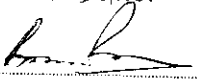




IN THE NORTH GAUTENG HIGH COURT
(REPUBLIC OF SOUTH AFRICA)

/ML

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED: ☒	
DATE 14.06.2012	SIGNATURE 

Case number: 24239/06

15/6/2012

In the matter between:

MINNIE, JACOBUS GERHARDUS JOHANNES

PLAINTIFF

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY

DEFENDANT

and

NDODANA, BECKER AND ASSOCIATES

FIRST THIRD PARTY

NDODANA CONSULTING ENGINEERS (PTY) LTD

SECOND THIRD PARTY

BLACK TOP SURFACES (PTY) LIMITED

THIRD THIRD PARTY

JUDGMENT

RAULINGA, J

- [1] The Applicant (Defendant in the main action) seeks an order for condonation for the late delivery of its notice of amendment, which was delivered pursuant to the upholding of an exception brought by

the Respondent (the third third party in the main action). The Applicant also seeks an order that it be permitted to amend its annexure to the Respondent's notice in accordance with the notice of amendment.

- [2] The Respondent was joined as a third third party by the Applicant based on a written contract concluded between the Applicant and the Respondent ("the contractor agreement"). The parties will therefore be referred to as Applicant and Respondent. The application for condonation and application for leave to amend are both opposed by the Respondent. Since no replying affidavit was filed, the application will be decided on the founding and answering affidavits.
- [3] In July 2006 the Plaintiff (in the main action) commenced action against the Applicant for payment of damages in the amount of R1 668 208.00 being damages which he sustained when the motor vehicle which he was riding struck a hole in the surface of the N12 freeway. The Plaintiff alleges that the Applicant was negligent in causing his damages in that it did not repair the hole in the freeway which it was obliged to do.
- [4] The Applicant has delivered a plea in which it denies that it is liable to the Plaintiff, and at the same time delivered a third party notice joining the three third parties. The joinder of third parties by the Applicant was based on written contractor agreement concluded between the applicant and the third parties. In respect of each third party the Applicant advanced the following claims:
 - (a) Firstly, a claim for an indemnity based on the ordinary grammatical meaning of the contractor agreement;
 - (b) Alternatively a contractual claim for damages in the event that the indemnity claim did not succeed;

(c) Further alternatively a claim for a contribution on the basis that the Respondent was a joint wrongdoer together with the Applicant in respect of the damages claimed by the Plaintiff from the Applicant. The claim for a contribution is advanced in the alternative to the claim for indemnity and contractual damages.

- [5] The first and second third parties delivered a plea to the third party notice. The Respondent delivered an exception to the third party notice. The exception which the Respondent delivered was in essence that the ordinary grammatical meaning of the relevant provisions of the agreement did not entitle the Applicant to claim an indemnity from the Respondent where the Applicant was itself negligent, and that the Applicant was not permitted to claim damages from the Respondent because the agreement limited the Applicant to the type of claim contemplated in the agreement – which claim the Respondent said did not exist thereby effectively immunising itself from liability vis a vis the Applicant.
- [6] On the 3rd December 2010 Msimeki J granted an order upholding the exception with costs, striking out the allegations in the third party notice in so far as they relate to the Respondent, granting the Applicant 20 days from date of the order to deliver an amendment and in the absence of an amendment to the third party notice the applicant's claim against the Respondent would be struck out.
- [7] The Applicant's amendment to the third party notice was delivered on 7th January 2011 which is 3 days after the expiry of the 20 day period allowed for in the judgment of Msimeki J. The Applicant submits that the 3 day delay was not the result of a wilful default by itself. However the Respondent opposes the condonation of the late delivery of the amendment and the amendment.

- [8] It is common cause between the parties that on the 3 December 2010, Msimeki J granted the order in the exception affording the Applicant 20 days to amend the annexure to its third party notice. It is also common cause that the 20 day period expired on the 4th January 2011. The notice of amendment only reached the Respondent's attorneys on the 7th January 2011. The Applicant cites a number of reasons why the notice of amendment could not be served on time.
- [9] In the first place, when the Applicant's attorneys made an attempt to serve the notice at the address reflected on the notice of amendment as being the offices of the Respondent's Pretoria correspondent, the offices were closed for the Christmas break. Secondly, the Applicant's Pretoria correspondent's office re-opened on 5th January 2011 and the responsibility for delivering the notice was assigned to a new candidate attorney who was not advised of the urgency associated with the need to serve the notice of amendment. In short, the Applicant apportions the main cause of delay on its attorneys. However, the Respondent does not accept any explanation advanced by the Applicant, contending that there was no service.
- [10] In considering an application for condonation of a failure to serve a notice timeously, a court may have regard to the requirement of good cause. The determination of good cause entails a consideration of all of those factors which had a bearing on the fairness of granting condonation and affecting the proper administration of justice. The relevant factors might include:
- (i) the prospects of success in the proposed action;
 - (ii) the reasons for the delay;
 - (iii) the sufficiency of the explanation offered;

- (iv) the *bona fides* of the applicant; and
- (v) any contribution by other persons or parties to the delay and the applicant's responsibility thereto.

A Respondent, who raises prejudice, must lay a basis for its existence – the court cannot assume prejudice – **Madinda v Minister of Safety and Security 2008(4) SA 31 – para [10] at 316 E-F and para [21] at 320 I-J.**

[11] In general terms the interest of justice play an important role in condonation applications. The Applicant is required to set out fully the explanation for the delay, and the explanation must be reasonable and cover the entire period of the delay. The Applicant puts the cause of the delay squarely on the threshold of its attorneys and Counsel. This explanation is given in detail. It also gives an explanation why the notice of amendment was served only on the 7th January 2011.

[12] It is trite that where an applicant has satisfactorily explained to the court the reason for his default, and it is apparently not due to any act on his part, but may have been due either to neglect or oversight on the part of his attorneys, or to some misunderstanding between the attorneys and the client, and the Applicant states that he has a good defence on the merits, the court should not scrutinise too closely whether the defence is well-founded, as long as prima facie there appears to the court sufficient reason, for allowing the defendant to lay before the court the facts he thinks necessary to meet the plaintiff's claim. Further, the contention by the Respondent that the attorney who alleges that he handled the notice of amendment does not have the knowledge of all the relevant facts although he has deposed to an affidavit cannot be upheld. It is not necessary for an attorney who had failed to enter appearance to defend or in this case, who failed to file

an affidavit timeously to explain the circumstances, since there was a power of attorney indicating Applicant's intention to enter appearance or file an amendment – **Josub v Natal Bank Ltd 1908 NDP at 377 -379.**

[13] Although the Applicant has set out fully the explanation for the delay, this may be plagued by the requirement of 'good cause' under which is subsumed the factor of "prospect of success" already discussed above. In its proposed notice of amendment the Applicant cites the original third party notice in which it advanced certain claims. The claim's advanced in the original third party notice were held as excipiable by Msimeki J. Three separate claims and alternative claims were advanced in the original third party claim:

- "1. the first claim advanced by the defendant against the third party in the original third party notice was that the plaintiff's claim against the defendant fell within the purview of the indemnity set out in clause 17 of the contractor agreement and that the third party was liable to indemnify the defendant.
2. the second claim, which was advanced in the original third party notice which was advanced in the alternative to the claim for an indemnity, was that the third party had breached the contract agreement in consequence of which the defendant had suffered damages in the amount equal to its liability to the plaintiff and that the first party was liable to pay those damages to the plaintiff.
3. the third claim which was advanced in the original third party notice which was advanced in the alternative to the indemnity and the contracted damages claim was a claim for contributions. In this claim the defendant alleged that the third party was joint

wrongdoer and that the defendant in respect of the plaintiff's damages and that the defendant was entitled to a contribution from the third party having regard to the defendant's and third party's relative degree of negligence.

- [14] According to the Applicant, the exception which the respondent took to the original third party notice, attacked the indemnity claim and the damages claim, but the Respondent limited itself to the alternative claim for contractual damages. Accordingly, the claim for a contribution by the Applicant from the Respondent does not arise from the written agreement therefore the allegations raised by the Respondent in paragraph 9 of the exception in regulating their relationship in terms of the agreement have no application to and can certainly not trump a statutory right to a contribution.
- [15] The Applicant's proposed amendment to the third party notice introduces new claims. The said new claims are tabulated by the Applicant. It is not necessary to regurgitate the said claims. On the proper interpretation claim which the Applicant proposes to introduce by way of amendment, the Applicant submits it is not based on an isolated grammatical interpretation of clause 17 of the contractor agreement. The Applicant contends that the proper interpretation is premised on an interpretation which has regard to certain specified background and surrounding facts which were within the knowledge of the parties at the time of conclusion of the contract agreement. Of paramount importance is that the Applicant avers that the proper interpretation claim which the Applicant advances in its notice of amendment was not considered by Msimeki J. Therefore, the Applicant concludes, that Msimeki J made a finding without any regard to background and surrounding facts which could have played a role in the interpretation of clause 17 – he only interpreted clause 17 with regard to grammatical meaning only – the Applicant instead now seeks

a pro rata indemnity. This is different from what Msimeki J pronounced.

- [16] Our courts have laid down a principle that according to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or consistency with the rest of the instrument. The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is broadly speaking to have regard to:
- (i.) the content in which the word or phrase is used with its interrelation to the contract as a whole including the nature and purpose of the contract.
 - (ii.) the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted.
 - (iii.) to apply the extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties showing the sense in which they acted on the document, save direct evidence of their own intention. (**Coopers & Lybrand and others v Bryant 1995 (3) SA 761 at 767E and 768 A-D.**)

- [17] The Applicant submits that the proposed amendment that it wishes to introduce is not based on an isolated grammatical interpretation of clause 17 of the contractor agreement, but on the proper interpretation which is premised on an interpretation with regard to certain specified background and surrounding facts which were within the knowledge of the parties at the time of the conclusion of the contractor agreement. Applicant submits that Msimeki J did not consider this aspect in his

judgement. However, it appears to me that Msimeki J in interpreting clause 17 considered the background and surrounding circumstances which are subsumed under the so called "proper interpretation". Despite this observation there is no harm that will befall the Respondent if amendment is allowed on this aspect as well. In any event, the court has the inherent powers to grant an amendment of a fatally defective summons so as to cure the defect where such amendment will occasion no prejudice to the Respondent. This case is not an exception to the rule.

- [18] The Applicant now abandons its notice of amendment made in amended paragraphs 42 and 43 of the third party notice. The second claim is no longer a claim for contractual damages, because Msimeki J has found that such a claim is not permitted in terms of the contractor agreement. The second claim is now advanced in the notice of amendment on the basis of rectification to clause 17 of the contractor agreement. The effect thereof is that the respondent will indemnify the Applicant only to the extent of the third party's negligence.

- [19] In my view it does not matter whether the same phrase is introduced or not. The main purpose of the rectification is to use phrases which will fit into clauses 17(i) (a) and 17 (i) (b). Nothing prevents the Applicant from rectifying the standard form. The answer can be found in the detail of the necessity for the Applicant to present its case properly.

- [20] It is indeed trite that a party who has made his case in the pleading, and wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he can not be allowed to harass his opponent by an amendment which has no foundation. But in a similar vein it must be accepted that the aim in allowing an amendment to pleadings should

be to do justice between the parties by deciding the real issue between them. The mistake or neglect of one of them in the process of placing the issue on record is not to stand in the way of this. His punishment is in his being mulcted in the wasted costs. – **Trans –Drakensberg Bank Ltd v Combined Engineering 1967 (3) SA 632 D & C.L.D.**

- [21] I am satisfied that the Applicant has explained why paragraph 42 of the third party notice does not contain reference to mistake. I agree with the Applicant that the “triable issue” cannot be divided at this stage and that evidence in that regard must be heard. The second claim based on rectification is upheld.

- [22] The third claim which the Applicant proposes to introduce into the third party notice is a claim for contribution from the third party as a joint wrongdoer *vis a vis* the plaintiff together with the Applicant. My reading of Msimeki J judgment at page 21 para 90 is that in the original third party notice the plaintiff had not claimed any sum of apportionment and that the Applicant has not claimed contribution from the third party.

- [23] It is my considered view that a party claiming contribution does not depend on the plaintiff claiming apportionment before it can claim contribution from a third party. The issue concerning the duty of care can be raised during the trial. I am with the Applicant that findings which were made by Msimeki J to the effect that the original third party did not allege facts from which a duty of care owed by the third party arose, or that the negligence relied on could not consist solely of a breach of the terms of the contractor agreement do not apply to the new contribution claim. The argument of the Applicant is sustained.

- [24] There exists a rule of practice that the issue of a summons is the initiation process of an action and has certain specific consequences,

one of which is that it must be served. Mere 'knowledge' of the issue of a summons is not service and a plaintiff is not relieved of his obligation to follow the prescribed Rules – **First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd 1998(4) SA 565(NCD)**. In my view, the present case is distinguishable in that the action has already been initiated by means of a summons which was properly served. The process now in question is service of a notice of amendment which although not served properly, by chance landed in the hands of the Respondent. The Respondent reacted to the said process.

[25] Moreover, applications for rescission of default judgment, removal of bar, leave to defend an application and extension of time for the filing of pleadings must be seen as a species of the same genus. In all these cases there is a failure by a litigant to act timeously in terms of the Rules and who seeks the indulgence of the court so as to allow him to proceed with his action or defence. A party who seeks an indulgence must show 'good cause' – this gives the court a wide discretion which must, in principle, also be exercised with regard to the merits of the matter seen as a whole – **Du Plooy v Anwes Motors (EDMS) BPK 1983 (4) 2010(OPD)**.

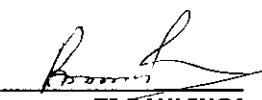
[26] The merits of this case demand that condonation should be granted to allow the Applicant to prosecute its case. Amendments to pleadings are as a rule allowed to do justice between the parties by deciding the real issues between them. The amendment will be refused, only if to allow it would cause prejudice to the other party not remediable by an order of costs and where appropriate a postponement. The respondent has not succeeded in showing that it has suffered any prejudice. As a consequence the amendment is allowed.

[27] It is also vital to note that Rule 28 (10) ordains the court notwithstanding anything to the contrary in this rule, at any stage before judgment is granted leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

[28] Delay in bringing forward an amendment is in itself, in the absence of prejudice, no ground for refusing an amendment as already stated above. In the absence of prejudice to the other party, leave to amend may be granted at any stage, however careless the mistake or omission may have been, and however late may be the application for amendment – **Krongman v Van Reenen 1926 OPD 191 AT 193**. In casu the Applicant was only late by three days. It is in the interest of justice that condonation be granted and that the Applicant be allowed to amend its particulars of claim.

[29] **I therefore make the following order:**

- (a) **Condonation to amend is granted.**
- (b) **The Applicant is granted 15 days to file its amendment.**
- (c) **The Applicant is ordered to pay costs of the amendment.**
- (d) **The Respondent is ordered to pay the costs of the application.**


TJ RAULINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

FOR THE CLAIMANT: ADV I P GREEN
INSTRUCTED BY: SAVAGE JOOSTE & ADAMS INC
FOR RESPONDENT/THIRD PARTY: ADV BRUCE BERRIDGE SC
INSTRUCTED BY: EVERINGHAM, ROGERS, NEL & PARTNERS
C/o STUART VAN DER MERWE INC
DATE OF JUDGMENT: 15 .06.12
HEARD ON: 22.09.11