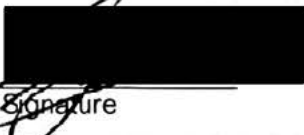


THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 49156/2021
CASE NO: 56219/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
Date	<u>3 February 2026</u>
Signature	

In the matter between:

COMPENSATION SOLUTIONS (PTY) LTD

Applicant

and

THE COMPENSATION COMMISSIONER

First Respondent

**DIRECTOR-GENERAL OF THE DEPARTMENT OF
LABOUR OF THE NATIONAL GOVERNMENT OF
THE REPUBLIC OF SOUTH AFRICA**

Second Respondent

**THE MINISTER OF THE DEPARTMENT OF
EMPLOYMENT AND LABOUR OF THE NATIONAL
GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA**

Third Respondent

JUDGMENT

ELS AJ

INTRODUCTION

[1] The applicant, in two separate applications (both argued together), seeks money judgments against the respondents. Although the facts differ slightly, for the sake of convenience, I will deal with both matters in one judgment.

For the sake of convenience, I will refer to the applicant ("Compensation Solutions") henceforth as "the plaintiff". I will refer to the respondents collectively as "the defendants".

[2] During 2021 the plaintiff instituted both actions against the defendants. After receipt of the plea in each matter, the plaintiff launched two separate summary judgment applications. Both applications were heard simultaneously and one judgment was delivered by Ally AJ in those applications ("the Ally judgment").

[3] The following order was granted by Ally AJ:

- "(a) Summary Judgment in case numbers 56219/2021 and 49156/2021 is refused;*
- (b) The defendant is granted leave to defend in respect of case numbers 56219/2021 and 49156/2021 only insofar as a plea of prescription is to be raised;*
- (c) The defendant is to file a notice of intention to amend its pleas in respect of the case numbers mentioned in paragraph (b). within 10 days of this order failing which the plaintiff may approach this court on papers duly supplemented for orders for summary judgment;*
- (d) The defendant is to pay the costs of the applications for condonation on a party and party scale;*
- (e) Each party is to pay their own costs in respect of the applications for summary judgment."*

(the emphasis is my own)

[4] To distinguish between the two matters, I will henceforth refer to the matter with case number 49156/2021 as "matter 49" and to the matter with case number 56219/2021 as "matter 56".

MATTER 49

[5] In matter 49 the plaintiff delivered a notice of exception against the special pleas of prescription. This exception served before Jacobs AJ, who delivered judgment on 6 February 2024. The following order was granted:

- "1. The exceptions are upheld with costs.*
- 2. Paragraphs 1 to 9 of the defendant's plea dated 14 February 2022 are struck out.*
- 3. The defendants are afforded 20 days from date of this judgment to file an amended plea or special plea in respect of the defence raised in paragraphs 5 to 9 of its plea dated 14 February 2022, if so advised."*

[6] The defendants did not deliver an amended plea in respect of the defence raised in paragraphs 5 to 9 of its plea dated 14 February 2022 within 20 days from the granting of the order by Jacobs AJ.

[7] On 2 September 2024 the plaintiffs delivered a notice of bar on the defendants wherein the following was stated:

"TAKE NOTICE THAT the PLAINTIFF requires the DEFENDANTS to deliver their amended plea in respect of the defences raised in paragraphs 5 – 9 of its plea dated 14 February 2022, as per the court order of the Honourable Jacobs AJ granted on 6 February 2024 and attached hereto as Annexure "X".

[8] On 11 September 2024 the plaintiff launched the application that serves before me, wherein the plaintiff seeks judgment against the defendants. The defendants delivered their answering affidavit on 5 November 2024, whereafter the plaintiff delivered its replying affidavit on 19 November 2024.

[9] After the plaintiff had already delivered its heads of argument, and shortly after the delivery of heads of argument by the defendants, the defendants

delivered a notice of intention to amend its plea. This was done on 20 June 2025. The defendants then also proceeded to deliver an amended plea on 17 July 2025.

[10] The defendants proceeded to deliver the notice of intention to amend and the amended plea, without seeking condonation or launching an application for the upliftment of the notice of bar.

[11] In **Santam Insurance CO Ltd v Mangele** 1975 (1) SA 607 (D) at 609H t-610F it was held that, where an order similar to the order granted by Jacobs AJ is granted, it is necessary to first deliver a notice of bar, before proceeding with a request for absolution (or judgment). In **Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others** 1991 (3) SA 795 (N) the opposite was held i.e. that it was not necessary for any delivery of a notice of bar.

[12] In **Standard Bank of SA Ltd v Van Dyk** 2016 (5) SA 510 GP the following was said at paras 4–6:

"[4] The dicta in Natal Fresh Produce must however be considered in the light of the well-known judgment of the Appellate Division in Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A), in which Corbett JA (as he then was), writing for the court, finally coined the rule applicable as a corollary to successful exceptions, which is that leave to amend within a certain period of time, if so advised, must always be granted to a plaintiff, even where the pleading was set aside on the ground that it disclosed no cause of action. In arriving at this conclusion Corbett JA (Group Five at 603C to H) specifically disapproved of the distinction drawn by Hugo J, to which I have referred above, for the reason that it would lead to the anomaly that it would leave no room for the grant of leave to amend when an exception is

successfully taken to the particulars of claim in a combined summons on the ground that no cause of action is disclosed, a proposition that was considered to offend the law and the practice in our courts. As correctly argued by counsel for the bank, the disapproval of Hugo J's distinction in Group Five effectively overrules the judgment in *Natal Fresh Produce*. It is interesting to note that the judgment of Harms J (as he then was) in *Princeps (Edms) BPK en 'n Ander v Van Heerden NO en Andere* 1991 (3) SA 842 (T) at 845D to 846D, which was delivered after the judgment in *Natal Fresh Produce* but reported in the same volume of the South African Law Reports, without a reference thereto, contradicts the distinction in *Natal Fresh Produce* and, as a forerunner thereto, is fully consonant with the judgment in Group Five.

- [5] Rule 26 applies to 'a replication or subsequent pleading within the time stated in rule 25' and further to 'any other pleading' which a party fails to deliver within the time laid down in the rules 'or within any extended time allowed in terms thereof.' The application of the rule was confirmed in two cases, which, by way of background, I shall briefly refer to. In *Beukes v MEC, Agriculture and Environmental Affairs, Eastern Cape* 1999 (4) SA 772 (Tk), in regard to the plaintiff having failed to deliver the amended particulars of claim consequent upon a notice to amend to which no notice of opposition had been filed, Petse AJ (as he then was) held that the defendant should have invoked Rule 26 before resorting to an exception in terms of rule 23. In *Woolf v Zenex Oil (Pty) Ltd* 1999 (1) SA 652 (W) the plaintiff's failure to deliver a declaration within the time laid down in the order referring the application for trial, was held not sufficient to ground the defendant's application for the dismissal of the action, as the defendant was required to invoke rule 26 in order to place the plaintiff ipso facto under bar. Joffe J reasoned that the referral for trial was ordered under the provisions of rule 6(5)(g) and, therefore, clearly with the intention that the rules of court should apply thereto generally, and, in particular, in regard to the filing of pleadings. The learned judge concluded that the intention that the rules of court should apply thereto generally, and, in particular, in regard the filing of pleadings. The learned judge concluded that the period laid down for filing of the declaration in the order is 'a time period', or on the facts of that matter, 'an extension thereof', falling within the ambit of 26.
- [6] The fundamental question to be extracted from the above cases is whether the amended particulars of claim in the present instance can be classified as a pleading. Counsel for the respondent, on a parity of reasoning in regard to an amendment following upon a

notice of intention to amend in terms of rule 28(1), clearly being a pleading, was driven to concede that the amendment provided for in the judgment of Jansen J, likewise was a pleading. That being so, the amended particulars of claim fell into the category of 'any other pleadings', under rule 26. The respondent, accordingly, should have invoked rule 26 and waited the bank's continued inaction thereafter before resorting to an application to dismiss the action.

...”

- [13] I agree with the judgment in **Standard Bank of SA Ltd v Van Dyk**. I also find that the same principle applies where it is the defendant that fails to deliver an amendment.
- [14] In matter 49 the plaintiff did deliver a notice of bar, as already indicated.
- [15] The defendants have provided no explanation whatsoever for their failure of more than nine months after the filing of the notice of bar.¹ The defendants simply proceeded by ignoring the notice of bar.
- [16] The defendants did not even bother to seek the upliftment of the notice of bar after the plaintiff delivered supplementary heads of argument wherein the requirement for the filing of an application for the upliftment of the bar, was emphasized. The defendants also did not give any indication during the argument of this matter that they intended to seek an upliftment of the bar.
- [17] In my view the plaintiff was entitled to proceed with an application for judgment. The defendants have clearly taken the stance that it was unnecessary to seek any extension of time, condonation or the removal of

¹ The notice of bar was served on 2 September 2024 and the notice of intention to amend on 20 June 2025.

a notice of bar. In my view, in the absence of an application to do so, it should be accepted that there is no amended plea before court. It follows that the plaintiff is entitled to judgment in the amount claimed in respect of matter 49.

- [18] In the replying affidavit an allegation was made that the defendants proceeded to pay an amount of R118,381.69 after the application for judgment was delivered. If the defendants indeed made such a payment (or effected any further payments) then the plaintiff would, of course, only be entitled to recover the amount outstanding. Although I intend to grant judgment in the amount claimed in the notice of motion, it would still be necessary for the plaintiff, before issuing any writ of execution, to deal with the exact amount still owing to the plaintiff in an affidavit in support of a request for the issuing of a writ.

MATTER 56

- [19] In matter 56, defendants proceeded to deliver a notice of intention to amend on 1 August 2023 ("the first amendment"). Although the notice of intention to amend was delivered one day outside the ten day period contemplated in the order of Ally AJ, the plaintiff did not take issue with the late delivery of the first amendment.
- [20] The plaintiff delivered a notice objecting to the first amendment and the defendants, in turn, proceeded to deliver an application for an amendment based on the notice of intention to amend dated 1 August 2023.
- [21] The application for leave to amend (in respect of the first amendment) was

heard by Potgieter AJ. On 14 May 2024 Potgieter AJ delivered judgment in the matter and dismissed the application for leave to amend ("the Potgieter judgment").

[22] After the Potgieter judgment, the plaintiff proceeded to deliver an application for judgment on 25 September 2024.

[23] On 20 June 2025 (after both parties delivered heads of argument in the application for judgment) the defendants proceeded to deliver a further notice of intention to amend ("the second amendment"). The plaintiff did not deliver any notice of objection. Consequently the defendants proceeded to deliver an amended plea on 17 July 2025.

[24] An important distinction between matter 49 and 56 is that, in matter 56 no notice of bar was ever served.

[25] As a consequence of the second amendment the plaintiff proceeded to deliver an application for leave to file a supplementary affidavit to deal with this further development. The defendants, in turn, proceeded to deliver a supplementary answering affidavit in response to the supplementary affidavit of the plaintiff. In my view the plaintiff was entitled to deliver a further affidavit. The defendants did not claim any prejudice to the application for leave to deliver a further affidavit and proceeded to address the relevant issues in its own supplementary answering affidavit.

[26] In supplementary heads delivered on behalf of the plaintiff the view was expressed that the second amendment should be disregarded as "*pro non*

scripto". The main issue to consider in matter 56 is the legal status of the second amendment. More in particular, it should be considered whether or not it was necessary for the plaintiff to file a notice of bar before proceeding with an application for judgment.

[27] The order granted by Ally AJ made it clear that the defendants were only granted leave to defend on the issue of prescription. In the application for leave to amend that served before Potgieter AJ, the defendants raised two separate prescription issues. The first was based on sections 43 and 44 of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ("the prescription based on COIDA"). The second prescription issue was raised on the basis of the Prescription Act, 68 of 1969.

[28] In paragraph 8 of the Potgieter judgment it was held that the notice of intention to amend was not an amendment as permitted in terms of the judgment of Ally AJ, because the amendment attempted to also deal with the merits. In commenting on this, the following was expressly stated:

"The defendants' application should, on this ground, be dismissed. However, it cannot be gainsaid that the abortive amendment also contains two types of prescription which was indeed something permitted to be raised in a Notice of Intention to Amend, by Ally, AJ. A dismissal of the defendants' present application on the grounds that it did not comply with the permission granted by Ally, AJ, to apply to amend the defendants' plea to raise only Prescription, would, inevitably lead to another round of an application to amend and objections thereto."

[29] In the second amendment the defendants did not persist with the prescription based on COIDA. The defendants only persist with the prescription defence based on the Prescription Act.

[30] The findings of Potgieter AJ in respect of the plea of prescription based on the Prescription Act, is different to the findings in respect of the prescription based on COIDA. It was not held, as a legal proposition, that the defendants cannot raise the issue of prescription based on the Prescription Act. In paragraph 22 of the Potgieter judgment the following was said:

“[22] *In my finding the only ground of objection to the proposed Plea of Prescription based on the Prescription Act which is worthy of consideration in proceedings of this nature is the objection that the Special Plea falls foul of **Gericke v Sack 1978 (1) SA 821 (SCA)**, i.e. a Plea of Prescription which does not contain certain details is excipiable and does not disclose a defence.*”

[31] In dealing with its findings relating to the failure of the defendants to raise the issue of prescription adequately in its first amendment, the following was said in paragraph 28 of the Potgieter judgment:

“[28] *I am therefore, in the premises, constrained to conclude that the defendants have failed to properly plead prescription based on the Prescription Act and consequently the amendment, **as it now stands**, cannot be entertained. The application to amend the Defendants’ Plea as set out in the Defendants’ present fourth Special Plea, (i.e. the Plea of Prescription based on the Prescription Act), is refused with costs as set out below.*”

[32] The emphasising of the words “as it now stands” in paragraph 28 of the Potgieter judgment, appears from the judgment itself.

[33] After the delivery of the Potgieter judgment, the defendants were effectively in the same position as they were when the Ally judgment was granted. Once it is accepted that it was necessary for the plaintiff to first deliver a notice of bar (if the defendants failed to timeously deliver an amendment)

then it follows that it was still necessary for the plaintiff to do so after the delivery of the Potgieter judgment.

- [34] If it is accepted that the defendants were still entitled to deliver the second amendment (because no notice of bar was delivered) then it follows that the second amendment cannot simply be ignored and that the plaintiff is not entitled to judgment.

COSTS AND THE ORDER

- [35] As the successful party in matter 49, the plaintiff is entitled to its costs. I have considered the request of the plaintiff for costs on an "*attorney and own client*" scale, but decided not to grant such an order. In my view, the plaintiff is, however, entitled to counsel's costs on scale C.

- [36] In my view there is a basis to deviate from the normal rule that a successful party be entitled to its costs, regarding matter 56. The defendants delayed in delivering the second amendment after the delivery of the Potgieter judgment, for a considerable period. In the exercising of my discretion, I find that no order for costs should be granted in matter 56.

- [37] In the premises I make the following order:

Matter 49

1. The defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay to the plaintiff as follows:
 - 1.1 The amount of R7,913,823.49;

- 1.2 Interest on each of the medical invoices set out in annexure "CS1" at the applicable legal rate calculated from the 61st day after the submission date, to date of final payment;
2. The defendants are ordered to pay the plaintiff's costs, including the cost of counsel on scale C.

Matter 56

1. The further affidavits delivered by the parties are permitted;
2. The application for judgment dated 25 September 2024 is dismissed;
3. There is no order for costs.



APJ ELS
ACTING JUDGE OF THE HIGH COURT

DELIVERED: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

Counsel for the applicant: EJJ Nel
(in both matters)

Instructed by: VDT Attorneys

Counsel for the respondents: M Makhubele
(in both matters)

Instructed by: The State Attorney

Date of hearing:

4 August 2025



Date of judgment:

3 February 2026

