REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 19131/2020
(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO
DATE: 12 August 2024
SIGNATURE

In the matter between:

PULANE QHAMAKOANE **PLAINTIFF**

and

THE ROAD ACCIDENT FUND **DEFENDANT**

Summary: *Default judgment procedure – late stage amendment of quantum – what is the effect of the reopening of pleadings when the Defendant is ipso facto barred – a party that is ipso facto barred is barred from filing a plea to the particulars of claim as they stand at the time of bar and has the effect of bringing pleadings to a close. Should such particulars of claim be amended it would have the effect of reopening the pleadings and the bar would no longer have effect.*

JUDGMENT

KRŰGER AJ

BACKGROUND

[1] The matter came before me on the Default Judgment roll on 2 July 2024. The summons was issued in regard to a claim against the defendant in respect of

a motor vehicle collision that occurred on 1 May 2018, in which collision the plaintiff was a passenger.

[2] The summons herein was served on 24 March 2020 claiming the following relief in respect of quantum:

Past medical and hospital expenses	100 000.00
Estimated future medical treatment	100 000.00
Past loss of income	20 000.00
Estimated Future loss of income	80 000.00
General damages	200 000.00
Total	**500 000.00**

[3] A notice of intention to defend was filed on 1 July 2022 and the plea was due, according to the plaintiff, on 30 July 2022. When the plea was not served, the plaintiff caused a notice of bar to be served on the defendant on 27 September 2022. The defendant was thus *ipso facto* barred[1] from 5 October 2022, therefore at the time of close of pleadings, the case the defendant was to plead to in respect of quantum, at the time before the defendant was barred, was R 500 000.00 excluding the value of the undertaking. The amount for past and future loss of income was R 100 000.00.

[4] The matter was placed on the default judgment roll previously and removed by notice on 15 July 2022. The application for default judgment before me was served on the defendant on 24 January 2023 and the notice of set down was served on 26 March 2024.

[5] The plaintiff served and filed a notice of intention to amend the particulars of claim to a total, claimed in respect of loss of income, in the amount of R 7 767 745.00. In this notice of intention to amend, the defendant was given 10

[1] The effect of the notice of bar "… *is that the pleadings are deemed to be closed and the appellants were accordingly barred from filing a plea."* See reportable judgment in *Khethiwe Dlodlo and Others v Omega Constructions and Building (Pty) Ltd (*CA85/2022) [2022] Eastern Cape Division, Makhanda (1 March 2022) at para 6.

days within which to object, should they wish to do so in terms of Rule 28(2). The notice of intention to amend was served on the defendant on 25 June 2024. The matter was on the default judgement roll before me 5 days after service of the notice of intention to amend. The amended pages were also served on the defendant on 25 June 2024.

[6] In terms of Rule 28(7), the amendment is effected by delivering the amended pages within 10 days after the 10 day period in which to object has lapsed and no objection was received. In the matter before me, the amendment has not been effected since the 10 day period afforded to the defendant to object had not yet lapsed and furthermore the amended pages had been delivered prematurely.

[7] Counsel for the plaintiff was asked to address the court on the validity and effectiveness of the amendment with specific reference to the judgment of Natal Joint Municipal Pension Fund v Emdumeni Municipality[2] (*Natal Joint Municipal Pension Fund judgment*) and Tshepo Patricia Rallele obo P..M...M.. v Road Accident Fund[3] (*Rallele judgment*) and the matter was stood down to accommodate such address.

[8] The Counsel for the plaintiff then made application to have the amendment granted by this court in terms of Rule 28(10), which rule states that:

"The court may, not withstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit."

[9] I requested Counsel for the plaintiff to address me on the effect of Rule 28(10), should same be granted, taking into consideration Rule 28(8) which reads: *"**Any party** affected by an amendment may, within 15 days after the amendment has been effected or within such other period as court may*

[2] Natal Joint Municipal Pension Fund v Emdomeni Municipality 2012 (4) SA 593 (SCA) at paras [13] and [15}
[3] Tshepo Patricia Rallele obo Pearl Mohlala Makhudubela v Road Accident Fund (9117/2019) [2024] ZAGPPHC (18 April 2024) Davis J

determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30." (emphasis added) This would essentially have the effect that should the amendment in terms of Rule 28(10) be granted at default judgment proceedings, the default judgment would have to be postponed in order to give effect to the rights of the other party in terms of Rule 28(8).

DISCUSSION

[10] Counsel's argument was firstly that, in the Uniform Rules, Rule 26 and Rule 27[4] which respectively deal with implications of the notice of bar and the upliftment of the bar, was specifically placed before Rule 28 and therefore precede the question of amendment and therefore the defendant would not be entitled to adjust its documents.

[11] I disagree with Counsel, in that Rule 28 and more specifically Rule 28(8) states: "***any party*** *affected by an amendment may....."(my emphasis).* That would include a party that is *ipso facto* barred from delivering a plea.

[12] Then secondly, the argument of Counsel for the plaintiff was that, where a party has been met by a notice of bar, it has not filed any documents and as such cannot make any consequential adjustments to its documents.

[13] I again disagree with Counsel, in that the defendant has filed a notice of intention to defend and therefore has various options open to it*, inter alia* to adjust the documents by making application to uplift the bar and then, if

[4] Rule 27 provides as follows:

27. Extension of time and removal of bar and condonation *(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by any order of court or fixed by any order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet. (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules. (3) The court may, on good cause shown, condone any non-compliance with these Rules*

successful, to file a plea to the amended particulars of claim, or to bring an application for the rescission of judgement in granting the amendment. A Notice of bar and the consequences thereof, does not close the door of the court to the party that is *ipso facto* barred. It merely means that such party can not file a plea to the plaintiff's case **as it is at the time of bar**. (my emphasis)

[14] The third argument of Counsel for the plaintiff was that the matter before me has to be distinguished from the Rallele judgement in that, in the Rallele judgement the court was dealing with a situation where the defence had been struck and there was a plea filed. In the current matter where there is a notice of bar, no plea was filed and accordingly no adjustments can be done to the documents because none have been filed.

[15] Again, I have to disagree with Counsel and this brings me to the two judgments the court referred Counsel to address me on in this regard. In the Natal Joint Municipalities Provident Fund Judgment, Wallis JA, stated:

"[13] ..... On the first day of the trial the parties agreed a list of issues and included this one without any amendment to the pleadings. In so doing they expanded the issues in dispute to go beyond those existing at the close of pleadings. It is permissible for parties to do this in an informal way, as a host of cases demonstrates, but its implications do not appear to have been considered in the present case. "

"[*15] The answer is that when pleadings are re-opened by amendment or the issues between the parties altered informally, the initial situation of litis contestatio falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of litis contestatio was conceived. In Roman law, once this stage of proceedings was reached, a new obligation came into existence between the parties, to abide the result of the adjudication of their case. Melius de Villiers[5] explains the situation as follows:*

[5] Melius de Villiers *The Roman and Roman Dutch Law of Injuries* 236.

'Through litiscontestation an action acquired somewhat of the nature of a contract; a relation was created resembling an agreement between the parties to submit their differences to judicial investigation …'

When the parties decide to add to or alter the issues they are submitting to adjudication, then the 'agreement' in regard to those issues is altered and the consequences of their prior arrangement are altered accordingly. Accordingly, when in this case they chose to reformulate the issues at the commencement of the trial, a fresh situation of litis contestatio arose and the rights of the Fund as plaintiff were fixed afresh on the basis of the facts prevailing at that stage. Those facts were that the amendment embodying the proviso had been registered at least a year earlier with retrospective effect to 1 July 2004, which was prior to all relevant events in this case. Had this been appreciated when the list of issues was prepared the point would not have been taken. It was rightly not suggested that any initial defect in the Fund's reliance on the proviso would not be remedied by registration of the amendment prior to litis contestatio."

[16] In the Rallele Judgment, Davis J referred to the judgment in Olivier[6] the relevant paragraph which reads: "*When due consideration is had to the amended particulars of claim, the amendments are substantial and material. There are new aspects that in my view would require some consideration. It may be so that this increase in quantum did not alter the cause of action, the identity of the parties and the scope of the issues in dispute .... Notwithstanding, the scope of damages has been increased significantly and would without doubt require a pleading".*

[17] Davis J went further in paragraph [20] which reads: *"Although doubt had been expressed whether an immaterial or minor amendment would have the same result of a "fresh litis contestation", it must be beyond doubt that any substantial amendment would have the result that pleadings are reopened.*

[6] Olivier v MEC of Health, Western Cape 2023 (2) SA 551 (WCC) at [21] *(Olivier)*

That the Supreme Court of appeal has confirmed in Endumeni. By way of illustration, in Olivier, the amount of damages was increased from R6 105 000.00 to R7 155 500.00 and the court found that that would have entitled a defendant to plead thereto. In the present matter the amount of damages was even more significantly increased." In the matter before me the amount was increased from R 100 000.00 to R 7 767 745.00 in respect of loss of income. I align myself with the views of Davies J and Mantame J in this regard.

[18] This begs the question as to the difference in a matter where a defence has been struck as set out in the Rallele matter and a situation where the defendant has been *ipso facto* barred as in the matter before me. In the Rallele matter Davies J found that : "*A defence which has been struck out by a court, would have been a response to a plaintiff's pre-amended case and to the quantum which the plaintiff had then claimed he or she would be entitled to. Once that claim had been "frozen" by the close of pleadings and the plaintiff thereafter seeks to "unfreeze" its position, there can, in my view, be no objection to allow a defendant to plead to this "unfrozen" or reopened case. To allow a defendant to plead afresh, would also be consistent with provisions of Rule 28(8) which expressly allows "any party affected by an amendment... to make... any consequential adjustment to documents filed by him".*

CONCLUSSION

[19] In my view, when a party has been *ipso facto barred*, this means that such party is barred from filing a plea to the particulars of claim of the plaintiff as they stand **at the time of bar** (*my emphasis*) and to use the words of Davis J would have the effect of "freezing" the plaintiff's claim in that *litis contestation* would be reached and the pleadings would be closed.

[20] If a party has been barred from pleading, they have the option of bringing an application in terms of Rule 27 to uplift the bar, but same can also be "uplifted" by agreement between the parties. In my view this does not pertain to a situation where the plaintiff, by his conduct, through amending the particulars

of claim, “invites” the defendant back into litigation by re-opening the pleadings, as the defendant had been barred to the pre-amendment pleadings and not to the reopened and amended pleadings. Therefore in my view, it is not necessary for the defendant to bring an application to uplift the bar, but through the amendment attains the right to plead to the amended particulars of claim.

[21] On Counsel for the plaintiff’s argument that, when a party is ipso facto barred, it has the factual implication that the party is automatically excluded from further participating in the case. It is my view that a notice of bar and a subsequent result of being ipso facto barred, must not be confused with the idea that the party is barred from further participation in the litigation. When a party is *ipso facto* barred, this means only that such party is barred to deliver a plea to the particulars of claim of the plaintiff, as they stand at the time of the bar. It does not have the effect that the notice of intention to defend disappears or that the party is also barred from defending the matter. The party that is *ipso facto* barred can still participate in the litigation by conducting the litigation on the case of the plaintiff as it stands at the time of bar.

[22] In the premises, I make the following Order:

1. The Amendment sought by the plaintiff in terms of Rule 28(10), amending the amount in the particulars of claim in respect of past and future loss of income, to R 7 767 745.00 (seven million, seven hundred and sixty seven thousand, seven hundred and forty five rand), is hereby granted.

2. The default judgement is postponed *sine dies.*

3. The Defendant is afforded 15 days from date of service of this judgment on the Defendant, to file a plea herein.

4. No order as to costs.

M KRŰGER

ACTING JUDGE OF HIGH COURT

GAUTENG DIVISION

PRETORIA

Date of hearing: 02 July 2024

Date of judgment: 12 August 2024

For the Applicant : Adv P Venter

Instructed by : VZLR INC, PRETORIA

For the Defendant : no appearance

Instructed by : STATE ATTORNEY, PRETORIA