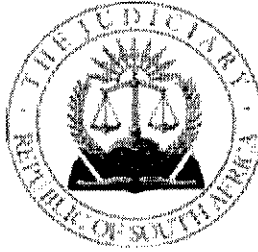


REPUBLIC OF SOUTH AFRICA

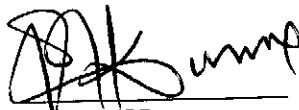


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 5512/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

13/05/2021
DATE


SIGNATURE

In the matter between:

INSTANT LIFE (PTY) LTD

Excipient/Applicant

and

MELLICENT THANDIWE TSHUKUDU

Respondent

In re:

In the matter between:

MELLICENT THANDIWE TSHUKUDU

Applicant/Plaintiff

and

INSTANT LIFE (PTY) LTD

First Respondent/First Defendant

GUARDIAN RISK LIFE LTD

Second Respondent/Second Defendant

**GUARDIAN RISK INSURANCE
COMPANY LTD**

Third Respondent/Third Defendant

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on

13 May 2021.

JUDGMENT

SKOSANA AJ

[1] There are two applications before me in respect of this matter, namely, the application for leave to amend in terms of Rule 28(4) brought by the applicant and the application to dismiss the applicant's action lodged by the first respondent. The application for leave to amend follows an objection against the applicant's proposed amendment of her particulars of claim.

[2] The applicant, who is the plaintiff in the main claim, issued summons on 29 January 2018 against the first respondent in which she claims payment of R1 500 000-00 from the first respondent by virtue of a written insurance contract allegedly concluded between the first respondent and one U'Mphile Phomolo Tshukudu ("the insured") in which the applicant is a nominated beneficiary.

[3] An exception was successfully taken against the applicant's initial particulars of claim. On 31 October 2018, Baqwa J granted an order striking out such particulars of claim but also granted the applicant an opportunity to amend within 15 days of the court order falling which the first respondent would be entitled to approach the court to seek an order.

[4] The applicant duly delivered a notice of intention to amend on 08 November 2018. The first respondent objected to the amendment on 30 November 2018. The applicant brought the application for leave to amend on 06 December 2018. The first respondent brought an application for the dismissal of the applicant's claim on 12 June 2019 ("the dismissal application").

[5] Counsel for the respondents, Mr Boot informed me that he acts for all three respondents. This is despite the fact that the objection to the amendment was initially taken by the first respondent alone. This was also the case with the dismissal application. Be that as it may, the objection is raised mainly on the basis that the proposed amendment renders the particulars of claim excipiable in that they will either not disclose a cause of action or will become vague and embarrassing.

[6] It was further contended that the proposed amendment does not comply with Rule 18 and renders the particulars of claim vague and embarrassing in that:

- 6.1 While the applicant cited the second and third respondents as defendants to the action, she does not set out the basis upon which their liability arises;
- 6.2 Further, the relief sought by the applicant in the particulars of claim holds all the three respondents/defendants jointly and severally liable, the one paying the others to be absolved;
- 6.3 The respondents also take issue with the substitution in respect of the second and third respondents and contend that it constitutes an improper joinder through the proposed amendment; and
- 6.4 Lastly, the respondents seek an order of dismissal of the applicant's claim mainly on the grounds of the alleged delay of the applicant in the prosecution of this amendment and the finalization of the claim.

[7] In her proposed amendment, the applicant makes lucid averments that, regard being had to the terms of the written insurance agreement in question, both the first and second respondents are the entities who are liable for payment to the applicant. However, he alleges the conclusion of the written insurance agreement only between the insured and the first respondent. There is no allegation that the second and third respondents signed or bound themselves to that agreement in some or other legally recognized manner.

[8] In my view the particulars of claim as reflected in the proposed amendment are vague and embarrassing and therefore excipiable in that they do not allege the basis for the alleged liability of the second and third respondents to the plaintiff/applicant. That notwithstanding, the statement needs qualification. The allegations made in regard to the terms of the agreement do establish a case against the first respondent and/or possibly even against both the first and second respondents.

[9] The fact that the particulars of claim are vague and embarrassing, already presupposes that they may still be amended to sustain a cause of action especially in relation to the first and second respondent..

[10] The fact that the applicant alleges that the second respondent is a registered insurer and does not make such allegation in respect of the first respondent, does not in my view render the particulars of claim incapable of disclosing a cause of action *vis-a-vis* the first respondent or the second. Such allegation is not necessary to sustain a cause of action. In my view, it is a matter for evidence or at best the issue may be raised as a special plea to the claim.

[11] For these reasons, I am inclined to grant the applicant an opportunity to rectify her particulars of claim accordingly.

[12] The reasons stated above also apply to my decision in regard to the application to dismiss brought by the first respondent. I am not persuaded that the delay in finalizing the Rule 28(4) application justifies the dismissal of the applicant's main claim in its entirety. The first respondent itself only brought the application to dismiss in June 2019, about a year after the applicant had filed the Rule 28(4) application in December 2018. It is not clear as to what exactly the applicant could have done to expedite the finalization of this matter. The first respondent's counsel also stated that further delays occurred due to matters that are not attributable to any party's conduct.

[13] I further disagree with the proposed interpretation of Baqwa J's order to the effect that the opportunity of 15 days to amend meant that the amendment should have been effected within those days. That would have been impossible even if the proposed amendment was not objected to since the applicant would still have had another 10 days to effect the amendment after the filing of the proposed amendment. The 20 days already exceeds the 15 days afforded by Baqwa J's order. The filing of the objection rendered such interpretation even more specious. It follows therefore that the only sensible interpretation of that order is that the applicant was granted an opportunity to deliver the notice of intention to amend within 15 days of the order.

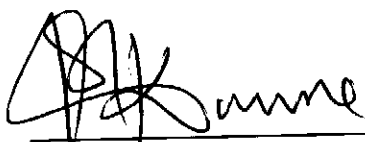
[14] Furthermore, when regard is had to the interchangeable manner in which the first and second respondents are mentioned in the written insurance

agreement, it becomes clear that substitution could be effected by adding the second respondent through the amendment. I do not mention the third respondent because there is no basis laid for including it. This however fortifies my view that the defects in the particulars of claim may still be cured and it is in the interest of justice that the applicant be granted an opportunity to do so, in a new proposed amendment.

[15] Regarding costs, I am of the view that no order of costs should be granted since I intend to dismiss the Rule 28(4) application brought by the applicant as well as the application to dismiss brought by the first respondent. The costs cancel each other.

[16] In the premises, I make the following order:

1. The application for amendment in terms of Rule 28(4) is dismissed;
2. The applicant may amend its particulars of claim within 15 days of this order;
3. The application to dismiss the applicant's main claim is dismissed;
4. There is no order as to costs.



DT SKOSANA (AJ)
Acting Judge of the High Court
Pretoria

Date of hearing: 12 May 2021

Date of judgment: 13 May 2021

Appearance:

For Applicant:

Adv I Kealotswe-Matlou

Instructed by Victor Mabe Inc.

545 Begemann Street

Mabe Law Chambers

Eloffsdal, Pretoria

For Respondents:

Adv B Boot SC

Instructed by Clyde and Co Inc.

c/o Macintosh Cross Farquharson

Embassy Law Chambers

834 Pretorius Street

Arcadia, Pretoria