IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not Reportable

Case No: CA & R 22/2022

In the matter between:

GEORGE RAKHOJANE **APPELLANT**

And

MEMBER OF THE EXECUTIVE COUNCIL:
DEPARTMENT OF HEALTH, NORTHERN CAPE PROVINCE **RESPONDENT**

Neutral citation: *Rakhojane v Member of the Executive Council: Department of Health, Northern Cape Province* (Case no CA & R 22/22) (19 April 2024)

Coram: PHATSHOANE AJP, LEVER and NXUMALO JJ

Heard: 20 November 2023
Delivered: 19 April 2024

Judgment

PHATSHOANE AJP

Introduction

[1] This appeal, with leave of the Supreme Court of Appeal, is against the whole of the judgment and order of the court a quo (Mamosebo J) in which it refused condonation for the late filing of the amended particulars of claim; set aside

the appellant's amended particulars of claim as an irregular step in the proceedings and struck out certain paragraphs of the appellant's answering affidavit to the Rule 30(1) application.

Application for condonation and reinstatement of the appeal

[2] The appellant failed to comply with rule 49(6)*(a)* of the Uniform Rules of this court which requires that within sixty days, after delivery of a notice of appeal, an appellant must make written application to the registrar for a date for the hearing of the appeal and rule 49(7)(a) which provides in part that simultaneously with the application for a date for the hearing the appellant file with the registrar three copies of the record on appeal and furnish two copies to the respondent. The notice of appeal was filed on 29 September 2021, thus the record of appeal ought to have been filed on 23 December 2021.

[3] An incomplete record, which was filed on 09 May 2022, constitutes of oral argument by counsel in the court a quo in respect of the main proceedings of 14 August 2020. A supplementary volume 5 of the record, which constitutes of oral argument by counsel in the court a quo with regard to the application for leave to appeal heard on 05 May 2021, was filed on 10 June 2022. Therefore, the appellant seeks condonation for non-compliance and the reinstatement of the appeal.

[4] In terms of rule 49(7), where the record is not ready for filing, the registrar may accept an application for a date of hearing without the necessary copies if—(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or (ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal. The appellant did not comply with rule 49(7) his reason being that he could not apply for the hearing date because the record had been incomplete.

[5] The application for condonation and reinstatement of the appeal was brought on 05 May 2023, approximately one year and five months later, after the appeal had lapsed and had been struck off the roll. In the application for the reinstatement of the appeal the appellant submits that he filed an application for condonation of the late filing of the record on 13 June 2022, soon after delivery of the complete record of the proceedings on 10 June 2022. I will accept this as the respondent, the Member of the Executive Council, Department of Health, Northern Cape, did not controvert the averment. However, that application was not placed before us for consideration as part of the record of this appeal. Clearly, there had been some procedural blunders on the part of the appellant's attorneys which the court a quo correctly labelled as "a lackadaisical approach" in attending to this matter. The frequency and flagrancy of the flouting of the rules of this court ought to be strongly deprecated.

[6] Needless to say, the efforts the appellant's attorney made in an attempt to obtain the full record of the proceedings, albeit an exercise in futility, cannot be ignored. As already alluded to, the transcript of proceedings he sought to file comprised of oral arguments by counsel which ordinarily ought not to form part of the appeal record. The appellant's attorney explained the difficulties he encountered in securing the complete record by referring to several contemporaneous exchanges at various intervals between his office and the transcription service. In my view, regard being had to this, the delay associated with the procurement of the record has been adequately explained.

[7] With regard to the delay in applying for the hearing date the appellant's attorney explained that he laboured under the misapprehension that the record had to be filed first prior to the application. Rule 49(7)(a) plainly sets out the time-frame within which the application for the hearing date is to be made. It is so that, for proper judicial case-flow management, the registrar had

advised the parties that, until the record was in order, she was unable to allocate the hearing date. In the end, the overriding consideration is the interest of justice which, in my view, demands that, in the present case, the application for condonation and the reinstatement of the appeal be upheld. A further reason for the application to be granted is that the appeal itself has reasonable prospects of success.

Background

[8] On 21 October 2016 the appellant instituted an action for damages against the respondent for injuries sustained as a result of the alleged medical negligence which caused him to lose his eyesight. In setting out his cause of action the appellant pleaded, in part, as follows in his original particulars of claim dated 20 October 2016:

"5. On the 24th of November 2015, the plaintiff went to Galeshewe Day Clinic Hospital in Kimberley for treatment of a severe and persistent headache, of which he was experiencing such a grave headache for the first time.

6. Upon arrival at Galeshewe Day Clinic Hospital the plaintiff was attended to upon by a nurse who then referred him to the medical doctor who was on duty on the aforementioned date.

7. Whilst the medical doctor was examining the plaintiff at Galeshewe, the plaintiff got a seizure and thereafter fell down from the hospital bed. The medical doctor then gave the plaintiff an injection on the back and commanded him to sit on a wheelchair while he called an ambulance.

8. At all material times, there was no further medical examination or check-ups done by the doctor whilst the plaintiff was seated on the wheelchair for hours until he was transferred to Kimberley Complex Hospital by ambulance.

9. Despite the plaintiff being referred to Kimberley Complex Hospital with a referral letter instructing the hospital staff to treat him on an emergency basis, the plaintiff was put in the waiting room at the casualty department for long hours, starting from 14h00 until late hours of the night.

10. On the evening of the 25th of November 2015, the plaintiff was taken for a CT Scan by medical doctor who was on duty, but it was only after midnight that

the plaintiff was taken to Intensive Care Unit (ICU). By the time the plaintiff was taken to ICU, his condition had already deteriorated as the medical staff had neglected to treat him on an emergency basis albeit being aware that he (plaintiff) was an emergency case and in this regard also being informed by the plaintiff's wife that his condition was worsening while the plaintiff was kept waiting at the Casual Department.

11. On the early hours of the 26th of November 2015, the plaintiff was taken for a surgical head operation for the bleeding which had developed from inside his brain.
12. As a result of the said surgical operation conducted by Kimberley Hospital Complex, the plaintiff lost his vision and became permanently blind until to date.
13. The following week after the 26th of November 2016, the plaintiff was referred to an Ophthalmologists at Kimberley Complex Hospital who found that the plaintiff's head operation affected his optic nerve and cerebral cortex.
14. The Ophthalmologists further confirmed that the surgical operation done by Kimberley Complex Hospital caused the plaintiff to have some visual disturbances with fluctuating visual activity causing the plaintiff to lose his vision and thus becoming permanently blind to date.
15. The plaintiff was discharged from hospital on the 1st of December 2015 and upon his discharge from the hospital, the plaintiff was informed that he should report for his follow up consultation scheduled for the 17th of February 2016.
16. The defendant further advised the plaintiff that by the 17th of February, the plaintiff would then have regained his vision, but the plaintiff is to date still blind albeit such a promise [was] made to him ..."

[9] On 09 March 2018 the appellant's attorneys served and filed a notice in terms of rule 28(1) and (2) of the appellant's intention to amend the above para 13 of his particulars of claim by adding the following sub-paragraphs:-

"13.1 At all material times the treating doctor from Kimberley Hospital was not sure about the cause of the plaintiff's blindness.

13.2 The defendant's treating doctors at Kimberley Hospital ought to have known that a drainage operation for a chronic subdural haematoma are far away

from the optic nerves, the blindness is not as a result of a direct injury to the optic nerves but the blindness is as a result of brain herniation.

13.3 The defendant's treating doctors ought to have avoided a lumber puncture (LP) procedure in the high pressure of haematoma."

[10] The respondent's attorneys did not object to the proposed amendment. However, the appellant's attorneys omitted to file the amended particulars of claim within the period of 10 days as contemplated in rule 28(5) but filed them on 14 November 2019, some 18 months after the *dies* had expired. The respondent contended that this constituted an irregular step in the proceedings and filed a notice in terms of rule 30(2)(b) on 28 November 2019 in which the appellant was afforded 10 days within which to withdraw the amended particulars of claim.

[11] In light that the appellant did not respond to the rule 30(2)(b) notice and had not sought the respondent's consent to file the amendment or the court's leave, the respondent filed an application in terms of rule 30(1) on 19 December 2019 seeking an order that the appellant's amendment be set aside pursuant to rule 30(1) on the basis that it constituted an irregular step in the proceedings. The respondent also raised three other issues in the rule 30(1) application. First, that the appellant had in his original particulars of claim pleaded that the operation performed at Robert Mangaliso Sobukwe Hospital (RMSH) had caused his blindness whereas in the amended particulars he averred that the brain herniation caused his blindness. It was argued that this constituted a new cause of action.

[12] Secondly, it was argued that, insofar as the appellant was treated at RMSH on 25-26 November 2015 any cause of action arising out of the said treatment ought to have been pleaded by 25 November 2018 (within a period of three years). Therefore, it was contended, the new cause of action raised in the amended particulars of claim had prescribed. Thirdly, it was half-heartedly argued that the particulars of claim were excipiable in that at para 12 thereof

the appellant pleaded that the operation performed on 26 November 2015 caused his blindness whereas in the amended para 13.2 he pleaded that the blindness occurred as a result of the brain herniation. The two paragraphs, it was argued, were contradictory, vague and embarrassing and consequently excipiable.

[13] On 14 February 2020 the appellant filed an answering affidavit to the respondent's rule 30 (1) application together with the application for condonation of the late filing of the amended particulars of claim in terms of rule 28(5). In this answering affidavit the appellant was at pains to show that the amended particulars did not introduce a new cause of action nor were they excipiable. He explained that the amendments were a simple elaboration of what had been contained in the initial particulars of claim for purposes of perfecting that pleading. The salient averments in this affidavit, which became central to the defendant's application to strike-out, read:

> '5.5 I submit that upon my attorneys of record having further consulted with my medical experts on the interrogation of his medico-legal report, the concept of brain herniation was clarified and that it means a brain swelling or bleeding from a head injury resulting from a long delay in receiving treatment, a fact that has always been part of my particulars of claim.
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> 5.10.1 The defendant does not dispute or deny my particulars of claim at page 9 paragraph 11 and further that it did a surgical head operation procedure after a long delay being seated at its casualty department. In this regard, at page 21 paragraph 9 of its Plea of defence, the defendant wholly admits the claim I have made herein. There is further no denial by the defendant that bleeding resulted from the head operation which I know that in medical terms that that condition of bleeding is brain herniation.
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> 5.10.2 The medico-legal report of Doctor Wilkinson, my medical expert witness, says the long delay in diagnosis and treatment are also causes of brain herniation which is now known that such a bleeding that occurred in medical terms is called brain herniation.

5.10.6 I am advised by expert specialist as this court can glean from paragraph 14 of his medico-legal report in that:

"…[T]he long delay in diagnosis and treatment are also causes of brain herniation…"

5.10.7 I further submit that of interest to the above, is that the defendant in its plea ad paragraph 15 does admit that I had brain bleeding, a fact which still comes to the same meaning of the concept "brain herniation" and this will be a matter for legal argument to the effect that the amendments sought are simply to explain in medical terms what is already contained in my particulars of claim.

21.3 I submit that the cause of action has been so disclosed in my particulars of claim as the long delay and not treating me on an emergency basis albeit the defendant's hospital had such a referral letter from Galeshewe Day Care Hospital. This I submit is what Dr Wilkinson is explaining in medical terms in his report that long delays are also causes of brain herniation and which the defendant does admit that it has to do with the bleeding in the brain as per its plea of defence..."

[14] In seeking condonation for the late filing of the amendment the appellant's legal representative stated that he had allocated the file to his candidate attorney and did not diarise the matter. Consequently, he forgot to effect the amendment within a period of 10 days pursuant to rule 28(5). The candidate attorney, who shortly qualified as an attorney, left the firm a year later without handing over the files to the appellant's attorney, who apologised for his mistake which he urged that it not be attributed to his client.

[15] On 09 March 2020 the respondent filed a replying affidavit together with a response to the appellant's application for condonation. In respect of condonation the respondent submitted that it suffered grave prejudice, which cannot be cured by an appropriate costs order, because the purported new cause of action, as pleaded in the amended particulars of claim, had

prescribed. It also contended that the appellant had not shown that it had a bona fide case which necessitated the amendment.

[16] On 05 May 2020 the respondent also filed an application to strike out the quoted paras 5.5, 5.10.1, 5.10.2, 5.10.6, 5.10.7 and 21.3 of the appellant's answering affidavit to its rule 30(1) founding affidavit on the grounds that they constituted inadmissible hearsay evidence in that the appellant filed only the confirmatory affidavit of his attorney but not that of Dr Wilkinson.

[17] On 14 August 2020, Mamosebo J considered the respondent's rule 30(1) application, the appellant's application for condonation of the late filing of his amended particulars of claim and the respondent's application to strike out the identified paragraphs of the appellant's answering affidavit.

The judgment of the court a quo

[18] The court a quo recorded it as common cause that the cause of action arose on 25 or 26 November 2015 and that the appellant had until 25 November 2015 to file the amended particulars of claim which introduced the "new cause of action". The court concluded that when the amended particulars were filed on 19 November 2019, some 18 months later, "the new cause of action had prescribed". The court reasoned:

"The cause of action as it appears in the original particulars of claim and new cause of action as it appears in the amended particulars of claim are substantially different and the new cause of action falls clearly outside the prescription period".

Accordingly, the court a quo upheld the respondent's application in terms of rule 30 by setting aside the amended particulars of claim as an irregular step in the proceedings.

[19] In any event, so reasoned the court, good cause had not been established for the late filing of the amended particulars of claim. It refused condonation on these bases:

> "I am not swayed by the explanation furnished by the plaintiff's attorneys. It does not provide an accurate account of the causes for the delay. The mere fact that his colleague has left the firm and he erroneously omitted to diarise this file displays a lackadaisical approach which fails to meet the required standard of diligence required of an attorney. It follows then that the application for condonation must fail, unless the prospects of success are strong."

[20] Turning its attention to the application to strike out the specified parts of the appellant's answering affidavit to the rule 30(1) application, the court noted that in para 5.5 of the appellant's answering affidavit he made mention of the consultation that his attorney had with his expert regarding the brain herniation. However, he only filed the confirmatory affidavit of his attorney excluding that of his expert. What the attorney conveyed to the appellant, so reasoned the court, constituted inadmissible evidence. Accordingly, the court a quo struck out para 5.5 of the appellant's answering affidavit. Insofar as the averment was repeated in paras 5.10.1, 5.10.2, 5.10.6, 5.10.7, and 21.3 of the answering affidavit, the court concluded, these had to suffer the same fate.

Discussion

[21] What arises for consideration in the present appeal is firstly, whether the court a quo correctly set aside the amended particulars of claim as an irregular step in the proceedings because the amendment introduced a new cause of action which had prescribed. Secondly, whether the court a quo correctly dismissed the application for condonation of the late filing of the amended particulars of claim and lastly whether the court correctly upheld the striking out application.

[22] The appellant argued that the allegation made in the amended particulars of claim, that his blindness was caused by brain herniation, does not introduce a new cause of action. Even if it were to be assumed that it did, it did not introduce a new debt for purposes of the Prescription Act 68 of 1969. It was further argued that the debt claimed in the amended particulars of claim is the

same debt claimed in the original particulars of claim, namely, a claim for injuries suffered by the appellant as a result of the negligent treatment at RMSH, which resulted in his permanent disablement. Consequently, it was submitted, the court *a quo* erred when it found that the amended particulars of claim introduced a new cause of action which falls outside the prescription period.

[23] It was further argued, for the appellant, that even if it were to be assumed that the court *a quo* was correct that the amended particulars of claim introduced a new cause of action, such new cause of action had not been extinguished by prescription. The appellant further submitted that the proposed amendment is not *mala fide* but is intended to perfect the particulars of claim in accordance with the expert report of Dr Wilkinson. As to the application to strike out, it was contended that there was no legal basis for such an application.

[24] The respondent countervailed that in para 12 of the original particulars of claim the appellant's cause of action was based on *commission* in that as a result of the said surgical procedure he lost his vision. He was referred to an ophthalmologist on 26 November 2016 who found that the head operation had affected his optic nerve and cerebral cortex. However, in the amended particulars of claim, the respondent argued, the appellant's cause of action morphed into an omission on the part of the treating doctors. It was argued that the surgical operation is 'a conduct' on its own and that the brain herniation arising from haematoma and the failure to act thereon, would constitute a separate conduct. The appellant had not initially pleaded that the cause of his blindness was brain herniation. To the extent that the appellant's blindness is said to have been caused by brain herniation, in the amended particulars of claim, it was argued for the respondent, this constituted a new cause of action different from the cause of action pleaded in his original particulars of claim.

[25] In any event, it was argued for the respondent, when the summons was issued on 21 October 2016 Dr Wilkinson's report dated 16 September 2016 was available. The amendment was only made on 14 November 2019, some eighteen months later. Therefore, the appellant's 'new claim' prescribed on 15 September 2019.

[26] A court hearing an application for an amendment has a discretion whether or not to grant it.[1] Such a discretion must be exercised judicially in the light of all the facts and circumstances. Case law is replete that for a proper ventilation of the dispute between the parties the convention is to allow amendments where this can be done without prejudice to the opponent. The attainment of justice between the parties is not to be obstructed by a too rigid adherence to the pleadings.[2] In *Macsteel Tube and Pipe, A Division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* [3] Molemela JA said:

> "[12] It is true that the refusal of an amendment may have a final and definitive effect because a party may be precluded from leading evidence at the trial in respect of the aspects which were to be introduced by the amendment of the pleadings. However, the granting of an amendment does not, without more, have that effect. Ordinarily, an order granting leave to amend is an interlocutory order which is not final and definitive of the rights of the parties."

[27] The striking feature pertaining to the proposed amendment is that it went unopposed. Ordinarily, absent any objection by the opponent, the party desiring the amendment is entitled to make it. The objection came some 19 months later, by means of rule 30(1), when it was evident that the appellant had not filed the amendment he sought within the prescribed 10 days period.

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[1] *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd and Others* 2021 (5) SA 457 (SCA) para 15.

[2] *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 637B and 638.

[3] 2021 JDR 3367 (SCA) para 12.

[28] In his original particulars at para 11 the appellant intimated that he had a "surgical head operation for the bleeding which had developed from inside his brain". This was admitted by the respondent who further averred in para 10 of his plea that "the loss of vision was caused by pressure on the brain as a result of subdural bleeding." The appellant explained, in his amended particulars, that the blindness did not result from a direct injury to the optic nerves but from brain herniation which he clarified in a later affidavit to mean the swelling of the brain or bleeding from a head injury as a result of a delayed treatment. In my view, this raises a triable issue worth of being decided between the parties.

[29] I could find no evidence on record that the plaintiff was in possession of Dr Wilkinson's report dated 22 September 2016 at the time the summons was issued as found by the court a quo in the judgment on the application for leave to appeal. In his answering affidavit to rule 30(1) application the appellant merely stated:

"The medico-legal report of my medical expert was already served on the defendant's attorneys on the 9th of March 2017."

To my mind, the date in respect of which the appellant received Dr Wilkinson's report is immaterial because a party is entitled to make an amendment to its pleading at any stage of the proceedings but before the judgment.

[30] Save to argue that the appellant had failed to establish a bona fide case which warranted the amendment, it was never contended that the amendment was mala fide. A careful and sensible reading of para 13, introduced by the amendment, is that the appellant intended to elucidate his real case by setting out averments supportive of the same claim made in the original particulars. In my view, the conclusion is irresistible that the clarification in question did not give rise to a distinct cause of action. Otherwise put, the proposed amendment did not introduce a new issue than the one already averred in the initial particulars of claim. Where, as here, the amendment does not introduce a fresh cause of action but only clarifies a pleading which insufficiently or

imperfectly set out the original cause of action, the amendment will be allowed.[4] It follows that the objection was not justified.

[31] As already mentioned, the respondent successfully applied for the striking out of some specified paragraphs from the appellant's rule 30(1) answering affidavit. Two requirements must be satisfied before an application to strike out a matter from any affidavit can succeed. First, the matter sought to be struck out must be scandalous, vexatious or irrelevant. In the second place, the court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.[5]

[32] To recapitulate, the purported objectionable matter in the affidavit is that the appellant referred to the consultation between his legal representative and the expert who clarified what herniation meant. He also referred to his expert's report which is to the effect that the long delay in diagnosis and treatment, as had allegedly occurred in his case, were also causes of the brain herniation. The respondent urged in the court a quo as it did in this court that the alleged offending paragraphs were susceptible to being struck out as inadmissible hearsay. It argued that, while the appellant's attorney had filed a supporting affidavit, in which he confirmed the contents of the answering affidavit as it pertained to him, there had been no confirmatory affidavit from the medical expert the attorney had consulted with.

[33] As I see it, what the appellant does in the impugned paragraphs is to point out what Dr Wilkinson stated in his report, which had been served and filed with the court. He did not adduce evidence regarding the probative value of Dr Wilkinson's expert report. The indications from the record is that, in all likelihood, Dr Wilkinson would testify at the trial in due course. To the extent that Dr Wilkinson's report had been availed to the respondent, there can be little prejudice to it. For these reasons, in my view, the alleged offending

[4] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279A–E.

[5] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733.

paragraphs ought not to have been struck out. Belatedly, in the application for the reinstatement of the appeal, the confirmatory affidavit of Dr Wilkinson which sought to support the averment as contained in the appellant's rule 30(1) answering affidavit was attached to the appellant's replying affidavit. No leave was sought for the admission of that evidence on appeal. Nothing turns on this.

[34] As to the argument that the appellant's claim had prescribed, established jurisprudence is that a plaintiff is not precluded by prescription from amending its claim, provided the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed, and provided the prescription of the debt originally claimed has been duly interrupted.[6] In *Evins v Shield Insurance Co Ltd* [7] Corbett JA held:

> "Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim, or the addition of a further item of damages."

[35] The conclusion I have come to, that the amendment did not introduce a new cause of action, disposes of the question whether the claim has prescribed. The respondent was timeously informed in the original particulars of claim, prior to the expiration of the period of prescription, of every material feature of the case it had to meet which ought to have left no uncertainty in its mind as to the nature of the action. In any event, prescription is fact driven and conveniently raised by means of a special plea in trial proceedings where the evidence may elicit facts which militates against it. In *Jugwanth v Mobile Telephone Networks (Pty) Ltd*[8] Gorven JA said*:*

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[6] *Associated Paint & Chemical Industries (Pty) Ltd v Smit* 2000 (2) SA 789 (SCA) para 13.

[7] 1980 (2) SA 814 (A) at 836D - E:

[8] 2021 JDR 2056 (SCA) para 8.

"The fact that a debt appears to have become due on a certain date is not the only relevant fact required to determine whether it has prescribed. The particulars of claim do not necessarily show when the debt became due, whether the creditor was prevented from coming to know of the existence of the debt, when the creditor became aware of the identity of the debtor, whether the completion of prescription was delayed, whether the running of prescription was interrupted or whether there was an agreement not to invoke prescription."

[36] The delay in bringing the application for leave to amend will not in itself, in the absence of prejudice, constitute a sufficient reason for refusing the amendment particularly where the amendment facilitates the proper ventilation of the dispute between the parties.[9] The remarks in the English decision *Cropper v Smith*[10] by Bowen LJ adopted by Broome JP in *Heeriah and Others v Ramkissoon*,[11] resonates with the present setting:

"Now, I think it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights . . ."

[37] to the extent that there had been a delay in effecting the amendment and in bringing the condonation application, I am of the view, that any resultant prejudice to the respondent can be mitigated by an appropriate costs order.

[38] On the aforegoing exposition, insofar as the court a quo granted the striking-out application, refused the application for condonation of the late filing of the amendment and set aside the amendment as an irregular step in the proceedings, it erred. The upshot of this is that the appeal should succeed.

[39] I come now to deal with the question of costs. The costs of the appeal itself including costs in respect of the application for leave to appeal must follow the

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[9] See *Trans-Drakensberg Bank Ltd, ibid* Fn 2 at 642H and see also *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T) at 667.

[10] L.R. 26 Ch.D. at 710-711.

[11] 1955 (3) SA 219 (N) at 222B-C.

result. In respect of the application for condonation and reinstatement of the appeal, I am of the view, that the appellant, as a party seeking an indulgence from the court, should bear those costs.

[40] On 21 November 2022 the appeal could not be disposed of because the appellant had failed to furnish good and sufficient security for the respondent's costs of the appeal as set out in rule 49(13). In addition, he did not arrange that he be released from furnishing security prior to the appeal hearing. This largely occasioned the delay which, to my mind, ought to be attributed solely to him. The appeal was subsequently set down on 20 March 2023 but was struck off the roll with costs because it had lapsed and no power of attorney to prosecute it had been filed. Here too, the delay, it goes without saying, ought to be ascribed to the appellant. It follows that he should bear the wasted costs occasioned by the postponement of 21 November 2022.

[41] As the costs of the proceedings before the court a quo, they must follow the result save for costs in respect of the application for condonation of the late filing of the amended particulars of claim which the appellant should bear. An order is therefore made.

Order:

1. The application for condonation and reinstatement of the appeal is granted.

2. The appellant is to pay the costs of the application for condonation and reinstatement of the appeal.

3. The appeal is upheld with costs including costs of the application for leave to appeal.

4. The appellant is to pay the wasted costs occasioned by the postponement of 21 November 2022.

5. The order of the court a quo is set aside and in its place is substituted the following:

"1. The defendant's (MEC for Health, Northern Cape) application in terms of rule 30(1) is dismissed with costs.

2. The plaintiff's (Mr George Rakhojane) application for condonation of the late filing of his amended particulars of claim is granted.

3. The plaintiff is to pay costs of the application referred to in para 2 of this order.

4. The plaintiff is granted leave to file its amended particulars of claim dated 14 November 2019.

5. The defendant's application to strike-out paras 5.5, 5.10.1, 5.10.2, 5.10.6, 5.10.7 and 21.3 of the plaintiff's answering affidavit to the rule 30(1) application is dismissed with costs."

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Phatshoane AJP

Lever and Nxumalo JJ concur in the Judgment and order of Phatshoane AJP.

Appearances:

For the appellant:	Mr MJ Ponoane Instructed by Ponoane Attorneys, Bloemfontein Towell & Groenewaldt Attorneys, Kimberley.
For the respondent:	Adv M Salie SC Instructed by Robert Charles Attorneys & Conveyancers, Kimberley.