IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No: 11554/2017

In the matter between:

NOBUHLE FAKUNI **Plaintiff**

vs

SANLAM LIMITED **Defendant**
Heard on: 15 November 2023
Delivered on: 26 January 2024

JUDGMENT

MANTAME J

Introduction

[1] This application for condonation pertains to the late filing of the plaintiff's replication to the defendant's plea in the main action. The plaintiff in the main action claims damages on behalf of her minor child, Esoxolo Fakuni ("*Esoxolo*") who allegedly suffered an injury at birth resulting in brain damage, severe asphyxia and cerebral palsy.

[2] The defendant opposed this application on the basis that the replication has been introduced woefully late and it is not "to be taken" that the issues raised in the

replication are triable in the sense required in order to permit the amendment of the pleadings by the introduction of the proposed replication.

Facts

[3] The facts summarised briefly are that Esoxolo was born on 3 January 2011 at St Mary's Mission Hospital in Pinetown. Esoxolo is currently thirteen (13) years old. At the time of Esoxolo's birth, the minor child allegedly sustained an injury which resulted in damage, severe asphyxia and cerebral palsy. The defendant, Santam Limited at the time was the insurer of St Mary's Mission Hospital.

[4] St Mary's Hospital at all times was owned and operated by The St Mary's Catholic Mission Hospital Trust ("*the Trust*"). The plaintiff instituted action against the Trust in April 2013 and against the defendant in June 2017. The Trust later became insolvent and was placed on final liquidation on 13 May 2016.

[5] The action instituted against the defendant by the plaintiff is that the injury suffered by Esoxolo at birth was as a result of negligence of the medical officers at St Mary's Mission Hospital, and such negligence was not solely limited to negligence arising from *"midwifery duties"* as the defendant has repeatedly said. Upon the Trust fulfilling its obligations, the defendant was bound to insure the Trust in accordance with Exclusion, Conditions and Limitations contained in the contract annexed as "*Annexure A*" to the Plea and entitled: Professional Indemnity, Medical Malpractice And Public Liability Insurance For Hospital And Clinics.

[6] On 28 January 2015, the plaintiff was invited by Norton Rose Fulbright to discuss the Trust's financial situation which appeared precarious at the time with Mr Andre Liebenberg ("*Mr Liebenberg*"). At the time, it was alleged that both the Trust and the defendant were aware that the plaintiff disputed that the claim arose solely out of *"midwifery duties."*

[7] On 4 November 2015, Mr Liebenberg addressed a letter to the Trustees of the Trust and set out various claims against the Trust, including R10 500 000.00 in respect of the plaintiff's claim. Mr Liebenberg stated that St Mary's Mission Hospital does not have insurance for any of these amounts. The only claim in which funds are held is in respect of plaintiff's claim where it was recorded that the defendant had paid R500 000.00.

[8] In turn, on 16 November 2017, Garlicke & Bousfield addressed a letter which confirmed that the Trust received an amount of R5 560 175.01 in settlement of its insurance obligations and <u>not</u> in settlement of the plaintiff's claim. According to the plaintiff, this appears to be in contrast to the wording of the Agreement of Loss concluded by the Trust and the defendant which specifically referenced the amount of R5 560 175.01 in full and final settlement of the insured's claim for an indemnity under its insurance policy in respect of the action.

[9] The plaintiff alleges that despite the acknowledgment that the monies paid over to Garlicke & Bowesfield were in respect of the plaintiff's claim, however Garlicke & Bousfield paid over to the Estate account an amount of R4 928 587.71. The plaintiff observed that this amount was not ring-fenced, nor used to settle the plaintiff's claim

against the Trust. It appears to have been dispersed for general expenses of the liquidated hospital.

Replication

[10] In its replication, *first*, the plaintiff asserts that the nature of the negligence and specifically whether it would fall within the ambit of the limitation pertaining to "*midwifery duties*" on the general malpractice clause has at all times been integral to the plaintiff's claim against the defendant, and the plaintiff has at no point accepted that the negligence arose solely from *"midwifery duties."* For instance, if the plaintiff is only able to establish negligence arising from *"midwifery duties"*, the limitation of R5 000 000.00 (R5 million) would be applicable. However, if the plaintiff establishes negligence from any medical officer or institutional negligence, the plaintiff's claim against the defendant would be for the medical malpractice with a R25 000 000.00 (R25 million) limit.

[11] It is the plaintiff's stance that the negligence was not limited solely to *"midwifery duties"* but medical practitioners. For instance, the plaintiff alleged that the obstetric medical officer on duty on the night of 2 January 2011 and 3 January 2011 mismanaged his or her on duty responsibilities. Essentially, the institutional failure on behalf of the hospital led to the unfortunate events and which ultimately caused Esoxolo's injury. The defendant cannot elect to pigeonhole the plaintiff's claim into the specific limitation for midwifery, as opposed to general damages.

[12] The *second* issue raised in the replication pertains to the amount paid by the insurance not being ring-fenced. The amount paid to Garlicke and Bousfield was in

respect of the plaintiff's claim and should not have fallen into the Trust's estate whether liquidated or not. Despite Mr Liebenberg's acknowledgment that the funds were held "in respect of Fakuni" and advised that Fakuni's claim was reduced from R10 500 000.00 to R5 500 000.00, there was no provision made by the defendant for the ring-fencing of the funds concerned.

[13] The *third* issue raised in the replication pertains to the agreement being concluded to thwart the provision of section 156 of the Insolvency Act 24 of 1936 *("Insolvency Act")*. At the time when the Agreement of Loss was entered into, the defendant and the Trust were aware that the Trust was carrying on business in insolvent circumstances and that liquidation in the near future was inevitable, without the assistance from the Department of Health. In the circumstances, upon the liquidation of the Trust, the plaintiff's claim would be against the insurance company directly in terms of Section 156 of the Insolvency Act.

[14] The opposition raised by the defendant appears to be that the proposed replication is ultimately excipiable and permitting it to be delivered at this stage would accordingly serve no purpose; and that no case for condonation has been made out in circumstances where this application is brought more than five (5) years after the close of pleadings.

[15] According to the defendant, the plaintiff's claim dealing with an injury to a foetus sustained in the course of labour, for purposes of the contract of insurance, is a claim arising out of *"midwifery duties"* provided for in the insurance policy. There appears to

be no ambiguity on the insured cover as the claims arising out of *"midwifery duties"* as it was expressly agreed between the parties to a contract of insurance that the claims are subject to the aggregate limit of R5 million. The agreement of parties with regard to the Agreement of Loss has no relevance to this application. The defendant was entitled to pay the amount of maximum indemnity to the Trust in terms of the policy. And, on making that payment, the defendant would be under no further liability to the insured in connection with the claim. Further, there is no provision in law allowing for the amount of the indemnity to be "ring-fenced as a payment for the plaintiff's claim" so as to fall outside an ensuing insolvency. In any event, Section 156 of the Insolvency Act does not allow an action directly by a claimant against an indemnity insurer, but only to the extent that the obligation to indemnify remains and would otherwise be enforceable by the insured.

Submissions

[16] The plaintiff submitted that the explanation for degree of lateness has been proffered. However, he conceded that it is not a day-to-day type of an explanation and in such circumstances, it was said that it is not an ideal one. However, it was pointed out that initially, it might have been that it was not deemed necessary to file a replication to the defendant's plea which was filed in 2017 hence a considerable amount of lateness. Regardless of that standpoint by old Counsel, after new Counsel came on brief, it was considered necessary to file a replication. In fact, the plaintiff and especially Esoxolo, cannot be prejudiced by the fact that old Counsel did not deem it appropriate to replicate to the plea. New Counsel considered the matter and highlighted the need to replicate in August 2022. As a result, the process in preparation

thereof ensued and the defendant was adamant that a formal application should be brought hence this application. Good cause, and the interest of justice requires that this application should succeed.

[17] In Madinda,[1] the plaintiff had this to say the Supreme Court of Appeal held that:

> "*Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant and any contribution by other persons or parties, to the delay and the Applicant's responsibility therefor.*"

[18] It was suggested by the plaintiff that the defendant's answering affidavit does not demonstrate that any of the issues pleaded in the replication are excipiable. Quite the contrary, it was stated that the issues raised in the replication are triable, and that will be determined by the trial court on the merits of the replication if this application is granted.

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[1] Madinda v Minister of Safety and Security, Republic of South Africa (153/07) [2008] ZASCA 34 (28 March 2008) para [10]

[19] The defendant on the other hand submitted that new propositions were introduced in the replication and therefore the requirements for the amendment of a pleading should be complied with, in the sense that the plaintiff must show the reasons for lateness and that it has something deserving of consideration, a triable issue. The plaintiff cannot place on record an issue for which it has no supporting evidence – See – *Ciba–Geigy.*[2]

[20] This assertion was disputed by the plaintiff on the basis that the issues raised in the replication are issues that are required to be raised in the pleadings and could not have been raised in the particulars of claim because the plaintiff had not, at that stage, had sight of the insurance documentation, upon which reliance is placed by the defendant. The defendant also is to blame as it did not furnish the plaintiff with these documents timeously.

[21] In addition, the defendant and the Trust might have been *ad idem* on the contents of the contract, however, the plaintiff interpreted the contract differently and that caused severe prejudice on the minor child that was severely injured.

[22] According to the plaintiff, the factors that weigh heavily in favour of granting condonation in the interest of justice include the following: (i) the importance of the case to the plaintiff (minor child), (ii) the sound prospects of success at trial, (iii) the fact that the condonation has not been brought *mala fide*; (iv) that it would be desirable to have

[2] Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en ‘n Ander 2002 (2) SA 447 (SCA)

all triable issues in the matter properly and fully ventilated before the Court; (v) that if condonation is granted, the defendant would suffer no prejudice; (vi) that if the condonation were to be refused, the plaintiff and the minor child would be severely prejudiced in that the plaintiff would have no option but to reinstate the action afresh – which would in itself serve to considerably delay finalization of the minor's claim and thereby causing substantial inconvenience to both parties and the Court's administration of justice; (vii) an adequate explanation for the delay has been provided; (viii) that neither the plaintiff nor the minor child are personally responsible for the delay; (ix) and that the plaintiff's claim on behalf of the minor child has not prescribed. In such circumstances, the Court should grant the condonation for the late filing of the replication.

Discussion

[23] Rule 27(3) of the Uniform Rules states that:

> "*The Court may, on good cause shown, condone any non-compliance with these rules*."

[24] Rule 25(1) of the Uniform Rules states that:

> "*Within fifteen days after the service upon him of a plea and subject to subrule (2) hereof, the plaintiff shall where necessary deliver a replication to the plea and a plea to any claim in reconvention, which plea shall comply with Rule 22*."

[25] The defendant's complaint is that the plaintiff has not complied with Rule 25(1) and a delay of (5) five years has not been explained. Indeed, the plaintiff's explanation for the delay in filing its replication might be considerably late and not be a blow-by blow type of an explanation. In my analysis, the explanation proffered by the plaintiff is cogent and reasonable. The plaintiff explained that the old Counsel might not have deemed it appropriate in that five (5) years to file the replication. However, upon the new Counsel accepting the brief and considering the matter, he made resolve to file the replication. Esoxolo cannot be prejudiced by an error that was committed by the legal representative.

[26] Courts have consistently refrained from attempting an exhaustive definition of what constitutes good or sufficient cause for the exercise of its discretion.[3] Good cause or sufficient cause for the exercise of discretion in my view suggest that each case must be judged on its own merits. The plaintiff has ably set out the factors that count heavily in favour of condonation in paragraph 22 above. The defendant has not gainsaid such factors.

[27] If regard is had to the merits, the defendant does not dispute the plaintiff's assertion that the plaintiff's claim had been formulated in such a way as to go beyond *"midwifery duties"* as they elected to interpret that provision in the insurance policy. As such, it was not for the Trust and the defendant's call to prescribe and reach an agreement suitable to them without taking into account the pending litigation in the matter. The plaintiff as the initiator of legal proceedings cannot be told by <u>any</u> party in

[3] Mynhardt v Mynhardt 1986 (1) SA 456 (T) at 463 E - F

the proceedings how it should proceed in prosecuting its claim. In my view, upon the plaintiff realising that its case has not been presented properly before Court, it was bound to ask for Court's indulgence and present it properly. As the defendant did not consent to the plaintiff's filing its replication out of time, it is therefore incumbent upon this Court to exercise its discretion judicially in assessing whether there has been sufficient or convincing reasons and / or good cause shown for the granting of the condonation in this regard.

[28] The plaintiff filed a damages claim after assessing the manner in which the minor child was injured and this was before the Trust was sequestrated. The manner in which the Agreement of Loss was concluded leaves much to be desired. To the extent that the Trust and the defendant always had an upper hand, the facts that have been put before this Court require some attention. On 28 January 2015, after the plaintiff did not avail themselves to an invitation by Norton Rose Fulbright's attorneys to discuss the Trust's precarious position with Mr Liebenberg, Mr Liebenberg who at the time was the chairman of St Mary's Mission Hospital later went ahead and concluded an Agreement of Loss with the defendant (Santam) that was represented by Stalker Hutchison Admiral (Pty) Ltd. Mr Liebenberg is a director of Garlicke and Bousfield, a firm of attorneys that act for the defendant (Santam). The defendant (Santam) is a client of both Norton Rose Fulbright and Garlicke & Bousfield. Clearly, there is a conflict of interest situation and / or a perception of bias in this regard, most notably to those at arm's length. As it was brought before the defendant that Mr Liebenberg appears to have put Santam's and his firm's interest above those of St Mary's Mission Hospital and / or the minor child in concluding the Agreement of Loss. In my view, the defendant should not have

demonstrated an aloof attitude, but should have explained his ethical and legitimate involvement in this agreement.

[29] The defendant might appear to dispute the conflict of interest and / or perceived bias on the part of Mr Liebenberg. However, as the defendant put it, the defendant was inundated with a series of claims under the policy. Having had this background, the insurer and insured (having been legally represented by one person) had to devise means to curtail their loss. On 20 May 2015, the insurer and the insured agreed that the limit of the indemnity under the contract of insurance in respect of the claim advanced by the plaintiff was R5 000 000.00 and that the defendant would pay to the Trust R5 560 175.01 being the maximum indemnity of the insurer and the insured in respect of the claims advanced by the plaintiff. Surely, in such circumstances, the interests of the plaintiff as a litigant were not taken into account.

[30] In *Chueu*[4] at paragraph 4 the Supreme Court of Appeal stated:

` *"Legal practitioners are obliged to conduct themselves with the utmost integrity and scrupulous honesty. Public confidence in the legal profession is enhanced by maintaining the highest ethical standards. A lack of trust in the legal profession goes hand in hand with the erosion of the rule of law. The Legal Practice Act 28 of 2014 (the LPA) replaced the Attorneys Act 53 of 1979 and came into operation on 1 November 2018. Like its predecessor, the objects of*

[4]Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and others (459/22) [2023] ZASCA 112 (26 July 2023)

the LPA are, inter alia, to promote and protect the public interest and to enhance and maintain appropriate standards of professional and ethical conduct of all legal practitioners. As such the Limpopo LPC is not an ordinary litigant, but generally acts for the public good. Legal proceedings brought by the Limpopo LPC in this regard are sui generis and the disciplinary powers of the High Court over the legal practitioners are founded in its inherent jurisdiction as the ultimate custos morum of the legal profession."

[31] Recently, the Constitutional Court restated the ethical standard which practitioners should uphold. In*: Ex Parte Minister of Home Affairs and Others*[5]*, it was stated:*

"[103] Legal practitioners are an integral part of our justice system. They must uphold the rule of law, act diligently and professionally. They owe a high ethical and moral duty to the public in general, but in particular to their clients and to the courts. In Jiba, this Court stated:

"Legal practitioners are a vital part of our system of justice . . . . As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty."[6]

[104] In Kekana, the Supreme Court of Appeal held:

"Legal practitioners occupy a unique position. On the one hand they serve the interests of their clients, which require a case to be presented fearlessly and vigorously. On the other hand, as officers of the court, they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence. Both professions have strict ethical

[5]In re Lawyers for Human Rights v Minister of Home Affairs and Others (CCT 38/16) [2023] ZACC 34; 2024 (1) BCLR 70 (CC) (30 October 2023)

[6] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at para 1.

rules aimed at preventing their members from becoming parties to the deception of the court. Unfortunately, the observance of the rules is not assured because what happens between legal representatives and their clients or witnesses is not a matter for public scrutiny. The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part."[7]

[32] This is the standard that the higher courts expect from legal practitioners. Obviously, it is unpalatable and undesirable that Mr Liebenberg represented the insurer and the insured in concluding an Agreement of Loss. More so, it is somehow incomprehensible for the defendant to assert that the plaintiff is not a beneficiary of anything and they were not compelled to ring-fence this amount. When the Agreement of Loss was concluded, the defendant knew that this amount was claim specific and not to defray the insolvent estate's costs. These are triable issues in my analysis.

[33] Seemingly, the purpose of the parties in this agreement was meant to protect both the Trust and the defendant and for them to be released from liability regardless of the outcome of the litigation. This intention is bolstered by the fact that the defendant in opposing this application stated that: "*It is, with respect not open to a stranger to the insurance contract to assert that a term of the contract has a meaning which is different to that as understood by the parties to the contract. The parties were ad idem as to the meaning of the policy and its effect and the Agreement of Loss reflect their common*

[7] *Kekana v Society of Advocates of SA* [1998] ZASCA 54; 1998 (4) SA 649 (SCA). See also: *Chueu* above at footnote 4.

understanding and intention. There is no room for the plaintiff to allege that they were labouring under some "common mistake" and that the agreement concluded is void."

[34] This response to the plaintiff's interpretation of the contract demonstrates that the defendant had a deem view of the seriousness of the plaintiff's claim. In other words, the plaintiff should have accepted whatever was shoved to her and keep quiet.

[35] Although this Court is tempted to interpret what exactly the parties meant in their agreement by limiting the claim to *"midwifery duties,"* it would shy away from such interpretation due to the fact that this might be a contentious triable issue in the main action. It is this Courts view that the Agreement of Loss was meant to collapse the plaintiff's litigation, and unfortunately this did not happen. In fact, I disagree with the defendant's stance that the plaintiff is not a beneficiary of the policy, and that the replication should it be granted, it would be uneventful. If that is indeed so, it then begs a question why the defendant incurred costs and opposed this application, and why the plaintiff's claim was reduced by the parties when they entered into an Agreement of loss. It might be so that the plaintiff was not a beneficiary to this policy. The fact that it was taken specifically to insure the events such as that of the plaintiff makes her an indirect beneficiary of the policy more so if she is so aggrieved. The plaintiff is entitled to interpret the contract in such a way that her interests are protected. Essentially, the plaintiff is directly affected by the outcome of the insurer and insured's contract, and she is entitled to interpret the contract employing the often quoted principles in *Endumeni.*[8]

[8] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

[36] It is common cause that this matter has not made its way to trial, and in such circumstances, the plaintiff was at liberty to file an application for condonation for the late filing of its replication. The defendant did not take issue with the delay in finalising the main action, but confined its opposition to the late filing of the replication.

[37] The Court had an opportunity to assess the conduct and motive of the plaintiff. In doing such an exercise, this Court is convinced that the plaintiff would not have pursued this matter this vigorously if there were no prospects of success. This matter indeed has dragged for years. Despite that being the case, cogent explanation was made. In my consideration there appears to be no prejudice or potential prejudice to be suffered by the defendant if this condonation is granted. This Court in all fairness has a duty to protect the interest of the minor child if there is an element of them being trampled at. In the interest of justice and fairness, this duty is entrenched in the Constitution[9]. The manner in which the Constitution is to be interpreted and applied is of paramount importance.

"Section 28 Children – states that:

> …
>
> *(2) A child's best interest are of paramount importance in every matter concerning the child".*

[9] The Constitution of the Republic of South Africa, Act 108 of 1996

[38] This therefore suggests that this Court, as the upper guardian of all minors should be slow in getting carried away by legal technicalities and rigid application of court rules that are raised before it. Prejudice, in matters of this nature reign supreme. And, in this instance, it is the minor child that would be prejudiced should the application not be granted.

[39] In addition, I disagree with the assertion that the defendant should be absolved from taking responsibility in this regard as the Agreement of Loss of Loss was reached. And further, the Agreement of Loss has no relevance and / or bearing in this application. The defendant overlooks the fact that the late replication was filed as a result of the consequences of the Agreement of Loss.

[40] Section 156 of the Insolvency Act notably reads as follows:

> "**Insurer obliged to pay third party's claim against insolvent**
>
> *Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insurer) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured."*

[41] The plaintiff posed a valid point that what motivated the Agreement of Loss was the fact that both parties knew that the Trust was operating at a loss. Notably, Mr Liebenberg when he concluded an Agreement of Loss, he knew that the Trust was in a precarious financial position before its liquidation. Surely, the Trust was aware of its insolvent state and intended to minimise its loss. In the circumstances there is no way that this Court would dismiss the allegations by the plaintiff that the agreement was concluded to thwart the provisions of section 156 of the Insolvency Act. The plaintiff is adamant that it is not precluded from proceeding directly against the defendant in terms of section 156 of the Insolvency Act. This Court is convinced that the plaintiff has raised triable issues in its replication.

[42] In conclusion, a proper case has been made up by the plaintiff for granting of condonation for the late filing of its replication.

[43] In the result, the following order is granted:

43.1 The application for condonation for the late filing of the replication is granted with costs including costs of two Counsel.

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MANTAME J

WESTERN CAPE HIGH COURT