



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 2301/2016

In the matter between:

**MEC FOR HEALTH, EASTERN CAPE
PROVINCIAL GOVERNMENT**

1st Applicant

**THE SUPERINTENDENT GENERAL
AND HEAD OF DEPARTMENT OF HEALTH**

2nd Applicant

and

**NGOZA MARASHA
OBO NOMSA EDITH MARASHA**

Respondent

JUDGMENT

ZONO AJ:

Introduction

- [1] This is an interlocutory application brought by the applicants, the defendants in the main action. The defendants in the main action is the Member of Executive Council for the Department of Health and the Superintendent General and Head of Department. They are applicants in this interlocutory

application. For the sake of clarity, I shall refer to them as such. The plaintiff in the main action is Nomsa Edith Marasha and she is the respondent in the instant Interlocutory application and I shall refer to her herein as such.

- [2] The applicants seek herein a relief in terms of which the respondent's claim (plaintiff's claim) in the main action be struck out with costs of this application to be borne by the respondent. The application is strenuously opposed by the respondent and in so doing the respondent has delivered answering affidavit. No replying affidavit has been filed by the applicants. The matter came for hearing as an opposed matter.

Brief Background of the Matter

- [3] The respondent, having instituted action proceedings on 05th July 2016 in this court, for applicants' failure as an employer to pay respondent's remuneration and benefits attached to the position of Deputy Director Nursing: Dr Malizo Mpehle Hospital. The applicant defended the matter and in so doing the applicant delivered its plea, *albeit* after the filing of notice to plead. The plea dated 05th October 2016 is fraught with bare denials and averments of lack of knowledge. However, on 06th November 2018 the matter was apparently enrolled for trial and both parties were represented and the following order was taken:

" 1. The defendants/ respondents be and are hereby declared to have failed to comply with paragraph 1 of the court order dated 5th September 2017.

2. The defendants/ respondents defence be and is hereby struck out.

3. Judgment against the defendants/ respondent's in favour of the plaintiff / applicant on the merits.

4. Respondents pay costs on a punitive scale as between attorney and own client." (sic)

[4] For the sake of completion, the court order of 05th September 2017 referred to in the court order of 06th November 2017 compelled the applicants to comply with Rule 35(14) within 30 days of granting of that order.

[5] The court order dated 04th November 2018, properly construed, struck out applicants' defence and simultaneously entered judgment on merits against the applicants. In effect, the applicants were found to be liable to the respondent for any proven damages of the respondent. Mr Hanise, applicants' attorney alleges in paragraph 3 of his affidavit supporting this application that:

“on 14th November 2024 the defendants delivered a notice upon the plaintiff requesting certain information.”

Although there is no such document in the court file, it appears to have been accepted that the said request was served upon the respondent. It is apparent that the request was made not only after the applicants' defence had been struck out, but also after the judgment had been entered.

[6] After the *dies* provided in the request had expired, the applicants apparently caused a notice in terms of Rule 30A(1) to be served. Again, this notice is not in the court file, notwithstanding reference made thereto in the papers. The respondent accepts that this notice was served. This application is apparently a consequence of respondents' non reaction to the notice referred to above. The respondent essentially contests applicants' entitlement to the requested information or particulars as I will demonstrate hereinafter.

The Applicable Legal Framework

[7] The parties are *ad idem* that the request made by the applicants was a request for further particulars. Request for further particulars is provided for by and in Rule 21 of the Uniform Rules of Court (UCR). The Rule provides thus:

“(1) Subject to the provisions of subrules (2) to (4) further particulars shall not be requested.

(2) After the close of pleadings any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him or her to prepare for trial. Such request shall be complied with within 10 days after receipt thereof.

(3) The request for further particulars for trial and the reply thereto shall, save where the party is litigating in person, be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the High Court, only by such attorney.

(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet.

(5) The court shall at the conclusion of the trial of own accord consider whether the further particulars were strictly necessary, and shall disallow all costs of and flowing from any unnecessary request or reply, or both, and may order either party to pay the costs thereby wasted, on an attorney and client basis or otherwise”.

- [8] Rule 21(2) of URC refers to the close of pleadings. A request for further particulars may be made only after the close of pleadings and not less than twenty days before trial. The stage in the litigation at which the pleadings close is provided and prescribed by and in Rule 29 of URC. Rule 29(1) of URC provides:

“(1) Pleadings are considered closed if—

(a) either party has joined issue without alleging any new matter, and without adding any further pleading;

(b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;

(c) the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or
(d) the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.”

[9] To the extent I may be requested to deal with the features of the request for further particulars as outlined in Rule 21(3) of URC, Rule 18(1) of URC provides as follows:

“(1) A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the High Court, only by such attorney or, if a party sues or defends personally, by that party”.

Discussion and Analysis

[10] It is common cause that applicants’ defence was struck out on 06th November 2018. Notwithstanding that event, the applicant requested further particulars which ostensibly should have been required for purposes of enabling the requester to prepare for trial. Having said above that no request for further particulars appears to have been filed, meaning that no delivery thereof had been effected¹, such failure to deliver the request manifests noncompliance with Rule 21(2) of URC. Service of the document alone does not constitute delivery contemplated by and in Rule 21(2) of URC. Service of the document must be accompanied by filing of the original document with the registrar of the court. I am therefore unable to find that the request for further particulars was delivered in terms of the rule sought to be invoked².

¹ Rule 1 of URC defines the word *delivery* to mean; to serve copies on all parties and file the original with the registrar.

² Rule 21 of the Uniform Rules of Court.

- [11] Entitlement to the particulars must strictly follow delivery of the proper and compliant request for those particulars. A litigant who has himself not complied with the rule seeking to enforce same must not get the relief or remedy the rule is providing. A drastic step having an effect of dismissing litigant's claim on the basis of the alleged procedural failure cannot lightly and randomly be embarked upon. The court itself must ensure that all the boxes have been ticked before dismissing litigant's claim, otherwise that would be an unnecessary and arbitrary invasion to party's right to access to court³. It therefore makes sense that a party who seeks compliance with a particular provision, must himself have complied with the provision and the related provisions. The court is therefore justified for not coming to the aid of a delinquent litigant.
- [12] It is common practice that practitioners only serve court documents or process just to evade or stave off consequences of an application for default judgment; and once they secure their colleagues agreement to extend a life line in litigation, they forget about filing the documents or process in court. Litigant and practitioners are discouraged from the tendency of not filing documents in court once they secure agreements with their colleagues. This conduct, as it does not only offend the rules, it also imperils the proper functioning of the court, it should in future attract punitive costs.
- [13] In the light of the finding I made above, applicants' application should fail only on this basis. Even if I would be found to be wrong on this ground, I would still find against the applicants on another ground.
- [14] It is fundamentally important that a party is only entitled to call for such further particulars as they are strictly necessary to enable him to prepare for trial⁴. The purpose of permitting a party to call for further particulars for trial is three pronged. Firstly, it is to prevent surprise during trial; secondly, that the parties should be told with greater precision what the other is going to prove

³ Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of the law decided by in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.

⁴ Rule 21(2) of URC.

in order to enable his opponent to prepare his case to combat counter allegation; and thirdly having regard to the foregoing nevertheless not to tie the other party down and limit his case unfairly at the trial⁵.

[15] There is authority for proposition that in determining what particulars fall within the scope of the rule, one would look primarily at the pleadings⁶. A party cannot, however, be required to give particulars in relation to a mere denial of allegations made by his opponent, such party cannot be required to furnish particulars of any aspect placed in issue by such denial⁷. I have indicated above that applicants' plea, before it was effectively set aside, was fraught or replete with bare denials and mere allegations of lack of knowledge with plaintiff being put to proof thereof. It is not desirous to direct the litigant to furnish particulars in circumstances where the requesting party's pleading is marred with bare denials. Even if the applicants' plea was not set aside, and still extant, it would not be necessary to require the respondent to furnish applicants with the particulars for trial preparation.

[16] The situation in this case is exacerbated by the fact that applicants' bare denial plea was effectively set aside on 06th November 2019 when applicants' defence was struck out *peri passu* with the judgment being entered in favour of the respondent on merits. Whilst the court would be justified to refuse to direct the provision of the particulars in circumstances where the plea is replete with bare denials, it is even more apposite to refuse such particulars when there is not even a plea and or a defence. Absence of a plea and or a defence that would be canvassed and championed in the trial justifies the refusal of the particulars.

[17] In civil proceedings, it is unprecedented that a party can prepare for trial when or in respect of which he has no claim or defence. It must be borne in mind that further particulars are required only to enable the party to prepare his

⁵ **Thompon v Barclays Bank DCO** 1969(2) SA 160(W) at 165; **Schmidt Plant Hire (Pty) Ltd v Pedelli** 1990 (1) SA 398 (D) at 402.

⁶ **Hardy v Hardy** 1961 (1) SA 643 (W) at 646.

⁷ **PJ v HJ (unreported)** FB Case No A55/2022 dated 10 November 2022 Para 16 and 18- Full Court Division; **Swart v De Beer** 1989 (3) SA 622 (E)AT 625.

case. A case is either made out in the plaintiff's particulars of claim⁸, or in the defendant's plea⁹, where the litigant shall clearly and concisely state all material facts upon which he relies for his claim or denial. The defendant sets out his defence in the plea. A plea is a document without which a defendant may raise his defence. It is trite that a defendant cannot rely upon a defence which he has not pleaded. As a corollary, a defendant whose defence in the plea has been struck out has no case to prepare for trial. It is therefore going to be without a purpose to compel that further particulars be furnished to the applicants herein whose defence had been struck out by this court on 06th November 2018. The applicants have no case to prepare for trial.

[18] The requested further particulars must “*strictly*” be necessary to enable the applicant to prepare his case for trial. A meaning must be attached to the word “*strictly*” in the subrule. One cannot treat that word as if it does not exist¹⁰. It is impermissible to do so, as it militates against a long standing precept of interpretation that every word must be given a meaning, and that no word should be ignored, or treated as tautologous or superfluous¹¹. A fundamental tenet of statutory interpretation is that the words in a statute must be given their grammatical meaning, unless to do so would result in an absurdity¹².

[19] The word “*strictly*” demands sternness and strictness with which the provision must be followed. The word is an adverb requiring the exact obedience with the Rule 21(2) of URC. South African Concise Oxford dictionary defines the word “*strict*” as follows:

“1. Demanding that rules concerning behaviour are obeyed. (of a rule) demanding total compliance; rigidly enforced.”

⁸ Rule 18(1) of URC.

⁹ Rule 22(2) of URC.

¹⁰ **Ndaba v Ndaba** 2017 (1) ALL SA 33 (SCA); 2017 (1) SA 342 (SCA) Para 54.

¹¹ **African Product (Pty) Ltd v AIG South African Ltd** 2009 (3) SA 473 SCA Para 13, **National Credit Regulator v Opperman and Others** 2013 (2) SA (1) (CC) PRA 99; **Kilburn v Tuning (Pty) Ltd** 2015 (6) SA 244 Para 15.

¹² **Cool Ideas 1186 CC v Hubbard and another** 2014 (4) SA 474 (CC) 2014 (8) BCLR 869 (CC) Para 28; **SATAWU and Another v Garvas and others** 2013 (1) SA 83; 2012 (8) BCLR 840 (CC) Para 37.

2.Following rules or beliefs exactly.

3.not allowing deviation or relaxation.”

The word is not defined in the Uniform Rules. The dictionary or grammatical meaning of the word fits and aligns with the context of Rule 21 of URC. I therefore come to a conclusion that provisions of Rule 21(2) of URC are peremptory. A statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequences, and any purported compliance falling short of that is a nullity¹³.

[20] It is imperative that the particulars requested must be strictly, exactly and sternly be necessary to enable the applicant to prepare his case for trial. If there is no case in the form of a defence of the applicants, particulars are not necessary to be furnished. A request made for furnishing of particulars notwithstanding that those particulars are not strictly necessary for preparation of a case is a nullity. It is not only on the basis of the authority of *Shalala* referred to above, but also on the basis of *Schiehoiut*.¹⁴ As a general rule non-compliance with a peremptory provision results in a nullity.¹⁵ The request for further particulars was made contrary to the imperative provisions of Rule 21(2) of URC, which exercise resulted in a nullity.

[21] In the circumstances, the applicants were not only not entitled to the particulars owing to the fact that they are not necessary to enable the applicants to prepare for their case. But also the request amounts to a nullity for it does not comply with Rule 21(2) of URC. Accordingly, the applicants cannot be successful in this application.

[22] Even if there was basis for the invocation of Rule 21(4) of URC, an application to strike out respondent's claim would not be granted without first having sought a less invasive order compelling the furnishing of the said particulars. It is not clear from applicant's papers why the applicant opted for this application instead of an application to compel (atleast) in terms of the same

¹³ *Shalala v Klerksdorp Town Council and another* 1969 (1) SA 582 (T) at 587 A-C.

¹⁴ *Schiehout v Minister of Justice* 1926 AD 99 at 110.

¹⁵ LAWSA, Volume 25, Part 1, Page 399 Para 366.

Rule 21(4) of URC, which provides for the striking out. In looking into this conduct, one must not lose sight of the fact that the applicants, who are the defendants in the main action have not disclosed any defence to meet respondent's claim in the main action. I reiterate that this application would not be appropriate in the circumstances where no defence had been disclosed in the plea. What aggravates the situation is the fact that applicants' defence had been struck out on 06th November 2018. The striking out of applicants' defence left no *lis* in terms of which the applicants would meaningfully and properly litigate against the respondents and convey a defence to the court.

[23] The respondents have contended for costs on a punitive scale. The respondent seeks such kind of costs order on the basis that applicants conduct is abusive of the process of this court. They cited instances of postponements at the instances of the applicants. The respondents come to a conclusion that the applicants are dilatory in this matter.

[24] In the amalgam of all this, I am of the view that applicants' conduct, not only in their previous engagement with the court and respondent, but also in the institution of this application is indeed dilatory and consequently abusive of the court process. Dilatory conduct under the pretext that a party is invoking the rules of court is not to be accepted. The object of the rules is to secure the inexpensive and expeditious completion of litigation before courts: they are not an end in themselves¹⁶. The rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible¹⁷. They are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not to reduce the scope of the right to a fair trial entrenched in section 34 of the Constitution.¹⁸ In my view this application is not only vexatious, but also frivolous. There is quite a good ground for costs on a punitive scale.

¹⁶ *Social Justice Coalition v Minister of Police* 2022 (10) BCLR 1267 (CC) Para 52-54.

¹⁷ *African Development Bank v TN* 2019 (2) SA 437 (GP).

¹⁸ *DF Scott (EF) (Pty) Ltd v Golden Valley Supermarket* 2002(6) SA 297 (SCA) at G-H.

Conclusion

[25] Having arrived at the above mentioned findings, it is not necessary to deal with the point which both parties thoroughly canvassed, which is the point of whether the pleadings in the main action at the time of the request for further particulars had closed. Mr Kunju SC argued that pleadings in the main action when the applicants requested further particulars had not closed. He said so because the applicants' defence in the main action had been struck out and consequently the applicants had no plea. This argument is premised on the fact that pleadings closed after the filing of the defendants' plea. On the other hand, applicants' Counsel Mr Notshe SC argued that pleadings close when there is no subsequent pleading filed. Pleadings can close once the *dies* for filing a notice of appearance to defend expires and no notice is filed; alternatively, once the time for filing of plea expires with no plea filed, so it is argued that pleadings close.

[26] It is common cause that Rule 29(1)(b), (c) and (d) does not find application on the facts of this matter. It is well accepted that there is no plea upon which replication could be filed; no agreement between the parties as to the close of pleadings and there is no court order declaring the pleadings closed¹⁹. Mr Notshe SC seemingly argued on the basis of Rule 29(1)(a) which provides that:

"Pleadings are considered closed if either party has joined issue without alleging any new matter and without adding any further pleading."

[27] This argument deserves a short shrift as it is not predicated on the applicants' papers. It is trite that applicant must stand or fall by his founding papers. To

¹⁹ Rule 29(1)(a)-(d) of the URC.

suggest otherwise would be antithetical to the dictum made by the Supreme Court of Appeal in *Slabbert*²⁰ Mhlantla JA observed as follows:

*“11. The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial”.*²¹

[28] In any event, in modern practice *litis contestatio* is taken as being synonymous with close of pleadings, when the issue is crystalized and joined²². Joinder of issues operates merely as a denial of facts and not as denial or admission of statements of law²³. The effect of *litis contestatio* is to freeze the plaintiff's rights as at that moment²⁴. In this case the applicant had not joined issues with respondent's case, therefore there is no joinder of issues herein.

[29] When applicants' defence was struck out, the status quo reverted, and the pleadings reopened. The matter became undefended. If it were not for the fact that there is a judgment entered on merits, the matter would have been at a stage where there is only a notice of appearance to defend. It would have been opened to the respondent to invoke the provisions of Rule 26 and require the applicant to file its plea, which preparatory step would asher the respondent into a default stage. In this case the judgment on merits had been entered. It is therefore available to the respondent to press for default judgment on quantum. My voice is not alone with regard to the fact that the matter is at this stage undefended. In *Wilson*²⁵ it was held that:

²⁰ **Minister of Safety and Security v Slabbert** 2010 (2) ALL SA 474 (SCA) Para 11.

²¹ **Imprefed (Pty) Ltd v National Transport Commission** 1993 (3) SA 94 (A) at 107.

²² **Van Ransburg v Condoprops** 42 (Pty) Ltd 2009 (6) SA 539 (E) at 542 A.

²³ Erasmus: Superior Court Practice, Second Edition-D1-349, issue 10, 2019.

²⁴ **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at 601 D-F.

²⁵ **Wilson v Die Afrikaans Pers Publikasies (EDMS) BPK** 1971(3) SA 455 (T) at 462 462 H-463 B.

“The striking out of a defendant’s defence is an extremely drastic step which has the consequences that the action goes forward to a trial as an undefended matter. In the case if the orders were granted it would mean that a trial court would eventually hear this action without reference to the justification which the Defendant has pleaded and which it might conceivably be in a position to establish by evidence. I am accordingly of the view that very grave step will be resorted to only if the court considers that a Defendant has deliberately and contemptuously disobeyed its order to furnish particulars.”

[30] In the conspectus of all the above it is plain that applicants’ case is unsuccessful. The first applicant is liable to pay respondent’s costs on a punitive scale. In *Kalil*²⁶ Leach JA held that:

*“30. That having been said, the manner in which the Municipality approached the appellants’ application militates against a costs order in its favour. This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. As this court stressed in *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng*, our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights”.*

²⁶ *Kalil NO and others v Mangaung Metropolitan Municipality and others* 2014 (3) ALL SA 291 (SCA); 2004 (5) SA 123 SCA Para 30.

Order

[31] In the result I would make the following order:

1. **The application is dismissed.**
2. **The first applicant is directed to pay respondent's costs on a punitive attorney and client scale C.**

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

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Delivered on

: 26 August 2025