



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

DATE 27/6/20 SIGNATURE [Redacted Signature]

**Case No: 53330/2019**

In the matter between:

**CHATZ CELLULAR (PTY) LTD**

Applicant

and

**CELLULAR CORPORATE SUITE (PTY) LTD**

Respondent

*IN RE*

**CELLULAR CORPORATE SUITE (PTY) LTD**

Plaintiff

and

**CHATZ CELLULAR (PTY) LTD**

Defendant

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**JUDGMENT**

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**DM LEATHERN, AJ:**

[1] This judgment deals with a number of interlocutory applications in action proceedings instituted by the plaintiff Cellular Corporate Suite (Pty) Ltd against Chatz Cellular (Pty) Ltd as defendant. For ease of reference, I will refer to the parties not as “applicant” and “respondent” in the various interlocutory applications but will use the nomenclature “plaintiff” and “defendant”.

[2] It is not often that a matter such as this comes before court. What should have been a relatively simple trial matter commenced with a combined summons has given rise to an exception, at least four interlocutory applications (including an application to compel the plaintiff to file heads of argument which was opposed and against which leave to appeal was sought) and antagonism between attorneys, acrimony and acerbic statements in various affidavits. The cost of the above and the imposition on valuable court resources is to be deprecated. I refer to this in more detail hereinlater.

[3] The applications forming the subject of this judgment are:-

[3.1] an application launched by the defendant to strike out the plaintiff's particulars of claim and dismiss the claim against the

plaintiff launched by way of notice of motion dated 26 July 2021 (“the dismissal application”);

[3.2] an application launched by the defendant to set aside the plaintiff’s second notice of intention to amend as an irregular step (“the Rule 30 application”) launched by way of notice of motion dated 25 February 2022; and,

[3.3] an application launched by the plaintiff to uplift the notice of bar served on it and grant it leave to amend its particulars of claim within ten days of the grant of such order (“the upliftment of bar application”) launched by way of notice of motion dated the 8th of June 2022.

[4] Underlying all three applications is an order granted by Hassim AJ (as she then was) granted on the 23<sup>rd</sup> of February 2021 when she upheld three exceptions which had been brought against the plaintiff’s amended particulars of claim and afforded the plaintiff fifteen days from date of that order to amend its amended particulars of claim.

[5] In summary, and I will deal with the chronology in more detail hereinafter, the plaintiff did not amend its particulars of claim within the fifteen day time period afforded to it, the defendant served a notice of bar and filed same the next day, the plaintiff filed a notice of intention to amend on what it alleges is the last day for filing of such notice of intention to amend and the defendant alleges was out of time, the plaintiff did not proceed with such

notice of intention to amend but served a second such notice months later and the three applications set out hereinbefore followed.

[6] Logically, the first application which would have to be dealt with would be the latest application which was launched that being the application to uplift the bar launched on the 8<sup>th</sup> of June 2022<sup>1</sup>. If that application were to be granted it would render the other two applications moot.

**THE UPLIFTMENT OF THE BAR APPLICATION:**

[7] The founding affidavit in the upliftment of bar application has been deposed to by Mr Nolte, the attorney of record for the plaintiff. Mr Nolte states that the application is launched in terms of Rule of Court 27(1) and / or (3). Mr Nolte states<sup>2</sup> that the application is *bona fide* and that the applicant (plaintiff) has not already complied fully with the respondent's notice of bar and due to the supine attitude of the respondent has been forced to make use of its rights as provided for in the Rules of Court". It would appear in context that the word "only" has left out of such quotation and should have appeared between the words "not" and "already" or that the word "not" is a Freudian slip. Be that as it may, the valiant attempt to place the cause of the plaintiff's dilemma at the foot of the defendant elicited indignation from the deponent to the answering affidavit.

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<sup>1</sup> CaseLines 0007-1.

<sup>2</sup> In paragraph 2.2.

[8] Mr Nolte goes on to give what he describes as a “brief overview” of the litigious process between the parties. Brief as it may be, important aspects are not included in this “brief overview” including that:-

[8.1] no reason is given as to why the original amendment was not pursued after an objection thereto had been filed on 7 June 2021 thus giving rise to the application to strike out the plaintiff’s particulars of claim served on the 27<sup>th</sup> of July 2021;

[8.2] while he states that the plaintiff drafted and served an answering affidavit to the defendant’s application on 14 December 2021 and indicated that it would be opposed, he does not mention that the 14<sup>th</sup> of December 2021 was the eve of the date on which the matter had been set down on the unopposed roll being 15 December 2021 and that he briefed senior counsel to appear to seek a postponement on that day, knowing full well that it would probably be granted;

[8.3] that he was advised on the 14<sup>th</sup> of December 2021 that the previous amendment had lapsed and prepared a new notice that was served on 14 December 2021, thereby conceding and making it clear that the previous amendment was not being proceeded with; and,

[8.4] having received an objection to the second notice of intention to amend on 30 December 2021 he again did not launch an

application for leave to amend until the 8<sup>th</sup> of June 2022, more than five months later.

[9] It was incumbent on Mr Nolte seeking condonation to set out inter alia why the plaintiff did not comply with the order granted by Hassim AJ (as she then was), did not proceed with the amendment (accepting for purposes hereof that it was filed timeously), why the second amendment was not proceeded with and why the application for leave to amend (assuming that that of the 8<sup>th</sup> of June 2022 can be considered to be pursuant to the notice of intention to amend) was only launched five months later.

[10] Mr Nolte's explanation as contained in the founding affidavit, before referring to the answering affidavit, falls woefully short of these requirements. They can be summarised as follows:-

[10.1] the first notice of amendment was timeously delivered but only filed on 27 May 2021 and this delay cannot be considered severe or prejudicial;

[10.2] he was not aware, nor was anyone at his office aware of the judgment handed down;

[10.3] while he does not dispute that the judgment was uploaded to CaseLines, this was nearly six months after the date of the hearing and it is in his submission impractical and unreasonable to expect a litigant to "religiously and regularly review every matter to which they are invited on CaseLines for any update";

[10.4] he only became aware of the judgment on 19 May 2021 when he served with the notice of bar;

[10.5] he was unable to arrange timeously to meet with the relevant counsel for the plaintiff as they were at various times unavailable or meetings had to be rescheduled due to logistical considerations.

[11] Mr Nolte then debates the question of prejudice and that it is a *bona fide* application, making the submission that it serves the interest of justice that the plaintiff has the opportunity to present its claim.

[12] As indicated hereinbefore, the application elicited vehement opposition in an answering affidavit. This affidavit pointed out the shortcomings in Mr Nolte's affidavit and *inter alia* that:-

[12.1] CaseLines advises all invited persons by email of the changes to the court file and would have done so by email when the judgment was filed;

[12.2] the plaintiff did nothing once an objection had been filed and did not apply for leave to amend;

[12.3] no explanation is given to why the application in terms of Rule 28(4) required was not launched;

[12.4] the application to have the particulars of claim struck out was launched on 27 July 2021 yet nothing was done by the plaintiff for a period of five months and no explanation was given;

[12.5] the interlocutory application was opposed on the 14th of December 2021 and no explanation is given as to why it was not done earlier and affidavits filed, it was also done without any condonation application being filed;

[12.6] at the time that the second notice of intention to amend was filed, the plaintiff was under bar and thus it was irregular;

[12.7] after 15 December 2021 the plaintiff again did nothing;

[12.8] in the Rule 30 / 30A notice filed on December 2021, the plaintiff was expressly informed of its failure to have the bar uplifted yet did nothing until this application was launched in June 2022;

[12.9] on 7 February 2022 the defendant lodged an application to have the second notice of intention to amend set aside as an irregular step, yet again the plaintiff did nothing and that application was set down to be heard on the 9th of June 2022 having been enrolled by way of notice of set down on 10 March 2022 which had no effect until the application to uplift the notice of bar was filed on 8 June 2022 and the answering affidavit in opposition to the Rule 30 / 30A application was uploaded on 9 June 2022 when the Court was already in session; and,

[12.10] after making remarks to the effect that the plaintiff is of the opinion that it is not bound by the Rules, that condonation is there for the taking and the like, the submission is made that

there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered.

[13] It is noteworthy that no replying affidavit was filed on behalf of the plaintiff dealing with the various serious allegations contained in the answering affidavit. Nor was any attempt made to rectify the shortcomings in the founding affidavit regarding the lack of explanation for the failure to act in the relevant periods.

[14] There are thus essentially two questions to be determined, these being:-

[14.1] was there an effective notice of bar; and,

[14.2] if so, should the Court grant leave to amend in any event in terms of Rule 28(10) notwithstanding the expiry of the periods set out in Rule 28(4).

Was there an effective bar?:

[15] There are two aspects to this question, namely:-

[15.1] whether the notice of intention to amend was filed timeously; and,

[15.2] does the fact that the notice of intention to amend was not proceeded with and by implication withdrawn when the second

notice of intention to amend was served on the 14th of December 2021 make any difference?

[16] It seems that it is at least common cause between the parties that:-

[16.1] the notice of bar was served on 19 May 2021 and uploaded onto CaseLines on 20 May 2021;

[16.2] the notice of intention to amend was served on 26 May 2021 and uploaded onto CaseLines on 27 May 2021;

[16.3] the Rule provides for delivery and this, in terms of the definition of delivery in the Rules and practice directives relating to CaseLines means that delivery is only effected when it is uploaded onto CaseLines.

[17] The plaintiff in his heads of argument (incidentally uploaded late) relies on a judgment by Goosen J<sup>3</sup> to make the submission that “there is no bar”. In that matter Goosen J was dealing with the question of whether an exception which was filed after a period of bar had expired while the notice in terms of Rule 23 to remove the causes of complaint had been filed during the period before the bar expired was an abuse and / or valid. The portion referred to is paragraph 13 of the judgment where the Learned Judge is in general terms dealing with the aspect of a bar and states simply that the bar occurs upon lapse of the notice period provided for in Rule 26 within five days after receipt of the notice. If within the five day period a pleading which the

<sup>3</sup> Unreported judgment *Steve's Wrought Iron Works & others v Nelson Mandela Metropolitan Municipality* case no: 441/2019 delivered 21 November 2019 marked “not reportable”.

party is entitled to file is filed, there is no bar. This is simply a statement of the general proposition and was stated in the context as set out clearly in paragraph 14 of the judgment that an exception is a pleading and can thus be filed in the period allowed before the notice of bar takes effect. This much is trite.

[18] A notice of intention to amend is not a pleading. Even less is a notice of intention to amend which is not proceeded with either by way of the filing of amended pages or an application in terms of Rule 28(4) a pleading. The bar became effective, if not on 27 May 2021 then when the first attempt at amendment was allowed to lapse.

[19] The question then to be asked is whether good cause has been shown for the upliftment of the bar.

[20] The requirements for the upliftment of the bar and good cause being shown have become trite. These include:-

[20.1] that the party concerned must give an explanation for his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives;

[20.2] a full and reasonable explanation which covers the entire period of delay should be given;

[20.3] if there has been a long delay, the Court should require the party in default to satisfy the Court that the relief sought should be

granted, especially in a case where the applicant is the dominus litis;

[20.4] it is not sufficient for the applicant to show that condonation will not result in prejudice to the other party;

[20.5] an applicant for relief must show good cause and the question of prejudice does not arise if it is unable to do so;

[20.6] the Court will refuse to grant the application where there has been a reckless or intentional disregard of the Rules of Court or the Court is convinced that the applicant does not seriously intend to proceed;

[20.7] the application must be bona fide and not made with the intention of delaying the opposite party's claim;

[20.8] the party in this case must satisfy the Court that his action is clearly not ill-founded;

[20.9] for the last mentioned requirement, the minimum that the applicant must show is that his claim is not unfounded and is based upon facts which must be set out in outline which if proved will constitute a claim;

[20.10] the grant of the indulgence must not prejudice the defendant in any way that cannot be compensated for by a suitable order as to postponement and costs.

[21] Furthermore, a litigant who asks for an indulgence should also act with reasonable promptitude, be scrupulously accurate in his statement to the court and other neglectful acts in the history of the case are relevant to show his attitude and motives<sup>4</sup>.

[22] In the present matter:-

[22.1] there has not been a full and reasonable explanation covering the entire period of delay;

[22.2] in the light of the paucity of the explanation, firstly in regard to why no checks were made as to whether any judgment had been granted, secondly in regard to failure to proceed with the amendment timeously or at all and thirdly with regard to the fact that no steps appear to be taken by the plaintiff unless the defendant takes steps, a reckless disregard of the Rules of Court is evidenced;

[22.3] there is no admissible evidence to indicate that the claim is in fact a good one, all that is contained in the application is a recital of what stands in the particulars of claim which is in any event hearsay by the plaintiff's attorney.

[23] The numerous neglectful acts in the history of the case indicate the plaintiff's attitude and motives. Even if these motives and attitude cannot be

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<sup>4</sup> Duncan t/a San Sales v Herbor Investments (Pty) Ltd 1974 (2) SA 214 (T) at 216 E-H.

Junkeepsad v Solomon [2021] ZAGPJHC 48, 7 May 2021.

ascribed to the plaintiff, they can certainly be ascribed to the plaintiff's attorneys and it is trite that there is a level at which the litigating party must accept the consequences of his attorney's actions<sup>5</sup>. That level has been crossed here.

[24] Under the circumstances I find that:

[24.1] No case has been made out for the upliftment of the bar which I have found to be effective; and,

[24.2] In any event no case has been made out to allow the amendment brought late, out of time with the judgment by Hassim AJ (as she then was) and at the eleventh hour. Under the circumstances, the application to uplift the bar and allow the amendment will be dismissed in the order set out hereunder.

#### **THE RULE 30 / 30 A APPLICATION:**

[25] As it has already been found that the notice of bar became effective the second notice of intention to amend was filed while the plaintiff was under bar. This point was also brought to the plaintiff's attention in the Rule 30 / 30A notice and the application to uplift the bar was only brought a year later.

[26] It was incumbent upon the plaintiff to launch an application to uplift the bar prior to the filing of a notice of intention to amend. This it did

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<sup>5</sup> See *inter alia* Colyn v Tiger Food Industries Ltd r/a Meadow Feed Mills (Cape) 2003 (6) SA1 at 9 F-I.

not do. The later application launched at the eleventh hour has, for the reasons set out hereinbefore, not been successful.

- [27] Under the circumstances, the application in terms of Rule 30 / 30A should be successful.

**THE DISMISSAL APPLICATION:**

- [28] Having found that the bar became effective and that the application to uplift the bar should be dismissed, it follows that the application to strike out the plaintiff's particulars of claim and dismiss the action should be successful.

- [29] In granting such application I take into account the manner in which the litigation has been conducted by the plaintiff. It is a sorry tale of disregard of orders of court, disregard of the Rules and only acting at the eleventh hour when forced to do so. In this regard *inter alia* applications to compel the delivery of heads of argument were opposed at the eleventh hour, postponements of matters on the unopposed roll were forced by the filing of affidavits at the eleventh hour and even heads of argument for the applications which form the subject of this judgment have also filed late and out of time.

**COSTS:**

- [30] As indicated hereinbefore, the interlocutory applications in this matter, the unnecessary taking up of the scarce judicial resources and the delay in what should have been a relatively simple action

procedure has been occasioned simply by the actions of the plaintiff and / or its attorney. The defendant has been successful in all 3 of the applications and the general rule is that costs should follow the result.

[31] As further indicated hereinbefore, animosity, acerbic comments and unnecessary insults permeate the affidavits filed in this matter. This includes one attorney accusing his colleague of blatant dishonesty, the plaintiff's attorney stating in a letter filed of record that the obtaining of the date for hearing of this matter was "at best opportunistic and at worst misleading of the Court and *mala fide*". Similar accusations appear in the papers from both sides.

[32] The animosity evidenced in the papers in this matter is to be deprecated. It does not assist the determination of these matters nor promote efficient litigation in general. It does not however under the present circumstances warrant denying the successful litigant its costs.

[33] The costs occasioned by a postponement on the 9<sup>th</sup> of June 2022 when the application in terms of Rule 30 / 30A was enrolled and was postponed as a result of the filing of an answering affidavit on the date of hearing have been reserved. Those costs should be paid by the plaintiff. It is noteworthy that there was no condonation application filed relating to the late filing of the answering affidavit.

[34] There were also costs reserved on the 15<sup>th</sup> of December 2021 in regard to the striking out application for the same reasons. These costs should also be paid by the plaintiff.

[35] The defendant has sought in each application a special punitive cost order. In light of the criticism set out hereinbefore regarding the conduct of the plaintiff and the plaintiff's attorney and the delay that it has occasioned, such an order is justified.

[36] As the plaintiff is to pay the defendant's costs on the scale as between attorney and client and not on a party and party basis, the provisions of Rule 69 as amended are not applicable. Should it be argued that they are and that the tariff is applicable I would allow scale C to be applied.

**ORDER:**

[37] I make the following order:

1. In respect of the interlocutory application by the defendant, Chatz Cellular (Pty) Ltd dated 25 February 2022:

1.1. the plaintiff's notice of intention to amend dated 14 December 2021 in respect of the action under case number 53330/2019 is set aside;

- 1.2. the plaintiff is ordered to pay the costs of such application on the scale as between attorney and client including the costs reserved on 9 June 2022.
2. The interlocutory application by the plaintiff Cellular Corporate Suite (Pty) Ltd dated 8 June 2022 is dismissed with costs on the scale as between attorney and client.
3. In respect of the application by the defendant Chatz Cellular (Pty) Ltd dated 26 July 2021:
  - 3.1. the particulars of claim filed under case number 53330/2019 is struck out;
  - 3.2. the plaintiff's claim against the defendant under case number 53330/2019 is dismissed with costs;
  - 3.3. the plaintiff is ordered to pay the costs of the application on a scale as between attorney and client, such costs to include the costs reserved on 15 December 2021.

  
  
DM LEATHERN  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 28<sup>th</sup> of June 2024.

**COUNSEL FOR THE PLAINTIFF:**

Adv G.W. Alberts SC

Adv Louis Hennop

**COUNSEL FOR THE DEFENDANT:**

Adv Ulrike Van Niekerk