

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 7535/19P

In the matter between:

**THE MEC FOR HEALTH, FOR THE
KWAZULU-NATAL PROVINCE**

FIRST APPLICANT/DEFENDANT

**HEAD OF DEPARTMENT, DEPARTMENT OF
HEALTH, KWAZULU-NATAL**

SECOND APPLICANT/DEFENDANT

**KWAZULU-NATAL DEPARTMENT OF
HEALTH**

THIRD APPLICANT/DEFENDANT

and

MEDICAL INFORMATION TECHNOLOGY SA (PTY) LTD RESPONDENT/PLAINTIFF

Coram: Koen J

Heard: 27 May 2022

Delivered: 8 June 2022

ORDER

The application is dismissed and the defendants jointly and severally are directed to pay the plaintiff's costs of the application, such costs to include the costs of senior counsel where employed.

JUDGMENT

Koen J

[1] The central issue at the heart of this application is whether an excipient would be entitled to demand that an exception be determined by a court without considering subsequent amendments effected to the pleadings excepted to. The applicants seek to achieve that result by maintaining that the notice of intention to amend the pleadings excepted to, and the amended pages filed pursuant to that notice after no objection had been recorded, constitute irregular steps or proceedings for the purposes of rule 30 of the Uniform Rules of Court, and that they should be set aside as such with costs.

Relevant background

[2] The respondent/plaintiff instituted an action against the applicants/defendants jointly and severally for payment of the sum of R29 916 324.¹ On 31 October 2019 the defendants, who are represented by the State Attorney, gave notice of their intention to defend the action. Their appearance to defend did not however appoint an address for service of notices and pleadings in the action.

[3] The defendants delivered a plea to which the plaintiff replicated on 12 November 2020. The defendants on 25 November 2020 delivered an exception to the plaintiff's replication 'on the ground that the first alternative claim is bad in law, does not disclose a cause of action and is otherwise defective on the following grounds.' The grounds for the exception were then set forth in paragraphs 1 and 2 of the exception. It is not necessary to have regard to these grounds for the purposes of this judgment, as this judgment is not concerned with the merits of the exception.²

[4] At the time the exception was delivered the parties were apparently preparing for mediation. The mediation yielded a partial settlement of the claim and resulted in further discussions. It was agreed between the parties that the exchange of pleadings would be suspended during this time, on condition that if the discussions would not result in the resolution of the matter by 15 February 2021, litigation would ensue.

¹ The parties shall hereinafter be referred to as in the action.

² This judgment is similarly not concerned with the merits of the amendments which were sought and effected.

[5] On 26 April 2021 the plaintiff served a notice of intention to amend its particulars of claim and its replication on the defendants' attorneys. The notice recorded that unless written objection to the proposed amendments was delivered within 10 days of delivery of the notice, the amendments would be effected.³ The notice also included a tender by the plaintiff to pay the wasted costs occasioned by the amendments. The time for objecting to the proposed amendments accordingly expired on 11 May 2021.

[6] When no objection to the proposed amendments was received, the plaintiff effected the amendments by serving the amended pages incorporating the amendments on the defendants, according to the formal receipt stamp, at 11h03 on 13 May 2021. The amendment accordingly took effect on that day.⁴

[7] On the same day, 13 May 2021, according to the receipt stamp at 15h32, the defendants delivered the first notice in terms of rule 30(2)(b) complaining that by delivering its notice of intention to amend dated 20 April 2021, the plaintiff took an irregular step. The notice required that the plaintiff remove this cause of complaint within 10 days of receipt of the notice, failing which the defendants would apply to court to have the plaintiff's notice of intention to amend set aside in terms of rule 30(1).

[8] The grounds upon which it was alleged in the defendants' notice in terms of rule 30(2)(b) that the plaintiff's notice of intention to amend constituted an irregular step, were as follows:

(I) On 25th November 2020 the Defendants delivered the Exception in terms of Rule 23 (1) in respect of the Plaintiffs Replication.

(II) The basis for the Exception was that the First and Second alternative claims respectfully (sic) are bad in law, do not disclose a cause of action or are otherwise defective.

(III) In terms of Rule 23 (1) the Excipient may set the Exception down for hearing in terms of paragraph (f) of sub-rule (5) of Rule 6.

³ That was in proper compliance with the provisions of rule 28(2) of the Uniform Rules of Court.

⁴ *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O) at 358C; *Van Heerden v Van Heerden* 1977 (3) SA 455 (WLD) at 457H.

(IV) Paragraph (f) (i) of Rule 6 provides that where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph (d), is delivered within the period referred to in sub-paragraph (ii) of paragraph (d) the Applicant may within five days of expiry thereof apply to the Registrar to allocate a date for the hearing of the application.

(V) Sub-paragraph (iii) provides that if the Applicant fails to apply within the appropriate period aforesaid the Respondent may do so immediately upon expiry thereof. Notice in writing of the date allocated by the Registrar must be given by the Applicant or Respondent, as the case may be to the opposite party within five days of notification from the Registrar.

(VI) The Exception has not been adjudicated upon and has not been set down for hearing by either party as the parties had agreed to engage in a mediation process scheduled and completed on the 8th December 2020.

(VII) In terms of the mediation agreement the pleadings were held in abeyance.

(VIII) In February 2021, the parties were still engage on the progress of the status of payment as recorded in the settlement agreement.

(IX) The Defendants prayed that the Exception be upheld as the exception dealt with the root of the Plaintiff's cause of action and the relief sought was Plaintiff's first and alternative claims be dismissed with costs.

(X) The Defendants' Exception must be adjudicated upon before any further steps can be taken by either party.

(XI) The Plaintiffs Notice to Amend seeks to ignore the exception taken and concurrently attempts to cure the defects raised by the exception without leave of the court.

(XII) In the premises the Plaintiff's Notice to amend is accordingly irregular and premature.'

[9] On 20 May 2021 at 15h29 the defendants served a second notice in terms of rule 30(2)(b) complaining that the plaintiff by delivering its notice of intention to amend dated 20 April 2021 and effecting the amendments by delivering amended documents on 13 May 2021, took irregular steps. This notice likewise required that the plaintiff remove the causes of complaint within 10 days failing which they would apply to have

the plaintiff's notice of intention to amend and the filing of the replacement pages set aside in terms of rule 30(1). The grounds advanced in support were identical to those previously raised in their previous rule 30(2)(b) notice.

[10] At 14h10 on 26 June 2021 the defendants served the application presently before this court. In this application the defendants seek the following relief:

- '1. That insofar as it may be necessary the Defendants' failure to comply with the time periods in terms of Rule 30 is hereby condoned;
2. That the Plaintiff's Notice to Amend in terms of Rule 28 dated 20 April 2021 and the delivery of the Amended Pages dated 07 May 2021 be set aside as an irregular step;
3. That the Plaintiff is ordered to pay the costs of this Application.
4. Further and/or alternative relief.'

The applicable rules of court

The address for service of documents on the defendants

[11] The relevant provisions of rule 19(3) provide:

'(3)(a) When a defendant delivers notice of intention to defend, defendant shall therein give defendant's full residential or business address, postal address and where available, facsimile address and electronic mail address and shall also appoint an address, not being a post office box or poste restante, within 15 kilometres of the office of the registrar, for the service on defendant thereof of all documents in such action, and service thereof at the address so given shall be valid and effectual, except where by any order or practice of the court personal service is required.

(b) The defendant may indicate in the notice of intention to defend whether the defendant is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, shall state such preferred manner of service.

(c) The plaintiff may, at the written request of the defendant, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.

(d) If the plaintiff refuses or fails to deliver the consent in writing as provided for in paragraph (c), the court may, on application by the defendant, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.’

[12] The defendants did not indicate in their notice of intention to defend whether they were prepared to accept service of all subsequent documents and notices through any manner other than at the address which they subsequently used for service, nor was any other preferred manner of service indicated. Indeed, the notice of appearance to defend failed to appoint an address within 15 km of the office of the registrar. Subsequent notices and pleadings have however been served on the State Attorney, care of its satellite office at the second floor of the Magistrate’s Court Building at 302 Church Street, Pietermaritzburg, or to Cajee, Setsubi Inc in Pietermaritzburg. Either one of these became the physical address where service of notices and pleadings were and came to be effected. In argument before me Mr Mtambo accepted that service was validly effected on the defendants at the satellite address.

[13] There was furthermore no indication that the parties agreed to, or the defendants having entered an appearance to defend, thereafter expressly requested that the pleadings be exchanged by email, although it appears that the service of pleadings and notices was often accompanied, sometimes prior to being delivered⁵ in accordance with the Uniform Rules, by being transmitted by email. For the purposes of calculating the dies for the delivery of notices, and adjudicating this application, regard must therefore be had to the dates when the pleadings and notices were served at the physical address appointed by the plaintiff in its summons, and at either of the addresses used by the defendants during this litigation for service, and where receipt was formally acknowledged. That was accepted by counsel on both sides. In what follows below I shall, unless otherwise expressly qualified, refer to and base this judgment on these dates, and not on the dates when documents were allegedly emailed.

⁵ ‘Deliver’ is defined in the Uniform Rules of Court to mean ‘serve copies on all parties and file the original with the registrar.’

The amendment of the plaintiff's particulars of claim and replication

[14] The relevant provisions of rule 28 provide:

‘(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) . . .

(4) . . .

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).’

(6) . . .

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.’

[15] The plaintiff duly served its notice of amendment on the defendants on 26 April 2021. The 10 days for lodging any objection to the proposed amendments accordingly expired on 11 May 2021. This is not disputed by the defendants. The defendants’ objection to the notice of amendment is not to the content thereof, but that it constitutes an irregular step or proceeding and falls to be set aside as such because their exception had not yet been adjudicated. Barring it being found to be an irregular step or proceeding and set aside as such, the notice of amendment is valid and would lead to a valid amendment of the plaintiff’s particulars of claim and replication. The defendants have never otherwise objected to or suggested that the amendments that were sought, and subsequently, pursuant to the notice of amendment effected, were otherwise objectionable or improper.

The provisions of the rules governing the present application

[16] In relation to an application such as the present, rule 30 provides:

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2)..’

The defendants’ non-compliance with the provisions of rule 30 and condonation

[17] The defendants have not identified the aspects in which they failed to comply with rule 30 and in respect of which they seek condonation. They simply submitted in argument that condonation was sought insofar as necessary. The extent of any possible non-compliance with the rules possibly requiring condonation accordingly had to be teased out of the papers. These are considered below.

The first notice in terms of rule 30(2)(b)

[18] In terms of rule 30(2)(b) the defendants’ first notice had to be filed within 10 days of becoming aware of the irregular step (ie the notice of intention to amend served on 26 April 2021), namely on or before 11 May 2021. The first notice was only served on 13 May 2021, two days later.

[19] The submission advanced was that it is not the date of service of the notice of intention to defend on the defendants’ satellite office from which the 10 day period for filing the first notice should be calculated, but, the rule provides, that this had to be done

within 10 days from the date from which the defendants, as applicants, had become 'aware of the step'. This date, it was argued, *ex facie* the founding affidavit in the application, was when the deponent, being the State Attorney dealing with the matter, became aware of the notice of intention to amend, which she states was when a hard copy thereof was received by her on 3 May 2021.

[20] The reference to 'becoming aware of the step', as the date from which the time period for the service of a rule 30(2)(b) commences to run, does not require that the actual litigant, that is the 'applicant' in the rule 30(1) application must have become aware of the irregularity of the step. Becoming aware of the irregularity means after becoming aware that the step that is irregular, had been taken, and not after becoming aware of the irregularity of the step.⁶ Litigation, by its very nature is conducted by attorneys as agents on behalf of litigating parties and the knowledge of the attorney as the agent of the litigant is imputed to the litigant, whether as constructive knowledge, or otherwise. To reach any other conclusion would be to introduce too much uncertainty in the litigation process and create an unworkable situation. Knowledge of procedural steps must be ascribed to a litigant and its agents when they occur, and by the exercise of reasonable care and skill, could and would come to the knowledge of that litigant. By parity of reasoning, the service of the notice of intention to amend at the chosen satellite office of the State Attorney in Pietermaritzburg must be imputed to the defendants, as it is through the exercise of reasonable care that their attorney could and should have been aware of the existence of the notice of intention to amend having already been served on 26 April 2021.

[21] Accordingly, the first notice was served two days late, and condonation was required to be applied for in respect thereof.

[22] It is trite law that a party seeking condonation must provide a full and acceptable explanation for every period in respect of which the default exists. In *Van Wyk v Unitas*

⁶ *Minister of Law and Order v Taylor* NO 1990 (1) SA 165 (E).

*Hospital and another (Open Democratic Advice Centre as amicus curiae)*⁷ the Constitutional Court held that:

‘An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.’

[23] The defendants’ attorney explains that notwithstanding the plaintiff’s notice to amend bearing the date stamp of the State Attorney, Durban on 26 April 2021:

- (a) she received a hardcopy of the plaintiff’s notice of intention to amend served on 26 April 2021, only on 3 May 2021, that is 3 court days later;
- (b) that the notice had previously been sent to her by email on 21 April 2021 but that she was at the time experiencing problems with her computer which had crashed resulting in her not having sight of the notice of intention to amend until 3 May 2021;
- (c) she confirms that the notice was properly served on 26 April 2021 and had been received in the registry of the State Attorney in Durban on 30 April 2021;
- (d) she prepared a memorandum to counsel on 5 May 2021, but ‘missed’ the messenger and got the brief to counsel only on 11 May 2021;
- (e) that:

‘[a]t about this stage the pleadings were temporarily suspended by agreement between the parties as the parties were engaged in mediation in an attempt to resolve the matter. The Defendants Exception was also not set down for hearing in light of the agreement. The mediation was partially successful . . . in April 2021 the Plaintiffs filed a Notice to Amend both the Particulars of Claim and the Replication.’

This appears to be in conflict with the allegation earlier in her affidavit that ‘should the further discussions not result in the resolution of the matter by 15 February 2021 litigation would resume.’⁸

- (f) the defendants on 12 May 2021 prepared the first notice in terms of rule 30 which was served on 13 May 2021;

⁷ *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) para 22; *SA Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA) para 34.

⁸ This contradiction was accepted to be incorrect during argument.

(g) she submits that the first notice was delivered timeously, taking into account the date she actually became aware of the notice, namely 3 May 2021.

(h) she concludes that if there was a delay, it was not an unreasonable one and 'at most one of approximately one week' which she submits cannot cause any prejudice to the plaintiff as the plaintiff has always been aware of the fact that an exception was taken, 'that such exception must be adjudicated upon before any further proceedings', that 'notwithstanding such exception, Plaintiff proceeded to amend the pleadings which amendments make reference to the exceptions taken', and finally, that 'the exception must be dealt with first and depending on the success thereof, Plaintiff may be given leave to amend the pleadings.'

[24] However, even if the lack of knowledge of service of the plaintiff's notice of amendment on 26 April 2021 could be excused because of internal procedures in the office of the State Attorney, there is no satisfactory response for the delays which ensued when the attorney 'missed' the messenger who was to deliver the brief to counsel. There is no explanation why, having missed the messenger on 6 May 2021, she could not have expedited the delivery of the brief to counsel by other means of conveyance.

[25] I am not satisfied that this delay has been explained satisfactorily, albeit that it was ultimately one of short duration. As will appear below, that is however not the only basis on which this application should be refused, even if I am wrong in concluding that this delay was not explained satisfactorily.

The second notice in terms of rule 30(2)(b)

[26] In accordance with the provisions of the rule the defendants' second notice had to be filed within 10 days of becoming aware of the irregular step (the amended pages served on 13 May 2021), namely on or before 27 May 2021. This was served timeously.

The application in terms of rule 30(1) pursuant to the first notice in terms of rule 30(2)(b)

[27] In accordance with the provisions of rules the 10 day period to remove the causes of complaint in respect of the first notice in terms of rule 30(2)(b) served on 13 May 2021 expired on 27 May 2021. Hence, the application in terms of rule 30(1) had to be served within 15 days thereafter, that is on or before 18 June 2021. It was served late on 26 June 2021 only.

[28] Mr Mtambo however argued that the irregularity of the plaintiff's notice of intention to amend was also raised in the second notice in terms of rule 30(2)(b) as by then the second alleged irregularity of filing the amended pages had also occurred, and that it is the date of the service of the second notice which is to be used in calculating the time for serving the application in terms of rule 30(1). I respectfully disagree with that submission. Although the application seeks the setting aside of both the notice of intention to amend and the filing of the amended pages in one application, the setting aside of the notice of amendment as allegedly irregular is a separate and distinct act of the filing of the amended pages pursuant to the notice of intention to amend. The defendants could not unilaterally decide, even when the prospect of a potentially second irregular step arose, to simply ignore the time limits prescribed for enforcing the relief foreshadowed in the first notice. The provisions of rule 30(1) were not complied with in respect of the notice of intention to amend constituting an alleged irregular step. The application in terms of rule 30(1) should have been served by 18 June 2021, but was only served on 24 June 2021. Condonation would accordingly be required.

[29] There is no explanation whatsoever for the delay in bringing the application in terms of rule 30(1) from when it should have been brought, that is from 18 June 2021, until the application was eventually brought on 26 June 2021. Nor is there an explanation on oath, even one that the attorney might have understood that the second notice had somehow replaced the first notice insofar as it concerned the notice of intention to amend, as was argued.

[30] There is accordingly no basis to grant condonation for the late filing of the rule 30(1) application in respect of the filing of the plaintiff's notice of intention to amend.

The application in terms of rule 30(1) pursuant to the second notice in terms of rule 30(2)(b)

[31] The 10 day period to remove the causes of complaint in respect of the second notice in terms of rule 30(2)(b) served on 20 May 2021 expired on 3 June 2021, hence the application in terms of rule 30(1) had to be served on or before 25 June 2021. It was served timeously on 24 June 2021.

[32] However, even if I am wrong in concluding that condonation was required in respect of the first notice, and that the delays had not been adequately explained in regard to that first notice and the application required to be brought thereafter in terms of rule 30(1), then the defendants' lack of prospects of success nevertheless become dispositive of the application for condonation and the substantive relief claimed itself. A party's prospects of success is always an important consideration when deciding whether condonation should be granted. Condonation should be refused in this application, if for no other reason and even if the delays could otherwise be excused, but because the defendants' application to set aside 'the Plaintiff's Notice to Amend dated 20 April 2021' and 'the delivery of the Amended Page dated 07 May 2021' lacks prospects of success. The lack of prospects is also dispositive of the application, considerations of condonation apart. It is to the merits of the relief claimed that I then turn.

The merits

[33] The purpose of pleadings is to properly define the issues in dispute between the parties. The oft quoted truism is that the pleadings are made for the court, and not the court for the pleadings. If a pleading is in some way deficient, then an amendment will, subject to certain limited exceptions, generally be allowed if the amendment will allow a proper ventilation of the true issues in dispute. The exceptions will include where there is prejudice of the nature of which the law takes cognizance, to the party against whom the amendment is sought and which cannot be remedied by an appropriate costs order. This may for example include where an admission previously made on the pleadings is

sought to be withdrawn and the evidence to prove the facts previously admitted, is no longer available.

[34] No such prejudice has been raised by the defendants. Indeed, the defendants have not suggested that they would object to the proposed amendments, if they followed upon a successful hearing of the exception and a court having authorised the plaintiff to amend its pleadings.

[35] The complaint by the defendants seems to be that if they are allowed to argue the exception successfully, that it could bring an end to the litigation on those pleadings. But that is not the correct approach to be followed. Even if the exception was to be heard and upheld, a court would invariably allow the plaintiff to amend its pleadings.

[36] Whether the defendants could possibly succeed with an exception on potentially defective pleadings, should not be the issue. The issue must always be whether the particulars of claim and replication as amended, raise legally triable issues. If, after the amendments were effected, the pleadings still did not raise triable issues, then the defendants' remedy was to have objected to the proposed amendments, or having failed to do so, to persist with the exception and to enrol it for hearing, or to raise whatever other remedy would be open to it.⁹ But that is not what the defendants have done. Instead, the defendants seek to exclude the amendments, so it can hopefully succeed with its exception. But that will be a pyrrhic victory, except that it might result in a costs order, as a court upholding an exception will invariably grant leave to the plaintiff in any event, to amend its pleadings, even if that relief was not claimed specifically.¹⁰ And even where a court may limit the scope of the amendment without notice of intention to amend being required to be given pursuant to an exception,¹¹ an amendment on notice allowing time for objection is generally always available. All the

⁹ *Zwelibanzi Utilities (Pty) Ltd t/a Adams Mission Service Centre v TP Electrical Contractors CC* [2011] ZASCA 33 para 15.

¹⁰ *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D.

¹¹ *Trustee Insolvent Estate Mark William v Bank of Africa Limited* (1911) 32 NLR 36.

plaintiff did was to anticipate such a possible result, or simply to avoid any potential argument and the delay that would result, and to expedite the litigation process.

[37] At best for the defendants they might be entitled to the wasted costs occasioned by the exception and amendments, but they will have appropriate remedies in that respect. The costs occasioned by the amendments were tendered in the notice of amendment. The defendants' remedy was not to apply to have the notice of amendment and the subsequent amended pages set aside as irregular steps, which they are not.

Conclusion

[38] The application accordingly falls to be dismissed.

Costs

[39] The plaintiff has been successful. There is no reason why the costs should not follow the result. The plaintiff has however sought an order that the costs be on the attorney and client scale, including the costs of senior counsel.

[40] The application has been ill conceived, but it does not, in my view, display deliberate conduct that justifies a punitive costs order on the attorney and client scale. In coming to that conclusion I am alive to the fact that an application need not be frivolous by design to attract a punitive costs order. I am furthermore alive to the fact that this ill- conceived application has resulted in a delay of a number of months. The plaintiff's claim will attract interest.

[41] As regards the prayer for the costs of senior counsel, the defendants have employed senior and junior counsel. It is reasonable and appropriate that the costs order made should include the costs of senior counsel.

Order

[42] In the result, the following order is made:

The application is dismissed and the defendants jointly and severally are directed to pay the plaintiff's costs of the application, such costs to include the costs of senior counsel where employed.

KOEN J

APPEARANCES

For the applicants/defendants:

Mr M S Mtambo

(The heads were prepared by Mrs J M Singh SC and Mr M S Mtambo)

Instructed by:

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Ref: Ms Y Gangat 24/7443/19/M/P36

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(Ref: JTM/mm/WEKK17055.32)