorrect and I have given the correct reference above.

readily conceivable what evidence at trial could be proffered to disturb a *prima facie* impression that prescription either is good or bad, are issues pertaining to prescription decided in applications of this nature. This excludes evidence.

[24] A similar objection to the Defendants' Prescription Plea based on the Prescription Act arose in case number 4915/2021 before, HF Jacobs, AJ. It was found, (*vide* paragraph [8] at CaseLines 0-59 under the lastmentioned case number), that the Defendants' Plea "...lacks a firm allegation of the date of inception and the date of completion of the period of prescription as stated in *Gericke v Sacks* (sic)".

[25] *In casu* the Defendants' Counsel contends that the difference between this case and any previous case is that the Defendants have now attached Annexure "MM2" to their proposed amended Plea. On my understanding of the Defendants' Counsel's submissions and on my understanding of paragraph 4.2 of the proposed amended Plea, (p. 002-298), Annexure "MM2" is an extract from Annexure "CS1" attached to the Plaintiff's Particulars of Claim. It is, if my understanding is correct, thus contended that the Defendants no longer rely solely on a contention that everything contained in Annexures to the Plaintiff's Particulars of Claim have prescribed but are more specific in that Annexure "MM2" has identified specific claims as being prescribed.

[26] Whether or not the Defendants' submissions pertaining to Annexure "MM2" are correct, I simply do not know. I have deemed it unnecessary to compare Annexure "CS1" to the Plaintiff's Particulars of Claim with Annexure "MM2" to the proposed Plea. This would have been a time consuming exercise simply to

ascertain an irrelevancy. This would still not address the gravamen of the Plaintiff's objection which, so it appears to me, remains the same as the objection raised by the Plaintiff in the case before HF Jacobs, AJ.

[27] The Defendants' Special Plea on the Prescription Act, (i.e. the "*fourth special plea*"), is extremely succinct. It consists of one paragraph with only three sub-paragraphs, (excluding the sub-paragraph making the conclusion that allegedly the Plaintiff's claims had prescribed), and Annexure "MM2". It is from these that one must attempt to glean why the Defendants contend that the Plaintiff's claims have prescribed. This is something I have found to be impossible to do by perusing the relevant Plea read with Annexure "MM2". The fact that Annexure "MM2" contains two columns with, respectively, the following headings "*Date of incident*" and "*First Acceptance Date*" do not assist, especially in the light of the fact that the present case bears a 2021 case number and some of the listed dates are 2021 dates.

[28] I am therefore, in the premises, constrained to conclude that the Defendants have failed to properly plead prescription based on the Prescription Act and consequently the amendment, **as it now stands**, cannot be entertained. The application to amend the Defendants' Plea as set out in the Defendants' present fourth Special Plea, (i.e. the Plea of Prescription based on the Prescription Act), is refused with costs as set out below.

[29] What remains to be dealt with pertains to costs.

[30] The Plaintiff's main motivation, (I do not imply that this might necessarily be the

only motivation but it is the only one of any import in my opinion), for a punitive costs order is that the Defendants persist in attempting to raise Pleas which have already been dismissed as unmeritorious by previous decisions. I am not convinced that there is any merit in this contention insofar as everything done by the Defendants is concerned.

[31] It furthermore appears to me that in other decisions punitive costs were ordered for the reasons relied upon by the Plaintiff which I have recorded directly above. Axiomatically I am not bound by those previous decisions pertaining to the appropriate scale of costs and, in any event, I do not regard the fact that the Defendants persist in raising or attempting to raise Pleas that had been dismissed as unmeritorious in the past by a Court of equal stature as a ground to justify a punitive costs order. The situation might have been different had all of the appeal attempts on which the Defendants have embarked, run their course and the Defendants had failed to upset the previous judgments on the same issues. However, this is not the case.

[32] If one were to punish a litigant merely because previous decisions by a Court of the same stature as the Court in which a present application is being adjudicated have found against a litigant on the same issue, this would imply that there is an element of finality in the previous decisions despite the fact that they are pending the outcome of higher Courts on precisely the question whether or not the previous decisions are correct. Whilst it is true that a decision of a Court remains effective and must be complied with until it is set aside by a competent Court, (*in casu*, a higher Court), one cannot lose sight of the fact that the principle I am

referring to is analogous to the principle that judgments against which appeals have been noted and are pending, are suspended pending the outcome of the appeal. Only in extraordinary circumstances is the contrary true.

[33] In the premises I find that the mere fact that there are previous decisions on the same issues which are the subject matter of appeals cannot be justification for penalizing a litigant raising the same issue in other cases before a Court of similar stature to those Courts who made the previous decisions subject to appeal.

[34] Having stated the foregoing there is certain conduct of the Defendants which justifies a punitive cost order viz:

[34.1] The late filing of a Replying Affidavit without any proper application for condonation therefor.

[34.2] The attempt to amend the Defendants' Plea by raising other Pleas than those permitted by Ally, AJ.

[35] In the premises I make the following orders:

[35.1] The Defendants' application to amend the Defendants' Plea as set out in the Defendants' new Plea attached as Annexure to the Defendants' Notice of Intention to Amend, is refused with costs. These costs are to be on Scale B, (and, to avoid doubt, shall include the costs of Senior Counsel where so employed but will not be on an attorney and own client or attorney and client basis). This

is subject to the costs orders made below.

[35.2] The Defendants' application for condonation for the late filing of the Reply is granted and the Defendants are ordered to pay the costs of same on an attorney and own client scale, (in order to avoid doubt, on Scale C).

[35.3] The costs occasioned by the Defendants' attempt to amend the Defendants' Plea beyond the scope of the permission granted by Ally, AJ on 17 July 2023, are to be paid by the Defendants on Scale C, (in order to avoid doubt they are to be attorney and own client costs).

TALL POTGIETER
ACTING JUDGE OF THE HIGH COURT, PRETORIA

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This judgment has been delivered by uploading it to the Court Online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and for the delivery is the 14TH day of MAY 2024.