



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2887/2021

In the matter between:

OUTSURANCE INSURANCE COMPANY LTD

Applicant

And

SIMON MAVELA

Respondent

HEARD ON: 13 APRIL 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 03 July 2023 at 09H00.

[1] The parties are embroiled in an action instituted by the respondent as plaintiff against the applicant as defendant for damages arising out of the applicant's repudiation of the respondent's insurance claim after the respondent's motor

vehicle was damaged in an accident which took place on 12 April 2021 on the road between Hobhouse and Wepener situated in the Free State Province. The action is resisted on the grounds that the respondent had been driving the said motor vehicle whilst under the influence of alcohol therefore the applicant is entitled to repudiate the claim. Following the close of pleadings, the matter was set down for trial on 24, 25 and 27 January 2023.

- [2] For the sake of convenience, I shall refer to the parties as they are referred to in the action, the applicant as defendant and respondent as plaintiff.
- [3] This is an opposed application in terms of which the defendant seeks leave to amend its plea to incorporate a special plea of jurisdiction. The premise is to challenge the jurisdiction of this court to adjudicate the plaintiff's claim on the grounds that both parties are not domiciled within the area of this court's jurisdiction and the cause of action also did not occur within this court's jurisdiction.
- [4] The application was filed late. On the facts germane to this matter, the plaintiff delivered his notice of objection to the proposed amendment on 21 December 2022 and in terms of Rule 28 (4) of the Uniform Rules of Court the defendant ought to have filed the application within ten (10) days thereof on or before 9 January 2023. The application was only filed on 23 January 2023 approximately ten (10) days late. The defendant seeks condonation in that regard.
- [5] The reasons for the delay are set out in the defendant's founding affidavit deposed to by its attorney Mr Alno Smit. He explains that following the delivery of the defendant's notice of intention to amend on 15 December 2022 he transmitted an email to the plaintiff's attorneys enquiring whether they would be amenable to postponing the trial. He then went on leave. On 21 December 2022 the plaintiff's attorney responded by indicating their objection to the proposed postponement of the trial. He responded by reiterating his request for the postponement and although the plaintiff's attorneys undertook to revert by 11

January 2023 they only responded on 10 January 2023. Their response only came to his attention on 13 January 2023 and it stated that the since the time for the lodgement of the application had lapsed the plaintiff presumes that the defendant had abandoned its intention to amend the plea. He replied stating that the defendant was still intent on proceeding with the application and that he was on leave till 16 January 2023. Upon his return to the office although he had other urgent matters to attend to he was able to instruct counsel to draft an application for the postponement of the trial which was delivered on 17 January 2023. The application was only finalized on 22 January 2023 and filed on the next day.

- [6] It is the defendant's case that a sufficient explanation for the entire days of the delay has been duly furnished. The proposed amendment raises an important triable issue which has prospects of success in the intended special plea including the action and no prejudice has been asserted by the plaintiff in the papers.
- [7] On the other side, the plaintiff contends that no case has been made out for condonation. The unavailability of the defendant's attorney to attend to the filing of the application simply because he was on vacation leave is unsound. The application was only filed a month before trial and it is clearly intended to delay the trial as the defendant pleaded to the merits of the action and even went further to participate in the pre-trial proceedings and trial dates arrangements without raising the jurisdictional challenge.
- [8] The plaintiff submits that there are are no reasonable prospects of the defendant succeeding with the proposed amendment as an objection to jurisdiction must be taken *in limine* before *litis contestatio* having failed to do so, the defendant has submitted to the jurisdiction of this court. For these reasons, condonation should be dismissed with costs.
- [9] It is tested law that condonation cannot be had for the mere asking, the defendant must make out a case entitling it to the court's indulgence by showing

sufficient cause by giving a full, detailed and accurate account of the cause of its ineptitude to enable the court to understand how the default came about and to assess responsibility.¹

- [10] Significant with the determination of the applications of this nature are factors such as the degree of lateness, the defendant's prospects of success in the proposed amendment, the avoidance of unnecessary delay and the interests of justice.
- [11] The delay of ten (10) days is not extreme however, I am not persuaded that the delay has been explained sufficiently to excuse the defendant's non-compliance with the court rules. I do not consider Mr Smit's unavailability to attend to the filing of the application due to his vacation as a valid reason. It is also important to note that despite having been away from office he was able to dedicate some time to transmit various emails to the plaintiff's attorneys to seek a postponement of the trial instead of filing the application. Furthermore, condonation should have been filed as soon as the defendant became aware that it was due² namely, on 13 January 2023 when Mr Smit was reminded by the plaintiff's attorneys that the time for filing the application had lapsed. The application was still not filed until 23 January 2023 a day before the trial was due to begin. For these reasons, the plaintiff's contention that the application is merely a ruse to delay the trial cannot be faulted. I conclude that the default was wilful.
- [12] Good prospects may mitigate wilful default. In this matter, the proposed amendment is intended to raise a jurisdictional challenge which ought to have been raised *in limine* because if upheld it would defeat the plaintiff's claim instead: the defendant pleaded to the merits of the claim and sought the dismissal of the action alternatively the apportionment of damages; the

¹ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* (619/12) **[2013] ZASCA 5** (11 March 2013) para 11; *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* (95/2016) **[2017] ZASCA 88** (6 June 2017) para 26;

² *Rennie v Kamby Farms (Pty) Ltd* **1989 (2) SA 124** (A) at 129G.

defendant actively participated in all the pre-trial proceedings;³ and *litis contestatio* occurred during September 2021 in that regard, the defendant is deemed to have acquiesced to the jurisdiction of this court whether or not the defendant was aware that it could raise the special plea.⁴

[13] In *Purser v Sales; Purser and Another v Sales and Another*⁵ it was pointed out that:

“[18]...A defendant who pleads to the main claim without objecting to the jurisdiction must, after litis contestatio, ‘be considered to have bound himself irrevocably to accept the jurisdiction of the court’ even when failure to raise the question of jurisdiction derives from a mistake on his part”.

[22]...A defendant who raises no objection to a court's jurisdiction and asks it to dismiss on its merits a claim brought against him is invoking the jurisdiction of that court just as surely as the plaintiff invoked it when he instituted the claim. Such a defendant does so in order to defeat the plaintiff's claim in a way which will be decisive and will render him immune from any subsequent attempt to assert the claim. Should he succeed in his defence, the doctrine of res judicata will afford him that protection. Should his defence fail, he cannot repudiate the jurisdiction of the very court which he asked to uphold it.”

[14] For the reason that the defendant has demonstrated its acquiescence to this court's jurisdiction. It is not in the interests of justice to grant condonation for the defendant to pursue an amendment in order to incorporate a defence which has no prospects of success. I have thus come to the conclusion that the application for condonation must fail.

³ At the pre-trial conference held on 23 June 2022 the defendant confirmed that: *“The parties agree that this matter is properly before the above Honourable Court.”*

⁴ At para 27 of the defendant's founding affidavit, it is stated that at the time of filing the plea, attending the pre-trial and case management conferences the defendant and its attorney did not know that a special plea of jurisdiction ought to be raised.

⁵ **2001 (3) SA 445** (SCA); *Advertising Regulatory Board NPC and Others v Bliss Brands (PTY) LTD* **2022 (4) SA 57** (SCA) para 13.

[15] In the absence of condonation being granted, the application to amend the defendant's plea must also fail. The costs shall follow the result.

[16] In the circumstances, following order is issued:

1. The condonation application is dismissed.
2. The application for leave to amend the defendant's plea as set out in the notice to amend dated 15 December 2022 is dismissed.
3. The defendant shall pay the costs.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the applicant / defendant:

Instructed by:

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C/O McIntyre & Van der Post

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